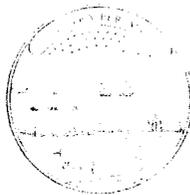


FILE

Subject County Officers  
Commissioners  
Copy to Meeks  
Conflict of Interest



STATE OF KANSAS

*Office of the Attorney General*

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VERN MILLER  
Attorney General

March 13, 1974

Opinion No. 74- 87

J. Byron Meeks  
Edwards County Attorney  
P.O. Box 228  
Kinsley, Kansas 67547

Dear Mr. Meeks:

You advise that the chairman of the Board of County Commissioners of Edwards County is a stockholder and member of the board of directors of the Home State Bank, Lewis, Kansas, presently serving as chairman of the board of directors of that bank.

Pursuant to K.S.A. 9-1401, the board of county commissioners designated the Home State Bank of Lewis, Kansas, as a depository for county funds. This was done by resolution approved by two commissioners, the chairman of the board abstaining therefrom. You advise that the commissioner in question does have a "substantial interest" in the Home State Bank, as defined by K.S.A. 1973 Supp. 75-4301.

No question is raised regarding compliance with the disclosure requirements of K.S.A. 75-4301, -4302(b) and -4306. We note that in State v. Griffiths, Case No. 70-CR-905, decided April 22, 1971, by the Shawnee County Magistrate Court, it was held that the disclosure requirements of K.S.A. 75-4301 and -4302(b) were unconstitutionally overbroad. The court also held that the penalty provision, K.S.A. 75-4306 was also unconstitutional. The court's ruling on this point appears itself to be perhaps overbroad. We conclude that the decision of the court in that case, which was not appealed, extends only to K.S.A. 75-4306 when invoked for failure to comply with the disclosure requirements of the act.

We are concerned here with the application of K.S.A. 75-4304(a) which states in pertinent part thus:

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"No public officer or employee shall in his capacity as such officer or employee, make or participate in the making of a contract with any person or business by which he is employed or in whose business he has a substantial interest, and no such person or business shall enter into any contract where any public officer or employee, acting in such capacity, is a signatory to or a participant in the making of such contract and is employed by or has a substantial interest in such person or business."

The board action in question was taken under K.S.A. 9-1401, which directs that the governing body of any municipal or quasi-municipal corporation

"shall designate by official action recorded upon its minutes the state and national bank and trust companies which shall serve as depositories of its funds . . . ."

The question may be raised whether the board action in question constitutes the making of a contract. The designation of the bank for deposit of county funds is a necessary prerequisite for the deposit of county funds there. The designation of a bank does not itself constitute a contract, but is merely that, the designation of a bank to receive public funds. Once county funds are deposited in the bank, the relationship becomes that described in Herbel v. Peoples State Bank, 170 Kan. 620, 228 P.2d 929 (1951):

"The relationship between the bank and the depositor is that of debtor and creditor. Absent any special agreement, as here, there is an implied contract that the bank will pay nothing out of the depositor's account except on his valid order. The bank is charged with knowledge of the depositor's signature." 170 Kan. at 626.

The designation of the bank is, of course, a necessary and preliminary step leading to the deposit of funds and the making of at least an implied contract between the county as depositor and the bank. As stated in 10 Am.Jur.2d, Banks, § 338,

"In the usual case the contract entered into between a depositor and the bank is one that is implied; the depositor delivers to the bank money, funds, or credits constituting the deposit, in return for which the bank assumes the obligation to pay out on his demand or order a sum equal to the amount deposited, with or without interest, depending upon the nature of the account. The consideration which

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the depositor receives for his money in such case is either interest or the absolute and unconditional contract by the bank to pay his checks to the extent of his deposits."

Thus, the deposit of funds creates at one and the same time the relationship of debtor and creditor, and an implied contract between the two. The prohibition of K.S.A. 75-4304(a) is broad and unequivocal. It prohibits the making of contracts under prescribed circumstances, whether the contract is express or implied. Certainly, it prohibits any decision by a public officer made in that capacity to enter into a business relationship with himself as a private businessman, whether the relationship is characterized technically as only that of an implied contract, or whether it be articulated as an express contractual relation. In this instance, the designation of the bank was apparently followed by the deposit of county funds there. On this ground, the bank designation was a step toward and involved in the making of a contract, albeit perhaps only implied, and we think the action of the board is subject to scrutiny under K.S.A. 75-4304(a).

The prohibition of that statute is twofold. First, a public officer or employee is prohibited from acting in that capacity "to make or participate in the making of a contract" with any person or business by which he is employed or in which he has a "substantial interest." Secondly, any such person or business is also prohibited from entering into any contract where the public officer or employee, acting in that public capacity and having a substantial interest in or employed by the private person or business, "is a signatory to or a participant in the making of such contract." The use of the disjunctive in this last phrase merely suggests the obvious, that one may participate in the making of a contract without being a signatory thereto. The Committee on Governmental Ethics, which renders advisory opinions upon the act under K.S.A. 75-4303, has recognized this, concluding that the fact that a public officer has abstained from voting upon a contract with a business in which he has a substantial interest does not conclusively establish compliance with the act:

"If it could be proved that a member of a governmental body had urged its adoption in either public or private discussion of the contract with other members of that body, it is doubtful that he could claim he had not 'participated' in the making of the contract." (Committee on Governmental Ethics Opinion No. 4.)

Thus, in the matter at hand, although the chairman of the board of county commissioners abstained from the formal vote upon the designation, he might prior thereto have participated fully in

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the deliberations of the board on the bank designation, and indeed, have been the persuasive voice inspiring the board action. Certainly, nothing before us indicates that such has been the case, or that the commissioner in question participated in any way in the action of the board leading to the designation of the Home State Bank.

In an opinion dated May 3, 1973, addressed to John H. Taylor, Geary County Attorney, we stated thus:

"As we noted above, the statute prohibits a public officer or employee from participating in the making of the contracts in question. This is a broad prohibition and it seems to us that merely abstaining from signing a contract is not sufficient; a public officer or employee must not participate in any way in the making of such a contract. Thus it would be improper for the public official or employee to participate in any deliberations of the governing body regarding the terms or conditions of such. It would be prudent for him to exclude himself from any meeting or that part thereof wherein such contracts are being considered."

As stated above, whether the commissioner participated in the making of the designation other than by abstaining from voting involves factual matters which are not before us and as to which we can only conjecture. Certainly, there is no information before us to suggest that he did so. Thus, we cannot conclude purely as a matter of law that there was no violation in this instance. Similarly, however, there exists no basis upon which we may conclude as a matter of law that the commissioner did in fact participate in the discussions and deliberations of the board leading to the designation.

You inquire whether alternative procedures are available to forestall future questions of conflict of interest. When a member of the board of county commissioners has a "substantial interest" in a bank which may be considered as a depository of county funds, he should conspicuously and notoriously absent himself from that portion of the board meeting during which bank designations are discussed, making certain that his absence is noted in the minutes of the meeting. Alternatively, if the board of county commissioners were to decline to make a designation, the custodian of county funds would be entitled under K.S.A. 9-1401 to do so, freeing the board of county commissioners from involvement therein.

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If you should have further questions on this matter, please  
feel free to call upon us.

Yours very truly,



VERN MILLER  
Attorney General

VM:JRM:jsm

cc: Edwards County Commissioners