670926.1

COLLEGES AND UNIVERSITIES: Officers and members of governing boards in conflict of interest.

An officer or member of governing boards of state institutions of higher education is a state officer within the purview of Article IV, Section 10 of the Michigan Constitution of 1963.

An officer or member of a governing board of a state institution of higher education who simultaneously serves as an officer or director of a private corporation doing business with that institution is involved in a substantial conflict of interest contrary to law.

An officer or member of a governing board of a state institution of higher education who simultaneously serves as an officer or director of a state regulated public utility furnishing service to a college or university is not involved in a substantial conflict of interest as defined by law.

An officer or member of a governing board of a state institution of higher education who simultaneously serves as an employee of a labor organization is not involved in a substantial conflict of interest where the institution of higher education purchases certain services only from business organizations which are unionized and where the officer or board member receives no direct personal benefit therefrom.

No. 4587 September 26, 1967.

Honorable Jack Faxon
State Representative
The Capitol
Lansing, Michigan

Honorable William P. Hampton
State Representative
The Capitol
Lansing, Michigan

Dr. John A. Hannah
President
Michigan State University
East Lansing, Michigan

Representative Faxon submitted to me several questions, phrased in general terms, relative to possible conflicts of interest by members of governing boards and officers of state institutions of higher education. These questions may be condensed to read as follows:

1. Would a member of a governing board or an officer of an institution of higher education that enjoys constitutional status under Article VIII of the Michigan Constitution of 1963 be in violation of Article IV, Section 10 of the Constitution and/or Act 317, P.A. 1966 if such person were to serve simultaneously as an officer or director of a bank, or any other enterprise for profit, that does business with the educational institution that he is serving?

2. If any violation does exist, what legal consequences could ensue?

The Purpose and Meaning of Conflict of Interest

Article IV, Section 10 of the Michigan Constitution of 1963 provides:

> "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."

As a statement of the basis and public policy upon which this statement prohibiting conflicts of interest now embedded in our Constitution rests, it would be difficult to improve upon the language of Justices Manning and Christiancy in *The People, ex rel. Albert Plugger, et al. v. The Township Board of Overryssel,* 11 Mich. 222 (1863). Speaking for the Court, Justice Manning said:

> ". . . All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And, a greater necessity exists in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less. . . ." (p. 225)

To which Justice Christiancy added in his concurring opinion:

> "The public were entitled to their best judgment, unbiased by their private interests, and by accepting the office they became bound to exercise such judgment, and to use their best exertions for the public good, regardless of their own. They had no right, while they continued in office, to place themselves in a position where their own interests would be hostile to those of the public . . . And, though these contractors may, as members of the board, have acted honestly, and solely with reference to the public interest, yet if they acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection." (pp. 226, 227)

These sentiments do not represent too exacting or old fashioned a standard of moral conduct for public officials. As with the requirement that every public official take an oath of office before he may assume the powers and duties of his office, this doctrine has been reaffirmed many times. *Robinson v. Patterson,* 71 Mich. 141 (1888); *Ferle v. City of Lansing,* 189 Mich. 501 (1915); *Consolidated Coal Co. v. Board of Trustees of the Michigan Institution for the Blind,* 164 Mich. 235 (1910); *Woodward v. City of Wakefield,* 236 Mich. 417 (1926). Were this principle abandoned or allowed to atrophy it is doubtful that our democratic institutions, which in a very large measure depend upon the dedication to duty of public officers, could endure.

Arguments may be advanced that the increased size and complexity of present day business entities coupled with the increased volume and complexity of state operations will make it difficult to recruit competent and dedicated citizens to serve in a public capacity. The more success a person achieves in the world of business, the argument runs, the greater the poten-

tial contribution that person can make to the public, yet his very success may become the barrier to public service. Such arguments must be addressed to the people who, by their constitution, have clearly indicated their willingness to forego the services of such persons if they are accompanied by a substantial interest in a contract with the state or any of its political subdivisions.

Private Corporations

Since the constitutional provision establishes the pattern, the answer to the first question as rephrased requires only a determination of whether the facts described, or rather the circumstances deducible from the facts described, fall comfortably within this pattern. If it be determined that members of governing boards and officers of institutions of higher education enjoying constitutional status are "state officers" within the ambit of Article IV, Section 10 of the Constitution, supra, then there can be no doubt that their simultaneous service as officer or director of a bank, or any other enterprise for profit, which enters into contractual relationship with their educational institution is prohibited by the aforesaid section of the Constitution.

Service as an officer or director of a private corporation is *per se* a substantial interest in that entity. See Opinion No. 4555 of April 12, 1967.

> "The exercise of the powers of the corporation is ordinarily and primarily committed to the directors, and, subject to such restrictions as are imposed by constitution, statute, charter, or by-laws, they may exercise all of the powers which the corporation possesses." *19 C.J.S. Corporations,* Section 742, p. 81

Directors of a corporation must safeguard, care for and promote the *corporation's* interest, *Wiseman v. United Dairies, Inc.,* 324 Mich. 473 (1949), and they must exercise the same degree of fidelity and care which an ordinarily careful man would use in his own affairs of like magnitude and importance, *Trembert v. Mott,* 271 Mich. 683 (1935). The conclusion that the interest a director has in the corporation he is serving must be "substantial" is therefore inescapable; any other conclusion would derogate from the degree of dedication and fidelity that he must devote towards the corporation.

Insofar as officers of private corporations are concerned, it is equally clear that, although such officers generally derive their authority to represent the corporation from the board of directors, the corporate functions must be performed by corporate officers or agents. *People ex rel. LaGrange Township v. The State Treasurer,* 24 Mich. 468 (1872); *Farmers & Merchants Nat. Bank & Trust Co. v. Globe Indemnity Co.,* 264 Mich. 395 (1933); *Garey v. Kelvinator Corp.,* 279 Mich. 174 (1937). And, as in the case of directors, corporate officers have a duty to serve their corporation with fidelity *Pikes Peak Co. v. Pfuntner,* 158 Mich. 412 (1909); *Garber v. Town,* 208 Mich. 1 (1919); *Holman v. Moore,* 259 Mich. 63 (1932).

While it is conceivable that, in some rare instance, a corporate officer may hold a title devoid of any apparent substantial interest to himself, the title itself must be deemed to have been conferred for the mutual benefit of the corporation and the officer in question. Were only a trivial benefit running to the officer to exist, it would be advisable for any state officer holding such an empty title to divest himself of it if a prohibited contractual

relationship is present—such a gesture could hardly be viewed as too great a sacrifice for the opportunity to engage in public service. This would be necessary since any title as officer of a corporation must be presumed to carry with it commensurate obligation to serve the interest of that corporation.

Public Utilities

While the questions asked refer specifically to service by university governing board members or officers as officers or directors of banks or other enterprises for profit, separate attention must be given to a similar service by them as officers or directors of a privately owned public utility regulated by the State of Michigan. President John A. Hannah has asked legal clarification on this question.

There is authority to support the proposition that public utilities are in a category separate and distinct from other kinds of enterprises. Thus it has been held that a public utility was not a free agent with power to contract or to refuse to do so with a governmental body, its duty to furnish services arising not by virtue of any contract but by operation of law. *Capital Gas Co. v. Young, City Auditor,* 41 Pac. 869 (Calif. 1895).

To the same effect is *Hotchkiss v. Moran,* 293 Pac. 148, where a contract for lighting the city of Crescent City was held not to be illegal because one of the officers of the city was the manager of a company in which a prominent stockholder of the electric company was also a stockholder. The Court held that the interest of the public officer was too remote and speculative. Further, the utility being subject to regulation by the state was required upon demand to supply the city with electricity. The obligation of the lighting company to supply such services to the city under the law distinguishes the transaction from the mere enforcement of a contract.

The Supreme Court of Washington in *Mumma v. Town of Brewster,* 24 Pac. 2d 438 (1933), refused to find a conflict of interest where the mayor of a municipal corporation served as the manager of a public utility furnishing services to the city, where a public officer exercised no judgment, discretion, power or option in furnishing said electric power to the governmental unit nor the rates charged and paid therefor.

Public utilities have long been regulated by the State of Michigan. The obligation of the public utility to provide service at rates fixed by the Public Service Commission is well established in law. *With the exception of the colleges and universities that are newly formed, the decision of a college or university to avail itself of a particular public utility service is a matter of history and based upon such decision the college or university and the public utility company have undertaken financial obligations to insure proper service. Thus it must be held that any conflict of interest that may result from a person serving as a university governing board member or officer and also as an officer or director of a public utility furnishing service to a college or university is unsubstantial as it relates to a public utility service rendered to the university.* This was the conclusion of the Court in the *Opinion of the Justices,* 183 A 2d 909 (N. H. 1962), where the Court found an unsubstantial conflict of interest in the case of a person serving as chairman of the state board of education and also as

an officer of a public utility selling electricity to a state supported technical institute.

These holdings appear to recognize the reality of a situation that a privately owned public utility is the sole source of supply of this service, that its rates are regulated by a state agency and that the utility is legally required to furnish the service upon request.

There is authority to the contrary. See *People ex rel. Schenectady Illuminating Company v. Board of Supervisors of Schenectady,* 151 N.Y.S. 1012 (1915), and *Village of Courtland v. Courtland Electric Co.,* 215 N.W. 673 (Minn. 1927). But these cases are not persuasive, particularly in light of the constitutional history of Article IV, Section 10 of the Michigan Constitution reviewed at some length in O.A.G. No. 4492, 1965-1966, page 216, at 228-229, which clearly indicates that ownership of one share of stock of any nominal ownership would not serve as a basis for a substantial conflict of interest.

In light of the fact that a public utility must provide services upon demand and that the rates and service are regulated by the State of Michigan, any conflict of interest that might arise as to the provision of such public utility service by virtue of the same person serving on a governing body of a college or university or one of its officers and simultaneously serve as a director or officer of such public utility must be considered unsubstantial. At best, under the decision of the *Village of Courtland, supra,* a possible conflict of interest might arise where the college or university has a choice of purchasing utility service from more than one privately owned or municipally owned public utility, or has a choice of providing its own utility service and one of its governing board members or officers serves as officer or director of the privately owned public utility.

Employee of Labor Organization

Representative Hampton advises me that Don Stevens, a member of the Michigan State University Board of Trustees is employed by the Michigan AFL-CIO. Several months ago he voted favorably upon a resolution requiring Michigan State University to purchase printing services only from unionized printing shops. Subsequently, this resolution of the Board of Trustees was modified so as to permit non-union shops to provide such services if they certified that they are observing union standards.

It should be noted that such resolutions voluntarily conform to the well-established state public policy expressed by the legislature in Act 153, P.A. 1937, being C.L. 1948 § 24.61 et seq.; M.S.A. 1961 Rev. Vol. § 4.315 et seq., that state printing bear the label of the branch of the allied printing trade council of the locality in which it is printed in Michigan, or that printing firms not having the use of such label certify that their employees receive prevailing wage rates and work under conditions prevalent in the locality in which the work is produced. See O.A.G. 1957-58, Vol. II, p. 26.

Representative Hampton asked my opinion on the following question:

> "Whether Don Stevens, a member of the Michigan State University Board of Trustees, is engaged in a similar, or any, conflict of interest with M.S.U."

Article IV, Section 10 of the Michigan Constitution provides in pertinent part:

> "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."

This office has examined a copy of the constitution of the Michigan AFL-CIO for the year 1966. Article 5, Section 1 thereof describes executive officers of Michigan AFL-CIO as the President, Executive Vice President and Secretary-Treasurer. Under Section 2, Article 5 they shall be elected by the convention of AFL-CIO by majority vote. In addition they shall serve as members of the Executive Board. The Executive Board, under Section 2, Article 5, is to be composed of 40 Executive Board members-at-large receiving the greatest number of votes at the convention. The Michigan AFL-CIO constitution was revised in 1967. A printed copy is not available but this office has been informed that no substantial changes have been made in regard to Article 5.

Mr. Don Stevens occupies neither an executive office nor is a member of the Executive Board of the Michigan AFL-CIO. Instead he is employed as Education Director of that organization by virtue of appointment of the president and approval of the Executive Board.

As an employee of the Michigan AFL-CIO and from the nature of such employment, there is no basis to contend that there is any direct or indirect pecuniary or beneficial benefit of substantial nature to him personally resulting from the action of the Board of Trustees of Michigan State University purchasing printing services only from unionized printing shops or non-union shops certifying that they are observing union standards. O.A.G. No. 4555, April 12, 1967.

It, therefore, follows that there is no conflict of interest prohibited by law arising by virtue of the fact that Mr. Stevens is a member of the governing body of the Michigan State University and an employee of the Michigan AFL-CIO.

If any conflict of interest were to arise it would be by virtue of Section 3(b) of Act 317, P.A. 1966, being M.S.A. Cur. Mat. § 4.1700(3), which provides that a substantial conflict exists where a state officer accepts other employment or engages in a business or professional activity which would require him to disclose confidential information acquired by him in the course of his official duties. There appears to be no foundation for any conclusion that Mr. Stevens, by virtue of his position as Educational Director of the Michigan AFL-CIO, is required to disclose confidential information acquired by him in the course of his duties as a member of the Board of Trustees of Michigan State University.

Are Officers and Board Members "State Officers"?

Having established that directors and officers of private corporations must be deemed to have a substantial interest in the business affairs of such corporations, the proper answer to the first question stated above requires only determination of whether persons serving as members of governing

boards of state institutions of higher education or as officers thereof are "state officers" within the meaning of Article IV, Section 10.

Governing boards of state institutions of higher education having authority to grant baccalaureate degrees owe their existence to provisions of the Constitution (see Constitution of 1850, Art. XIII, Secs. 6-8; Constitution of 1908, Article XI, Secs. 3-4; Michigan Constitution of 1963, Article VIII, Secs. 5 and 6. For earlier legislation relative to the establishment of the University of Michigan, 2 Terr. Laws 104; 1 Terr. Laws 879; Act 55 P.A. 1837 (Ex. Sess.); R.S. 1838 Title XI, Ch. 2; R.S. 1846, Ch. 57. Other state institutions of higher education were also established by the legislature pursuant to Michigan Constitution of 1908, Article XI, Section 10, and have since assumed constitutional status.) It has been pointed out that state universities are corporations created for public purposes. *Regents of the University of Michigan v. Board of Education of Detroit,* 4 Mich. 213 (1856) and, under Article VIII, Section 4 of the Constitution of 1963, the legislature is required to appropriate money to maintain these institutions and must be given an annual accounting of all income and expenditures by each of them. Thus, despite their independent constitutional status, state institutions of higher education remain a part of the state government. *Branum v. Board of Regents of University of Michigan,* 5 Mich. App. 134 (1966).

Members of the governing boards of such state colleges and universities are either elected by the people or appointed by the governor. In either case the governor is empowered to fill board vacancies by appointment. Michigan Constitution of 1963, Article VIII, Sections 5 and 6.

Thus, as stated in O.A.G. No. 4492, March 10, 1966, "There can be no question but that members of the Board of Regents of the University of Michigan are state officers." *Attorney General, ex rel. Cook v. Burhans,* 304 Mich. 108 (1942). And the same would be true of other state institutions of higher education.

Turning to officers of the state colleges and universities it is clear that, while their duties and responsibilities do not encompass the establishment of broad policy reserved to the governing board, they actually have greater involvement in the negotiation, execution and administration of contracts entered into by the institution. For example, the board may select a bank in which to deposit its funds, but it is the officers that have direct and regular contact with officials and employees of the bank. Disputes regarding interpretation of terms of deposit, time of deposit, amount of deposit or bank charges are generally resolved by the institution's officials and not by the governing board unless the dispute assumes major proportions. Also, while board members serve part time devoting the major portion of their activities to other matters, the officers of the institution are normally required to devote their full time and attention to the university's affairs. It would be an anomolous quirk of the law indeed were board members of an institution prohibited from having a conflicting interest in a state contract while no such prohibition applied to its officers. Thus, if the policy upon which the constitutional prohibition against conflict of interest rests is to be meaningful, it must be applicable to the very state officials who might be in a position to violate it.

As stated in *Schobert v. Inter-County Drainage Board,* 342 Mich. 270, 281 (1955):

> ". . . in one sense of the term a State officer is one who exercises a portion of the sovereign powers on a State-wide basis, normally from the seat of government, such as the attorney general, while in another, a State officer is any official whatsoever whose duties embrace the implementation of sovereign policy, however expressed, such as the village constable. . . ."

Therefore, since establishment and maintenance of state institutions is an exercise of the sovereign functions of the state pursuant to its constitution and, since officers of such institutions are engaged in the implementation of this exercise of sovereign power, it is clear that they are state officers within the contemplation of Article IV, Section 10 of the State Constitution.

The specific officers of the subject educational institutions so included are its president, secretary, treasurer and vice-presidents.

The president is designated in Article VIII, Sections 5 and 6, as the principal executive officer of the institution and is ex-officio a member of the board so that there is no doubt of his status as a public officer.

While not specifically designated in the Constitution, the delegation to the other officers of universities and colleges of a portion of the sovereign power in which the public is concerned contains the requisite elements to bring them within the ambit of the constitutional prohibition against conflicts of interests. In *State ex rel. Dunn v. Ayers,* 113 P. 2d 785 (Mont. 1941), one holding the position of assistant superintendent of a state asylum was held to be a public officer since his duties were in some degree executive and required the exercise of a high degree of discretion. Similarly, a county engineer appointed by a board of county commissioners under statutory authority was held to be a public officer and not an employee. *Mitler v. Ottawa County,* 71 P. 2d 875 (Kan. 1937). See also *Kent County Register of Deeds v. Kent County Pension Board,* 342 Mich. 548 (1955), in which the incumbent of the position of deputy register of deeds was held to be a public officer.

Consequences of Conflict

Turning next to your question as to the consequences that could ensue where a state officer is found to be in conflict of interest, the constitutional provision, Article IV, Section 10, supra, while self-executing insofar as the prescribed standard of conduct is concerned, also provides that the legislature shall further implement this provision by appropriate legislation. Consequently there is no doubt that the following provision of the Michigan Penal Code, Section 122 of Act 328 P.A. 1931; M.S.A. 1962 Rev. Vol. § 28.317; C.L. 1948 § 750.122, is valid and enforceable:

> "No trustee, inspector, regent, superintendent, agent, officer or member of any board or commission having control or charge of any educational, charitable, penal, pauper, or reformatory public institution of this state, or of any municipality thereof, shall be personally, directly or indirectly, interested in any contract, purchase or sale made for, or on account, or in behalf of any such institution, and all such

> contracts, purchases or sales shall be held null and void; nor shall any such officer corruptly accept any bribe, gift or gratuity whatever from any persons interested in such contract; and it is hereby made the duty of the governor or other appointing power, upon proof satisfactory of a violation of the provisions of this section, to immediately remove the officer or employee offending as aforesaid; and the offender shall be guilty of a felony."

This section of the Penal Code, it will be noted, refers to three consequences that can ensue where it can be established that a conflict of interest is present. First, the contract itself is declared to be "null and void"; secondly, the officer is subject to removal from office, and thirdly, upon conviction thereof, the officer is guilty of a felony.

It is recommended, however, that any prosecuting authority before whom such complaint may be brought take into consideration the fact that his problem has been awaiting formal legal clarification, and that until the issuance of this opinion there has been considerable uncertainty as to whether the described activities amount to a conflict of interest.

Section 2 of Act 317, P.A. 1966; M.S.A. Cur. Mat. § 4.1700(2); also prohibits any state officer from having any interest in a contract with the state or any of its political subdivisions which is in substantial conflict with the proper discharge of his duties in the public interest. And this statute left undisturbed the second and third of the consequences flowing from a violation of Section 122 of the Michigan Penal Code, supra, by providing, as it does in Section 7 thereof, M.S.A. Cur. Mat. § 4.1700(7), that:

> "The failure of a state officer or government employee to comply with this act subjects him to appropriate disciplinary action or civil action."

In addition, it should be noted, under Article V, Sec. 10 of the Michigan Constitution of 1963 the governor has the power and the duty to remove or suspend from office any public officer, elective or appointive, "for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein." There can be no doubt that any public officer who has an interest in any contract which is prohibited by Article IV, Sec. 10 of the constitution is subject to such removal or suspension by the governor.

However, Section 5 of Act 317 states that:

> "If the attorney general finds that a contract contains a direct or indirect interest that causes a substantial conflict of interest, the contract is not void but is voidable by the state or political subdivision. A party who entered into a voided contract in good faith and without knowledge of the existence of a prohibited interest therein may recover from the state or political subdivision the reasonable value of any benefits conferred upon the state or political subdivision in good faith reliance upon the contract." (M.S.A. Cur. Mat. § 4.1700(5))

Thus, with respect to the status of the contract, there appears to be an irreconcilable conflict between Section 122 of the Penal Code as to the

officers and institutions covered therein, and Section 5 of Act 317, P.A. 1966. A contract cannot be "null and void" and be "not void but voidable by the state or political subdivision" at the very same instant. Applying the proper rule to statutory construction reserved to such circumstances, *City of Detroit v. Michigan Bell Telephone Company,* 374 Mich. 543 (1965), it is my opinion that Act 317, being a later expression of the legislature is controlling despite the absence of a repealing clause. The contract would thus be voidable.[1]

FRANK J. KELLEY,
Attorney General.

670928.1

BLUE CROSS AND BLUE SHIELD: Authority to acquire home office building.

Blue Cross and Blue Shield may acquire a home office building under the nonprofit provisions of the Michigan General Corporation Act.

INSURANCE: Commissioner's power to regulate.

Regulation of the acquisition of a home office by Blue Cross and Blue Shield is not specifically set forth in Acts 108 and 109, P.A. 1939, and therefore the Commissioner of Insurance has no power to regulate such acquisition.

No. 4589 September 28, 1967.

Mr. David J. Dykhouse
Commissioner of Insurance
Lansing, Michigan

You have informed me that the Michigan Hospital Service and Michigan Medical Service, which are respectively known as Blue Cross and Blue Shield, propose to erect a home office building to replace an existing jointly owned home office and rented facilities. This proposal has raised fundamental questions of law as to which you request my opinion. These questions can be restated as follows:

1. Do such corporations have the power to acquire and own home office lands and buildings?

2. If they possess such powers, then what are the regulatory standards by which such acquisitions are to be measured?

The Michigan Blue Cross was originally incorporated as a Michigan nonprofit corporation on December 8, 1938 under the Michigan General Corporation Act (Act 327, P.A. 1931; C.L. 1948 § 450.1, et seq.; M.S.A. 1963 Rev. Vol. § 21.1, et seq.) as the Michigan Society for Group Hospitalization. Upon the enactment of Act 109, P.A. 1939[1] Michigan Blue Cross amended its articles of incorporation, changing its name to the Michigan

[1] But see Act 147, P.A. 1967; M.S.A. Cur. Mat. § 4.1700(6), which became effective June 28, 1967. The provisions of this act expire on December 31, 1968.

[1] C.L. 1948 § 550.501, et seq.; M.S.A. 1957 Rev. Vol. § 24.621, et seq.