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CONFLICT OF INTEREST: Members of Board of Hearing Aid Licensing covered by provisions of 1968 PA 318 concerning conflicts of interest.

CONSTITUTIONAL LAW: The Legislature may not define a constitutional term in such a manner as to restrict its application.

The members of the Board of Hearing Aid Licensing are covered by the provisions of 1968 PA 318 concerning conflicts of interest.

The legislature may not define a constitutional term in such a manner as to restrict its application.

Opinion No. 4799 February 1, 1974.

Honorable James D. Gray
State Senator
The Capitol
Lansing, Michigan 48902

You have requested that this office render an opinion on the question of whether it represents a conflict of interest for a member of the Board of Hearing Aid Licensing to hold and fulfill contracts with the Department of Social Services to provide hearing aids for persons entitled to health care under various Department of Social Services programs. The Michigan Constitution of 1963 provides at art 4, § 10 that:

> "No member of the legislature nor any *state officer* shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest. The legislature shall further implement this provision by appropriate legislation." (emphasis supplied)

In determining whether a given state contract violates this provision of the constitution, the following questions must be answered:

1. Is the party interested in the contract a "state officer"?
2. Assuming the answer to question 1 is "yes," is the conflict of interest created by the contract such as to be considered "substantial"?

Pursuant to the authority vested in it by art 4, § 10, the state legislature has undertaken to "further implement this provision by appropriate legislation." This was done by 1968 PA 318, MCLA 15.301 *et seq;* MSA 4.1700(21) *et seq*, entitled "AN ACT to implement the provisions of section 10 of article 4 of the constitution relating to substantial conflicts of interest on the part of members of the legislature and state officers . . ." Section 3 of 1968 PA 318 purports to designate those members of state government who shall be considered "state officers," as follows:

> "The term 'state officer' means only a person occupying one of the following offices established by the constitution: governor; lieutenant governor; secretary of state; state treasurer; attorney general; auditor general; superintendent of public instruction; member of the state board of education; regent of the university of Michigan; trustee of Michigan State University; governor of Wayne State University; member of a

board of control of one of the other institutions of higher education named in section 4 of article 8 of the constitution or established by law as therein provided; president of each of the foregoing universities and institutions of higher learning; member of the state board for public community and junior colleges; member of the supreme court; member of the court of appeals; member of the state highway commission; director of the state highway commission; member of the liquor control commission; member of the board of state canvassers; member of the commission on legislative apportionment; member of the civil service commission; state personnel director; or member of the civil rights commission; together with his principal deputy who by law under specified circumstances, may exercise independently some or all of the sovereign powers of his principal whenever the deputy is actually exercising such powers." (MCLA 15.303(a) *et seq*; MSA 4.1700(23) *et seq.*)

Because members of the state board of hearing aid dealers are not listed among the designated officers included in Sec 3 of the act, the question arises whether the act conforms to Const 1963, art 4, § 10, since it is apparent that the legislature has sought to limit the persons subject to the constitution rather than provide for its "further" implementation.

The Supreme Court of Michigan has considered the question of what constitutes a state officer in the following terms:

". . . the term 'State officer' will vary in content with its use and context, and . . . the same officeholder may be an officer of the State for one purpose and not for another. Thus we might well hold that a county, township, or municipal election official is a State officer as concerns the duty of State officers to administer constitutional rights equally to all races (e.g., *Mitchell* v *Wright,* 69 F Supp 698) while at the same time denying that he is a State officer to the extent that a vacancy in his office could only be filled by the governor by and with the advice and consent of the senate.

"We are not so bold as to attempt an all-embracing definition of 'State officer.' The precise delineation of the term will await our rulings as cases are brought before us. In each instance the meaning of the term 'State officer' will be governed by the purpose of the act or clause in connection with which it is employed." *Schobert* v *Inter-County Drainage Board,* 342 Mich 270, 281-2 (1955).

In an earlier case, the Michigan Supreme Court, in *People* v *Freedland,* 308 Mich 449 (1944), adopted the following language from *State, ex rel Barney* v *Hawkins,* 79 Mont 506; 257 P 411 (1927):

" 'After an exhaustive examination of the authorities, we hold that *five elements are indispensable* in any position of public employment, in order *to make it a public office* of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined,

directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.'" (pp 457-458) (emphasis supplied)

The Michigan court has continued to adhere to these principles. *People* v *Leve,* 309 Mich 557 (1944); *Kent County Register of Deeds* v *Kent County Pension Board,* 342 Mich 548 (1955); *Meiland* v *Wayne Probate Judge,* 359 Mich 78 (1960). It has been held in the case of *Richardson* v *Secretary of State,* 381 Mich 304 that the "Interpretation of the State Constitution is the exclusive function of the judicial branch."

In previous opinions, this office has declared the provisions of Const 1963, art 4 § 10 to be self-executing without the need for legislation:

"As to the effect of Article IV, Section 10 of the Michigan Constitution, it is my opinion that the first sentence thereof is self-executing and fixes the standard of conduct which must be observed by members of the legislature and state officers. Such persons, according to this clause, 'shall not be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest.' The fact that this section of the constitution also imposes the responsibility upon the legislature to 'further implement this provision by appropriate legislation' does not confer upon this body any power to grant indulgences from observance of established standard of conduct. The responsibility of the legislature to further implement the constitutional provision relates to enactment of such statutes as may prescribe penalties for breach of the standard of conduct or such other consequences that may result from a breach thereof, as for example, that a contract so entered into shall be voidable rather than void." OAG 1967-68 No 4555, p 41-42, (April 12, 1967)

In my opinion, it is also to be recognized as a "further implement[ation]" of this section of the constitution for the legislature to enact statutory provisions which are declaratory and co-extensive with the terms of the constitution. In doing so, the legislature performs a service to the citizens of the state by codifying and expanding upon the constitutional provision and court decisions. Such enactments are clearly within legislative prerogatives so long as no effort is made to restrict the applicability of the constitutional provision.

It is evident from the statements of delegates to the Constitutional Convention that some legislative activity expanding on the term "substantial" was anticipated. We note particularly the remarks of delegates Hoxie and Baginski, respectively Chairman and Second Vice Chairman of the Committee on Legislative Powers, which drafted this section. While recommending the adoption of the present art 4, § 10, Mr. Baginski noted:

". . . in the committee there was some question as to what would happen if a member of the legislature was in the insurance business

or something of that sort and so surely it would be a conflict to a degree, but it was felt that the legislature should take care of this rather than attempt to write legislation into the constitution." (2 Official Record, Constitutional Convention 1962, p 2959)

Subsequently, Mr. Hoxie stated:

"The intent of the committee was that it be something of a substantial nature where there would be a conflict, and we left it to the legislature to determine the ground rules, so to speak, of what would be a substantial conflict of interest." (2 Official Record, *ibid*)

It may be noted that there is a difference between the legislative treatment accorded two crucial terms which appear both in Const 1963, art 4, § 10, and in 1968 PA 318. These are the words "state officer" and the term "substantial." The first has been defined in a manner which limits its applicability to a field much more restricted than that contemplated by the constitution. The remarks of Chairman Hoxie of the Committee on legislative powers make it clear that the provision in question was intended to apply to "persons who serve the state in elected or appointed positions," 2 Official Record, Constitutional Convention 1962, p 2361. Section 3 of 1968 PA 318 does not effectuate this purpose. On the contrary it purports to be a limitation on the applicability of the Constitutional provision. This is a result which cannot be achieved by statute and therefore the entire section 3 must be excised as unconstitutional. The rest of the act, of course, remains in full effect in accordance with the policy of statutory severability established by 1945 PA 119; CL 1970 8.5; MCLA 8.5; MSA 2.216. This being the case, it is my opinion that an appointed member of a regulatory board having state-wide jurisdiction must be recognized as subject to the restrictions of Const 1963, art 4, § 10, and such statutory provisions enacted pursuant thereto as are declaratory of its purpose or in furtherance thereof.

On the other hand, it is my opinion that in 1968 PA 318, Sec. 4, which defines the term "substantial," the legislature has enacted provisions that represent a fair effort to explicate rather than restrict the terms of the constitution. Returning to the question at hand, then, it is apparent that a member of the Board of Hearing Aid Licensing is a state officer despite the purported limitations of 1968 PA 318, Sec. 3. The issue becomes whether or not the conflict of interest represented by a member's provider contracts with the Department of Social Services is such as to be considered "substantial." Of course, each contract must be considered individually, but the following excerpts set out the terms of 1968 PA 318, Sec. 4, which are most likely to be relevant to the present question:

". . . In the following cases, there shall be deemed to be no conflict of interest which is substantial:

* * *

"(b) In respect to a contract between the state . . . and:

"(i) a corporation in which a . . . state officer is a stockholder owning more than 1% of the total stock . . . or a director, officer or employee;

* * *

> "(iv) . . . if the . . . state officer does not solicit the contract, takes no part in the negotiations for or in the approval of the contract or any amendment thereto, and does not in any way represent either party in the transaction and if the contract is not with or authorized by the department or agency of the state . . . with which the state officer is connected."

We read the use of the conjunctive in subparagraph (iv), quoted above, to indicate that all of the four qualifications set out must be present in a case where the state makes a contract with a corporation in which a state officer is a major stockholder, director or officer in order for such contract to be considered free of any "substantial" conflict of interest. The obvious policy of the statute is to provide an exception in instances where an officer has *in fact* been so far removed from both sides of the bargaining table that what might otherwise seem to be a conflict of interest can safely be said not to be "substantial." Thus, it is provided that if the state officer has had no part in the negotiations with the state for the contract *and* if the contract is with an agency of state government other than the one with which the state officer is connected, no substantial conflict of interest will be held to exist.

These are the principles which must be adhered to by any state officer contemplating doing business with the state. In the case of small corporations, which normally are not able to compartmentalize their operations, these provisions may make it impractical to conduct any business with a state agency. In answer to such an objection, it can only be said that such is exactly the intention of the legislation and of the constitution. It is entirely reasonable for the legislature to suppose that a state officer is less likely to feel the influence of a conflict if he is entirely removed from the contract making function in both his private and public roles.

In summary, the question of whether it represents an unconstitutional conflict of interest for companies with which members of the Board of Hearing Aid Licensing are associated to hold and fulfill contracts as providers of hearing aids to the Department of Social Services, can only be answered on a case by case basis.

It can be said, however, that such members are state officers within the meaning of 1968 PA 318 and if such contracts are to be free from conflict of interest, they must be negotiated and fulfilled in accordance with the provisions of the act cited above.

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