

Opinion No. 32-373

February 9, 1932

BY: E. K. Neumann, Attorney General

TO: Honorable Arthur Seligman, Governor of New Mexico, Santa Fe, New Mexico.

{*134} Mr. Wm. J. Barker, Democratic State Chairman has written this office, requesting our opinion upon the following proposition, to-wit:

{*135} "A is a member of the Board of a state institution and while being such member he is alleged to have acted as the agent of a corporation which sold goods, wares and merchandise to the institution.

"It is further alleged that the vouchers for said purchase were delivered to him, although presumably made out to the corporation.

"It is further alleged that he has, at various times, sold various small items to the institution of goods, wares and merchandise, the amount of said sales probably being in small amounts which did not require bids.

"If the above charges are sustained, will such action of this Board Member be a violation of our State Laws?"

In discussing this point we will first examine our statutes for any legislative act prohibiting public officers of the kind mentioned from having any interest in contracts executed in their official capacities. If such Statutes are found, however, they are merely declaratory of the common law.

Section 130-118 of the 1929 Codification of the Laws of New Mexico is as follows:

"Should any member of the board of penitentiary commissioners, officer or other employee of the penitentiary, become interested in any manner in any contract for providing provisions, clothing or other necessaries for the use of said penitentiary, or become in any way interested in any contract for buildings or construction of any buildings of any kind connected with the penitentiary, or for furnishing materials for any such buildings or in any contract for labor of the convicts, such member of said board, officer or employee so interested shall be deemed guilty of a misdemeanor, and on conviction thereof shall be removed from office, and shall forfeit any interest he may have in such contract, and shall be fined not more than two thousand dollars, nor less than five hundred dollars."

Section 130-1409, 1929 Code, being Section 68 of Chapter 138 of the Session Laws of 1889 and relating to Boards and employees of such Boards of the University of New

Mexico, New Mexico Agricultural College, New Mexico School of Mines and the New Mexico Insane Asylum, is as follows:

"No employee or member of any said boards shall be interested pecuniarily, either directly or indirectly, in any contract for building or improving any of said institutions or for furnishing of supplies to any of such institutions."

It is to be noted that there is no penalty attached to the foregoing in event same is violated.

As to the employees and boards of the New Mexico Reform School, Deaf and Dumb School, Institute for Blind, Miners Hospital, the New Mexico Military Institute and the various Normal Schools, there is now no statute prohibiting such employees or board members in becoming interested in any contracts for the delivery of supplies and other things to such institutions. It is to be noted, however, that various appropriation acts up to 1931, but not including 1931, contained the following provision, which relates to **every** official or employee of the state, or of any institution, department or agency thereof, to-wit:

"No official or employee of the state or of any institution, department or agency thereof, shall be a party either directly or indirectly, to any contract, or interested in any contract for the expenditure of public money, and any such official or employee guilty of the violation of this provision shall upon conviction be punished by a fine of not less than \$ 100.00, nor more than \$ 500.00, and be removal from his office or employment."

In our opinion, therefore, it may be safely concluded that **by statute** the Board Members and Employees of the Penitentiary, the University, the Agricultural College, the Insane Asylum and School of Mines, and until July 1st, 1931, every official or employee of the state or of any institution, department or agency thereof was prohibited from becoming directly or indirectly interested in any contract for the expenditure of public money or from becoming {*136} directly or indirectly interested in any contract for furnishing supplies to the institutions of which he was a board member or employee, with a severe penalty attaching for violation of such prohibition.

Since July 1, 1931, we believe under the common law, the same prohibition is in force, but without any penalty other than the common law penalty, except of course in case of the board members and employees of the penitentiary.

Consequently, if the acts of the person mentioned in Mr. Barker's letter were committed prior to July 1st, 1931, or since that time if he were a member of the Board of Commissioners of the Penitentiary, he has violated a law, to which, for such violation, is attached a penalty. In any event, he has violated the common law rule against such acts and Section 130-1409, to either of which is attached no penalty, other than the penalty, perhaps, of removal from office for the violation of his official oath, and, under the common law, it is generally recognized that such contract is void.

The writer has always been of the opinion that the violation of such laws depended upon the closeness or remoteness of the officer's interest, and perhaps he has so expressed himself. It was his opinion that the law did not intend to prohibit contracts with a corporation, a stockholder of which was a public officer or board member of an institution so contracting, nor that it intended to prohibit contracts with an individual or firm of which the officer was an employee, and that the fairness of the contract and like things were to be considered. But such is not the law, the weight of authority being that these things are not to be considered.

As was said by the Court in *Stockton Plumbing Company vs. Wheeler*, 229 Pac. 1020: following the weight of authority:

"It is conceded by counsel for the respondents that the contract itself is perfectly fair in all respects to the city and that neither Councilman Charlesworth or his employer ever received or attempted to obtain any advantage by virtue of the position of Mr. Charlesworth as member of the city council. It is also conceded that Charlesworth did not take an actual part in the awarding of the contract. But these propositions constitute no reply to the conclusions above announced, nor does the fact, if it be a fact, that the contract proposed to be awarded would, if accepted, be more advantageous to the city than the others proposed for the same work. It is the principle which must be observed and applied. In other words, it is not the character of the contract itself, but the manner in which it is created, that renders it violative of sound public policy."

A Pennsylvania case held that a contract entered into by a city with a water company to supply water to that city, of which company several members of the council were stockholders was void even when later another council, none of the members of same being stockholders in the water company, attempted to ratify and validate the earlier contract.

The matter has never been before the courts of this state, in so far as we can ascertain, but it can be fairly safely predicted that our courts would follow the weight of authority.