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FILE NO. S-787

OFFICERS:
Corrupt Practices -
Interest in Contracts

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Honorable C. Joseph Cavanagh
State's Attorney, Sangamon County
Room 404, County Building
Springfield, Illinois 62701

Dear Mr. Cavanagh:

I have your letter in which you state:

"I hereby request your opinion on the following matter:

Is an individual employed by an insurance company as Director of Education and Assistant Personnel Director in Charge of Adult Training in violation of An Act to Prevent Fraudulent and Corrupt Practices in the Making or Accepting of Official Appointments in Contracts by Public Officers, Ill. Rev. Stat., Ch. 102, Sec. 3 and 4, when he serves as an elected school board member where that school board has entered into a contract with his insurance company for a group health insurance policy for employees of the school district? The

> policy in question, originally entered into prior to the individual's service on the school board, continues in effect barring an annual 30-day cancellation notice by either the school district or the insurance company. Does this individual avoid application of the aforementioned Corrupt Practices Act in his case by voting 'present' on school board roll calls affecting the payment of premiums to his insurance company as well as on roll call votes concerning the withdrawal of bid requests sent out by the school district's Assistant Superintendent for coverage in lieu of that provided by his insurance company?"

In order to facilitate the discussion of the issues involved in your question, I will initially discuss them as if the insurance contract was made while the individual in question was a school board member, and then discuss the effect of his not being a school board member at the time the contract was entered into.

Section 3 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (Ill. Rev. Stat. 1973, ch. 102, par. 3) provides:

> "§ 3. No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly,

> in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void." (Emphasis added.)

The prohibition contained in the first sentence of section 3 of said Act, supra, consists of five elements. The first element is that the individual involved be a person "holding any office, either by election or appointment under the laws or constitution of this state, * * * " It is clear that a school board member occupies an office derived under the laws of this State. People ex rel. Smith v. Wabash Ry. Co., 374 Ill. 165.

The second element is that the officer have either a direct or indirect interest of a prohibited nature. This

element was construed in the case of People ex rel. Pearsall v. Sperry, 314 Ill. 205, which involved a construction contract between a contractor and a city in which various city officers, who were involved in the making of the contract, were also, at the time of its making, employees of the contractor. The court construed the language "directly or indirectly interested in the contract" as follows:

> "* * * If we attach any significance to the words used by the statute, 'directly or indirectly interested in the contract,' we think the conclusion cannot be escaped that the officers of the city, who are also employees of the contractor, must be considered as indirectly interested in the contract, without regard to the fact that they derived no direct benefits from the contract itself. They would be more than human if they could make the same fair and impartial contract with the contractor, as they could with another party with whom they had no relation by way of employment or otherwise. We have no doubt that the officers, who signed and participated in making the contract, did so without any intentional bad faith, and that the same is true of the contractor; still, we are clearly of the opinion that the court properly held that the contract was void within the provisions of the statute. The three city officers, who signed on the part of the city, had such an interest in the business and welfare of the contractor in this case as would naturally tend to affect their judgment in their determination to let the contract, * * * "

The court in the case of Panozzo v. City of Rockford, 306 Ill. App. 443, also examined the element of interest. Said case involved a contract with defendant city for refuse disposal. The court, in determining the nature of interests prohibited, stated at page 452:

> "* * * [T]he general rule is, that relationship of a public officer to a contractor is not a disqualifying interest making it unlawful for an officer to be interested in a public contract without proof that the officer has a pecuniary interest in the contract. Thompson v. School District, 252 Mich. 629, 233 N.W. 439, 74 A.L.R. 790, and cases cited there in the Annotation, page 792 et seq.; Tuscan v. Smith, supra."

The court implied, however, by quoting a Wisconsin case, that the existence of a pecuniary interest per se would not, under all circumstances, invalidate a contract between a public body and a contractor having an employee who is also a public officer on the public body. The court stated at page 451:

> "In the case of Edward E. Gillen Co. v. City of Milwaukee et al., 174 Wis. 362, 183 N.W. 679, 682, it is stated: 'We do not hold that under all circumstances a contract between a municipality and a corporation having an employee who is also a public officer of the municipality would be invalid. The compensation of the employee might be so slight or

> his employment so transient that there would arise no conflict of interest.'"

From the facts you have presented, and from an examination of the insurance contract, it appears that the school board member has not received any direct benefits from the insurance contract itself. This fact, however, does not in and of itself prevent an application of section 3's remedial provision, for the above cases clearly indicate that a prohibited interest could be found to exist if the school board member has an indirect interest in the insurance contract.

As to what constitutes an indirect interest, the above cases also clearly indicate that such an interest could be found to exist by reason of the school board member's employment with the insurance company if said employment creates a pecuniary interest of a sufficient nature so as to engender a concern for the business and welfare of his employer which may in turn affect his judgment in determining whether or not to let the contract. Assuming, from the facts you have presented concerning the nature of the school board member's employment with the insurance company, that his pecuniary interest

is not de minimis or insubstantial, I am of the opinion that he possesses an indirect interest of the nature prohibited by the statute.

A third element is that the officer in question be empowered to act or vote. The phrase "may be called upon to act or vote" as used in section 3 of said Act, supra, was construed in Peabody v. Sanitary District of Chicago, 330 Ill. 250, where it was made clear that the phrase did not mean that an officer must have actually acted or voted in order for violation of said section to have occurred. Rather, merely being empowered to act or vote was deemed sufficient.

In Peabody, it appeared that the Sanitary District let a contract to a corporation in which the treasurer of the Sanitary District was vice-president, director, and owner of nearly one-fourth of the capital stock of the corporation. The treasurer, under the law, had no vote in the letting of the contract. However, under the rules of the Sanitary District, he was the financial adviser of the board of trustees of the district and the court held that he could have been called upon by the trustees to advise them relevant to the financial

ability of the corporation to perform the contract. The treasurer was not present at the meeting when the contract was let, nor was he called upon for any advice. Nevertheless, the court stated at page 528:

> "* * * While his [Sanitary District Treasurer] testimony is to the effect that he had nothing to do with making or letting the contract to the ballast company, this is quite beside the point. If his duties were such that he could or might have been called upon to take any action in the matter of making a contract, that fact disqualified him from having any interest in the contract, either directly or indirectly, and such a contract was void."

It is therefore clear that merely voting "present", refusing to vote at all, or refusing to act in any fashion, does not, in and of itself, mean that a violation of section 3 of said Act, supra, cannot occur.

A fourth element is that of timing. In order for a violation of section 3 of said Act, supra, to occur, the possession of a prohibited interest and the making or letting of a contract must temporally coincide. This temporal requirement would be lacking where an individual, who has acquired an interest in a contract with a public body, later becomes a

member of said public body. In School Directors v. Parks, 85 Ill. 338, a case in which a school director received orders drawn by his co-directors in payment for labor and supplies provided by said director, the court stated at page 340:

> "* * * Both the letter and the spirit of the law forbid that directors shall, in anywise, whether directly or indirectly, openly or covertly, become interested in demands or claims, originating while they are directors, to be satisfied by payments from the funds of their districts; and this construction must be rigidly enforced by the courts, without regard to the moral or equitable considerations that may urge a different policy in particular cases.
>
> If, on another trial, it shall appear that appellee was not, in fact, director when this labor was performed and wood was furnished, he will be entitled to a judgment; otherwise the money paid him on the orders was paid in violation of law, and the district is entitled to recover it from him."

Upon applying the above reasoning to the facts you have presented, it would appear that as to the inception of the insurance contract, no violation of section 3 of said Act, supra, occurred, since at that time, the individual in question was not a school board member. This leads, however, to the last element of the offense - the making or letting of a contract -

for if either the failure to terminate, the payment of premiums, the modification of the contract, or the withdrawal of bid requests can be said to constitute the making or letting of a contract, and if they occur while the individual in question is a school board member, a violation of section 3 of said Act, supra, would, in my opinion, have occurred.

With regard to the termination of the insurance contract, the policy states:

> "Policyholder: * * *
> Effective Date: October 1, 1970
> Renewal Date: October 1, 1971
> Group Policy No.: * * *
> State of Delivery: Illinois
>
> * * *
>
> This policy is effective the date stated above and shall continue in force provided however, that either the Policyholder or the Company may terminate his policy on the annual renewal date by giving written notice to the other at least 30 days prior to said termination date. All periods of insurance shall begin and end at 12:01 A.M., Standard Time, at the business address of the Policyholder."

It is clear from the above provisions that failure to terminate the insurance policy as prescribed results in a renewal of the insurance. The renewal of a contract in pursuance of a provision

to that effect does not constitute a new contract, but rather, is merely an extension of the old one. (Herron v. Peoria Marine & Fire Insurance Co., 28 Ill. 235.) Such a renewal, however, is necessarily a manifestation of mutual consent, and together with other legal requirements, e.g. consideration, constitutes the making of a contract. For the reasons set forth below, I am of the opinion that any failure of the school board to terminate the insurance contract, although not the making of a new contract, is nevertheless the making of a contract within the meaning of section 3 of said Act, supra.

It is a cardinal rule of statutory construction that a statute must be construed so as to ascertain and give effect to the intention of the General Assembly as expressed in the statute. (Lincoln National Life Insurance Co. v. McCarthy, 10 Ill. 2d 489.) In ascertaining the meaning of a statute whose language is vague and ambiguous, resort may be had not only to the language used, but also to the nature and subject matter of the Act (People v. Lieber, 357 Ill. 423), and the object or purposes to be accomplished thereby. Cherin v. R. & C. Co., 11 Ill. 2d 447.

In Kruse v. Streamwood Utilities Corp., 34 Ill. App. 2d 100, the court stated, at page 114, in reference to section 3 of said Act, supra,:

> "In United States v. Mississippi Valley Generating Co., 364 U.S. 520, 81 S. Ct. 294, 5 L. Ed. 2d 268 (1961), the court held that a government contract was unenforceable due to the government conflict of interest statute, which is addressed to the same evil as the Illinois statute. In discussing the purpose of the statute the court says: '* * * its primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction. * * * It is this inherent difficulty in detecting corruption which requires that contracts made in violation of Section 434 be held unenforceable even though the party seeking enforcement ostensibly appears entirely innocent.'"

The corruption sought to be checked by said section is self-dealing by public officers. Giving effect to the General Assembly's intention to eliminate this evil would be severely hampered if the renewing of a contract were not construed to be included in section 3's prohibition. It is clear that if the main intent of a statute can be ascertained, words may be supplied to give

effect to such intent. (People ex rel. Stewart v. Highway Commissioners of Town of Anchor, 279 Ill. 542.) Such action would be proper in this instance, for in my opinion, there is no basis for any distinction which would justify treating the renewing of a contract differently from the making of a contract, as the potential for self-dealing is equally present in both instances.

As section 3 of said Act, supra, employs the word "act", it may be argued that said section encompasses affirmative actions only and consequently the failure to act by failing to terminate would not be covered by said section. This argument, in my opinion, does not withstand analysis. It is clear that if the insurance contract had instead provided for automatic termination unless affirmatively renewed, action taken to so renew would be encompassed by section 3's language; to construe the insurance contract, which has the same end result, as not within section 3's prohibition simply because it is automatically renewed unless affirmatively terminated, would be to allow the legislative intent to be defeated by a mere procedural device. I am of the opinion that said intent may not be so defeated.

With regard to the payment of premiums, the policy states:

"Policyholder: * * *
Effective Date: October 1, 1970
Renewal Date: October 1, 1971
Group Policy No.: * * *
State of Delivery: Illinois

* * *

The first premium is due on the effective date and renewal premiums are due as stated above during the continuance of the policy.

* * *

GRACE PERIOD: A grace period of thirty-one days, without interest charge, will be allowed for payment of any premium due after the first premium, during which period the policy shall continue in force, provided the Policyholder has not, prior to the premium due date, given written notice to the Insurance Company that the policy is to be terminated on the day immediately preceding such premium due date.

<u>If the Policyholder fails to pay any premium within the grace period, the policy shall automatically terminate on the last day of such grace period</u>, but the Policyholder shall, nevertheless, be liable to the Insurance Company for the payment of all premiums then due and unpaid, including a pro rata premium for the grace period. If, however, written notice is given by the Policyholder to the Insurance Company, during the grace period, that the policy is to be terminated before the expiration of the grace period, the policy shall be terminated as of the

> date of receipt of such written notice by the Insurance Company or the date specified by the Policyholder for such termination, whichever date is later, and the Policyholder shall be liable to the Insurance Company for the payment of all premiums then due and unpaid, including a pro rata premium for the period commencing with the last premium due date and ending with such date of termination." (Emphasis added.)

It can be seen that the continuation of the insurance contract beyond the grace period is conditioned upon the payment of renewal premiums. The renewal premium constitutes school district's consideration, and since consideration is essential in order for a contract to be legally binding (Green v. Ashland Sixty-Third State Bank, 346 Ill. 174), I am of the opinion that any vote or action taken to pay said premiums would constitute the making or acting upon a contract within the meaning of section 3 of said Act, supra.

With regard to contract modification, the insurance policy states:

> "Policyholder: * * *
> Effective Date: October 1, 1970
> Renewal Date: October 1, 1971
> Group Policy No.: * * *
> State of Delivery: Illinois
>
> * * *

> * * * [P]remiums are subject to such change (a) on any premium due date that the rate for such insurance has been in effect for at least twelve months by giving written notice to the Group Policyholder at least thirty-one days prior to such premium due date; or (b) on any date the provisions of this policy are changed as to benefits provided or classes of persons insured. No increase in premium shall be retroactive.
>
> * * *
>
> No change in the policy shall be valid until approved by an executive officer of the Company and evidenced by endorsement on the policy or by amendment to the policy signed by the Policyholder and the Company. No agent has authority to change the policy or to waive any of its provisions."

It can be seen that the insurance contract contains specific provisions dealing with modification: One, with reference to modification generally, and the other with reference to changes in premiums. In Mahaffey v. Wisconsin Central Ry. Co., 147 Ill. App. 43, the court, in considering the effect of a contract modification, stated at page 46:

> "* * * We understand that an agreement when changed, by the mutual consent of the parties, becomes a new agreement. An agreement changed is not the old or prior agreement but a new one. When there is a change the minds of the parties

> have met again and by the fact of the change a new agreement arises. The minds of the parties may thus meet upon the terms of the old agreement with but the slightest change, yet the agreement then made is a new one.
> * * * *

It is therefore my opinion that any vote or action taken by the school board which results in the modification of the insurance contract constitutes the making of a contract within the meaning of section 3 of said Act, supra.

With regard to the withdrawal of bid requests for coverage in lieu of the insurance contract, it is my opinion that voting or acting in this regard does not constitute the making or letting of a contract. That such action does not make a contract merits no discussion. Also, such action, in and of itself, does not in any way affect the current insurance contract. The taking of such action does not constitute the taking of action in regard to the current insurance contract. Withdrawal of bid requests does not in any way obligate the board to pay premiums, modify the contract, or allow the contract to automatically renew.

Section 4 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official

appointments and contracts by public officers" (Ill. Rev. Stat. 1973, ch. 102, par. 4) provides:

> "§ 4. Any alderman, member of a board of trustees, supervisor or county commissioner, or other person holding any office, either by election or appointment under the laws or constitution of this state, who violates any provision of the preceding sections, is guilty of a Class 4 felony and in addition thereto, any office or official position held by any person so convicted shall become vacant, and shall be so declared as part of the judgment of court."

As to whether or not the facts you have presented result in a violation of said section, I must respectfully decline to answer as there is a case currently pending in the Illinois Supreme Court which may result in a judicial construction of said section.

In conclusion, I am of the opinion that the school board member is an officer within the meaning of section 3 of said Act, supra; that the failure to terminate the insurance policy, the payment of premiums under the policy and modifications made on the policy, if any, constitute the making of a contract within the meaning of section 3 of said Act, supra; that if any of the above described events occur or fail to occur, as the case may be, while the individual in question

is simultaneously a school board member and employee of the insurer, a violation of section 3 will have occurred since the interest possessed by said individual is of the type prohibited by section 3 of said Act, supra; and that voting "present" does not avoid application of section 3 of said Act, supra, as said section requires only the power to act or vote.

Very truly yours,

ATTORNEY GENERAL