

**OPINION
60-169**

July 21, 1960 (OPINION)

PUBLIC OFFICERS

RE: Contracts - Personal Interest

This is in reply to your request for an opinion on the interpretation of section 12-1006 as amended by Chapter 323 of the 1959 Session Laws.

The material portion of this section reads as follows:

Every public officer authorized to sell or lease any property, or make any contract in his official capacity, who contrary to law voluntarily becomes interested individually in such sale, lease, or contract, directly or indirectly, is guilty of a misdemeanor. . . ."

The specific question is whether or not the county may purchase gasoline, fuel and other items from the Farmers' Union Oil Company where one of its commissioners is a stockholder. You ask the further question, if it would be illegal if the stockholder (commissioner) was also a member of the Board of Directors of the Farmers' Union Oil Company. You conclude by asking what would be the situation if the immediate members of the family of the commissioner, such as wife, son, or brother, owned stock in the oil company.

The portion of the section in question was under consideration by the North Dakota Supreme Court in State of North Dakota v. Robinson, 71 N.D. 463. The court, after considering various statutes under other jurisdictions and conclusions reached thereunder, held that the mere fact that an officer, who is also a stockholder, does not make him interested individually, directly or indirectly in contracts of that corporation within the meaning of the statute. The court concluded by saying that this is a question of fact which must be determined by a jury under proper instructions.

In its discussion it recognized that there is a difference between a person holding one share of stock and a person holding the controlling interest (majority stock).

Considering that the action of the county is by the board of commissioners, and not by an individual person, it would seem that a commissioner who has stock in the Farmers' Union Oil Company does not because of such fact prohibit the county from purchasing gasoline, diesel fuel, and other items from the Farmers' Union Oil Company. However, where the commissioner who is a stockholder is also a member of the Board of Directors, the relationship becomes more closely established and would come within the prohibition of section 12-1006.

With reference to immediate members of the family of the commissioner holding stock in the Farmers' Union Oil Company, we do not believe that the statute contemplates such condition. The statute is

primarily directed against the officer who becomes interested individually in the sale, lease, or contract directly or indirectly.

It is therefore our opinion that the mere fact that a county commissioner who is also a stockholder in the Farmers' Union Oil Company does not place him in violation of the law by purchasing gasoline, diesel fuel, and other items from the Farmers' Union Oil Company.

In instances where the county commissioner would also be the controlling stockholder in a company or a substantial stockholder in the company, then the county would be prohibited from making such purchases from such company, and any such transaction by the county commissioner would be in violation of section 12-1006.

It is our further opinion that where the commissioner is also a stockholder and director in the oil company that he would be within the prohibitions of the above cited statute.

As to your last question, it is our opinion that the ownership of stock by immediate members of the commissioner's family, such as wife, son, or brother, would not come within the provisions of section 12-1006, except where the stock is merely held by such individual members of the family as a matter of convenience, and the proceeds and control thereof is actually vested in husband or father. In other words, a subterfuge would not be recognized as holding such stock in good faith if it is done merely for the purpose of escaping the provisions of section 12-1006. As to merely owning stock where it is not the majority stock or a controlling interest, that in itself would not come within the prohibitions of the above cited statute.

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