

## Opinion No. 43-4272

April 21, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Mr. M. E. Noble, District Attorney, Las Vegas, New Mexico

We are in receipt of your letter of April 15, 1943, in which you ask various questions concerning Section 120-1415 of the 1929 Compilation and Chapter 233 of the Laws of 1939, being Sections 6-401 to 407, inclusive, of the 1941 Compilation.

Your first question is whether Section 120-1415 is superseded by Chapter 233 insofar as it relates to purchases made by a Municipal Board of Education from a lumber company while a member of such School Board was the general manager and a partner in such lumber company. Section 120-1415 provides as follows:

"No board of regents of any state educational institution, board of education, board of school directors, nor any member of any said boards nor any school official or teacher, either directly or indirectly, shall act as agent for any person, firm or corporation engaged in selling school books, school furniture, equipment, apparatus or any other kind of school supplies, property or life insurance, or doing any work under contract, nor shall any such board or members thereof or school officers or teachers receive any commission on account thereof, and all persons identified in an official capacity with the public schools or with the state educational institutions supported in whole or in part by public funds of this state are prohibited from being parties directly or indirectly to any such contract, or interested in any such contract in connection with the operation or maintenance of such public schools or state educational institutions and any contract in which such persons are so interested or to which they are parties shall be void. Any person violating the provisions of this section shall be fined not exceeding one thousand (\$ 1.000) dollars or imprisoned not exceeding one year in the penitentiary or be fined and imprisoned as aforesaid in the discretion of the court."

It is noted that the acts a member of a board of education is prohibited from doing, under this statute, are:

- (1) To act as agent for a firm selling school supplies or property.
- (2) To receive any commission on account thereof. (Sale or contract.)
- (3) Being a party directly or indirectly to any such contract.)
- (3) Being a party directly or indirectly to any such contract or to be interested in such contract in connection with the operation or maintenance of the school of which he is a board member.

The question, then, is whether Chapter 233 necessarily occupies the same field. If it does so, then it supersedes Section 120-1415 and repeals it by implication to this extent.

Section 1 of Chapter 233, as amended by Section 1, Chapter 74, Laws of 1941, provides that:

"The provisions of this act shall apply to and the word 'purchaser', as used herein, shall include the following:

"All County, Municipal or Union High School Boards of Education or School Boards and the individual members thereof; Boards of Education of independent school districts and individual members thereof; all County officials; all State employees, heads of State departments, all agents and employees of State Departments, State Bureaus and State Boards and the officers and employees thereof, and any other person acting as a purchasing agent for this State or any subdivision thereof; all governing Boards of State Institutions and the members thereof and all agents and employees of the respective boards, officials and governing bodies referred to hereinabove, provided, however, that the provisions of this act shall not apply to purchases made by the State Highway Department, **or to purchases of, or contracts for, standardized finished machines or products, manufactured under patents, processes and designs not available to manufacturers or other machines or products, designed and recommended for the same purpose and use, and having a standard list or delivered price in excess of \$ 200.00 nor shall this act apply to purchases or contracts made by the legislature or its committees.**"

It will be noted that Section 1 covers all persons, commissioners and officials covered by Section 120-1415, and, specifically, municipal school boards of education, as well as a great many others.

Section 2 provides that:

"The word 'goods' as used herein shall include all goods, wares, merchandise, materials, supplies, furniture, equipment and every article or thing of whatsoever description purchased for the use or benefit of any purchaser to which this act is applicable."

This section is very broad in its definition and covers all the items set forth in Section 120-1415, as well as almost every other kind of personal property.

Section 6 provides as follows:

"No purchaser shall be or become personally financially interested, either directly or indirectly, in any purchase or contract covered by this act and no purchaser shall act as agent for any person, firm or corporation in selling goods to or entering into a contract with any purchaser, provided nothing herein contained shall prevent purchases being

made from any established concern, firm or corporation doing a general business in which a member of a Board, Commission, governing body, official, agent or employee, to which this act is applicable, is interested when the goods purchased are sold and purchased as provided in this act in the regular course of business or upon competitive bids at not to exceed the regularly established retail or list price and when such member or official receives no compensation or reward on account of the transaction other than from the profits of such business."

It will be seen by this section that the prohibited acts, for any member of the board of education, are: (purchaser):

1. To act as agent for a firm selling school supplies or property. (goods).
2. To be financially interested, either directly or indirectly, in any purchase contract.

It thus covers the same acts by the same persons as does Section 120-1415 and, therefore, appears to me to supersede it. This appears to me to be the legislative intent in enacting Chapter 233, since the Legislature has, by this section, made a broad, all-inclusive statute covering the whole field of purchases by state agents, setting out how such purchases should be made, providing safeguards, establishing the principle of local purchases, (and, as a necessity incident thereto, permitting the purchase, by a school board or other board, from a local business establishment, even though a member of such board has an interest in such firm, since in many small towns it would be impossible to buy locally without finding that members of such boards were interested in a concern from which it wished to buy) prohibiting sales in which members of such agencies were interested and providing penalties.

It is inconceivable to me that the Legislature could have contemplated that the school boards would be bound as to the other factors of Chapter 233 governing purchases, but that when it came to determining the question of purchases from a concern in which a member of such board had an interest, that the provisions of Chapter 233 would be ignored and the board would have to look to Section 120-1415.

It thus appears to me that the Legislature, by this act, intended to occupy the whole field of purchases and therefore superseded Section 120-1415.

It is, therefore, my opinion that Chapter 233, as amended by Chapter 74 of the Laws of 1941, superseded Section 120-1415.

This opinion is contrary to the results reached in opinions numbered 3176, 3209 and 3605.

The above numbered opinions are hereby over-ruled insofar as they apply to purchases of goods without determining the effect of Chapter 233 as applied to contracts and other matters covered by Section 120-1415. The first two of these opinions were based on the theory that Chapter 233 does not cover purchases of less than \$ 200, which theory

does not seem to me to be sound in the light of Section 2, supra, and the other all-inclusive terms used in this statute, as well as such provisions as Section 5, putting safeguards around purchases of any size or character.

Opinion No. 3605 was given solely upon the theory that the exceptions found in Section 6 had no application to school boards because of the language, "nothing herein contained shall prevent purchases", without determining whether the previous part of that section and the other sections occupied the whole field previously covered by Section 120-1415.

You next ask what is meant by the term "sold and purchased in the regular course of business" as used in Section 6 of Chapter 233.

In *Sgattone v. Mulholland*, 138 Atl. 655, 290 Pa. 341, "regular course of business" is defined as "the normal operations which constitute business."

In *Roman v. Eddy Estate*, 7 Atl. (2) 534, 136 Pa. (Super.) 438, "regular course of business", as applied under the workmen's compensation act, is defined as "the course and conduct of the employer's business" and refers to the experience and custom in the conduct of the business as the usual, if not daily, occurrence and observation or other normal operations which regularly constitute the business in question, including incidental or occasional operations arising out of the transaction of the business.

It would thus appear that in determining whether a sale was made in the usual course of business it would be necessary to look at the business and determine whether such sale was made in the same manner as sales usually are made. Thus, whether the goods sold were taken out of stock or were ordered by the firm would not be determinative but, rather, whether it was customary for such firm to order goods and goods of a similar character. The sale of a tractor by a jewelry store would not be a sale in the usual course of business, but the sale of a washing machine by a drug store might readily be, where such sales were frequently made. The same would be true as to ordering merchandise. The order of a piano by a grocery store would not be in the usual course of business, but the order of a gun by a Montgomery Ward retail store, or an automobile part by a garage, certainly would be.

It is, therefore, my opinion that what is a purchase and sale made in the usual course of business, depends upon the customary operation of the business involved; that no hard and fast rule can be laid down governing all cases, but that each case must be tested individually and that, necessarily, a good deal of discretion is vested in the purchasing board.

You ask, next, the meaning of the words "general business" as used in Section 6. I can find no exact meaning of this term. In fact, Webster's Century Dictionary lists 13 different uses of the word "general". However, it appears to me that the legislative intent is shown in Section 3, where the Legislature does not use the term "general business" in connection with its reference to "regular course of business", but the following:

"Establishments having or maintaining in the regular course of business merchandise inventories within the state upon which taxes are paid."

It is, therefore, my opinion that by "general business" the Legislature meant a business operated extensively in the state and maintaining an inventory of merchandise upon which taxes are paid, as distinguished from a firm doing business specially and in a limited manner in the state.

You also ask whether or not a person who is a member of the school board and of such a firm as outlined in your letter would be criminally liable under either of these sections.

I am not in a position to give an opinion as to this matter, as I do not have sufficient data or information.

Trusting the foregoing completely answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General