

2684.

CITY COUNCIL, MEMBER — PROHIBITED FROM HAVING INTEREST IN EXPENDITURE OF MONEY OF MUNICIPAL CORPORATION OTHER THAN PAYMENT OF FIXED COMPENSATION—WHERE HE IS PRESIDENT, GENERAL MANAGER AND OWNER OF FORTY PER CENT OF STOCK OF TRANSFER AND CARTAGE COMPANY, WHICH HAULS FOR MUNICIPAL CORPORATION, SUCH COUNCILMAN IS INTERESTED IN EXPENDITURE OF CORPORATION MONEYS. TRANSACTIONS IN VIOLATION OF SECTIONS 3808 AND 12912 G. C. NOT EXCEPTED BY SHOWING ABSENCE OF FRAUD, CONSPIRACY OR UNREASONABLE PROFITS.

SYLLABUS:

1. *Under the provisions of Section 3808, General Code, a member of the city council is prohibited from having any interest in the expenditure of money of the corporation, other than payment of his fixed compensation.*

2. *A member of the city council who is president, general manager and owner of forty per cent (40%) of the stock of a transfer and cartage company which hauls for that municipal corporation is interested in the expenditure on the part of the corporation of those moneys paid to such transfer and cartage company for services rendered.*

3. *Transactions in violation of the provisions of Sections 3808 and 12912, General Code, are not excepted therefrom by the showing of an absence of fraud, conspiracy or unreasonable profits.*

Columbus, Ohio, August 28, 1940.

Bureau of Inspection and Supervision of Public Offices,
State House Annex,
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion as to whether or not, in view of Sections 3808 and 12912, General Code, a transaction whereby a city pays for trucking and cartage services rendered to it by a transfer and cartage company in which a member of the council of said

city is president, general manager and owner of forty per cent (40%) of the outstanding stock is in violation thereof.

The statutes to which your inquiry is directed provide as follows:

Section 3808, General Code:

“No member of the council, board, officer or commissioner of the corporation, shall have an interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom.”

Section 12912, General Code:

“Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office.”

Obviously one who is president, general manager and owner of forty per cent (40%) of the stock of a company has an interest in the moneys received and profits realized by said company for services it renders. Should such person, therefore, be also a member of the council of the city from which said concern receives payment for services he would subject himself to the penalties prescribed in each of the statutes above quoted.

In the letter from the Director of Law of the city in question, which you inclosed with your request, it is pointed out that the transfer company under consideration is the only one of its kind in the city, that the rates charged are not excessive and further, it would be more expensive, most unsatisfactory and inconvenient to require the city to seek another such company to perform the hauling services.

In this connection, I feel that it should be pointed out that the province and duty of the Attorney General is to construe and not make the laws. It

is not his function to state what he thinks the statute under consideration should provide or give to the statute an operation which the Legislature clearly does not intend. Consequently, it is not his privilege to annul the plain provisions of a statute for the reason that the observance and enforcement thereof would work an inconvenience. If the meaning of the statute is plain, the Attorney General in construing the same may not take into consideration the hardship, unfairness, or even injustice, that may be caused thereby. If the provisions of a statute seem harsh or unjust and the application thereof will work an inconvenience or hardship, the place to seek the remedy is in the Legislature.

Pertinent to your question is the case of *Wright vs. Clark, et al.*, 119 O. S. 462, wherein the court held as evidenced by the third branch of the syllabus as follows:

“Neither fraud, nor conspiracy, nor unreasonable profits, are necessary elements of a cause of action for recovery of money from an officer of a city or village, under the provisions of Section 3808, General Code.”

At page 471 of the opinion, Marshall, C. J., said:

“ * * * It was the purpose of the Legislature in that enactment (Section 3808, General Code) to reach all persons holding positions in a city or village government who are charged with official responsibility in conducting an economic administration of corporate affairs, and to prohibit them from having any interest in the expenditure of corporate funds.”

(Parenthetical matter the writer's.)

The following is noted at page 472:

“It is not determined in the courts below—neither do we determine in this court,—that unreasonable profits or fraud entered into these transactions. We have, however, carefully scrutinized this record to learn how Mr. Wright handled the work of the village of Bedford in these transactions where he was an interested party, and, while we assume that no actual fraud was practiced, it is plain that if every municipality followed the same course the temptations to fraud would be enormously increased. Unreasonable profits, actual fraud, conspiracy, and graft are not essential elements of this statutory inhibition. The Legislature has in sweeping language forbidden any of its officials from having any interest in the expenditure of money on the part of the corporation, other than fixed compensation, and has made that provision effective by the recovery of all sums of money or other things he might receive contrary to such provisions. Wright will be presumed to

have had knowledge of that statute, and he therefore made contracts with the village at his peril.”

And finally at page 473:

“ * * * The statute (Section 3808, General Code) is clear and renders all such transactions illegal without regard to the honesty of their execution.” (Parenthetical matter the writer’s.)

In line with the foregoing, it is clear that transactions which come within the inhibitions of Sections 3808 and 12912, supra, are not exempted from the provisions thereof by the showing of an absence of fraud, conspiracy or unreasonable profits.

Specifically answering your inquiry, it is my opinion that:

1. Under the provisions of Section 3808, General Code, a member of the city council is prohibited from having any interest in the expenditure of money of the corporation, other than payment of his fixed compensation.
2. A member of the city council who is president, general manager and owner of forty per cent (40%) of the stock of a transfer and cartage company which hauls for that municipal corporation is interested in the expenditure on the part of the corporation of those moneys paid to such transfer and cartage company for services rendered.
3. Transactions in violation of the provisions of Sections 3808 and 12912, General Code, are not excepted therefrom by the showing of an absence of fraud, conspiracy or unreasonable profits.

Respectfully,

THOMAS J. HERBERT,
Attorney General.