

## Opinion No. 17-2072

December 29, 1917

**BY:** HARRY L. PATTON, Attorney General

**TO:** Honorable W. R. McGill, Chairman Board of County Commissioners, Fort Sumner, New Mexico.

County Commissioner Cannot Act as Attorney for the County Board.

### OPINION

I am in receipt of your letter of the 23rd instant in which you state that it will be necessary for De Baca County to bring suit against the Counties of Chaves, Guadalupe and Roosevelt, to receive the back taxes. You state that the other members of your Board of County Commissioners desire to retain you to institute and prosecute such suits, and you inquire whether or not, under the law, you are authorized to accept an attorney's fee in such case, under such circumstances.

Article IV, Section 28 of the Constitution prohibits members of the legislature from being interested in certain contracts. Section 4917, Codification of 1915, as amended by Section 37, Chapter 105 of the Laws of 1917, prohibits members of Board of Education and School Directors, from being interested in any contract connected with the schools represented by them. Section 1677, Codification of 1915, prohibits various county officers, including County Commissioners, from speculating in evidence of county indebtedness. Section 1678 imposes the same prohibition upon municipal officers with reference to municipal indebtedness. Section 6, Chapter 12, Laws of 1915, the same being the Salary Act, prohibits county officers from accepting or receiving any salary or compensation whatsoever other than the salary provided by law. I have cited these various statutes, but call attention to the fact that none of them would cover the character of case under consideration, and my conclusion is that we have no constitutional or statutory provisions which would prohibit such employment-

A majority of the states have statutes prohibiting the entering into of contracts of this character, and it follows that a great majority of the cases upon this subject are based upon the particular statute making the contract unlawful. I have, however, eliminated all such cases and have confined my research and investigation to instances in which this character of case is considered, irrespective of statutory provisions.

Notwithstanding the absence of a statute prohibiting such contract, a serious question is presented, for in Dillon on Mun. Corp., Section 773, we find the following language:

"At common law and generally under statutory enactment, it is now established beyond question that a **contract made by an officer of a municipality with himself**, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule

applies whether such officer acts alone on behalf of the municipality, or as a member of a board or council. Neither the fact that a majority of the votes of a council or board in favor of the contract are cast by disinterested officers, nor the fact that the officers interested did not participate in the proceedings, necessarily relieves the contract from its vice. The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial."

The same doctrine is announced in *McQuillin on Mun. Corp.*, Section 513.

The question involved in *Beebe v. Board of Supervisors of Sullivan County, et al.*, 19 N. Y. S. 629, was as to the legality of a contract between the Board of Supervisors of the county, and one of its members, an attorney at law, for legal services. The Supreme Court in that case held that such contract was void at common law, and that the same could not be enforced. The court in this case said:

"At the time of his employment, the defendant Anderson was a member of the board of supervisors. They were the agents of the county of Sullivan, and as such had no right to enter into contracts for their own benefit with their principal, the county of Sullivan. They are trustees, and have no right to enter into contracts with each other at the expense of those for whom they are acting, and whose interests they are bound to guard and protect. \* \* \* The legality of such contracts does not depend upon statutory enactments. They are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers; and this principle applies with particular force to members of a board like a board of supervisors, which not only makes the contract, but subsequently audits the bill.

"But it is said that in the case before us the supervisor who was employed did not vote on the question of his own employment, or upon the audit of his bill. That does not cure the evil. The influence upon fellow members is the same. His constituents are entitled to his judgment in making contracts, to his scrutiny in passing upon accounts, and to his unbiased and disinterested efforts in both; and he cannot make the violation or neglect of the duties he owes to his constituents the means of validating an otherwise illegal act. He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserve his private interests. He is a part of the board of supervisors. Its act is his act; and he cannot, as a supervisor, make a contract with himself as a private citizen."

In *Noble v. Davison*, 96 N. E. 325, the Supreme Court of Indiana, in passing upon the validity of a contract entered into between the school district and one of its trustees, held that in the absence of statute, the contract would be void, because it was contrary to public policy. A number of authorities are cited in this case in support of such doctrine. This doctrine is also supported by 7 R. C. L. 944; *People v. Board of Supervisors of Schenectady County*, 151 N. Y. S. 1012; *Seaman v. City of New York*, 159 N. Y. S. 563. See also case and notes 9 L. R. A. (N. S.) 1014.

From my investigation of the authorities, I am of the opinion that a contract between you and your Board of County Commissioners, in which you are employed as an attorney, would be void and against public policy.