

FILE

Subject

~~Banking~~

Cop. to

~~Organizational Administration~~
~~Miss Campbell~~
~~Legislative 1974~~



STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

May 2, 1974

Opinion No. 74-140

Carl O'Leary
State Bank Commissioner
Suite 600, 818 Kansas Ave.
Topeka, Kansas

Dear Commissioner O'Leary:

K.S.A. 1973 Supp. 75-4304 was amended by 1974 Senate Bill 993.
The amended paragraph states as follows:

"(a) 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. A public officer or employee does not make or participate in the making of a contract if he abstains from any action in regard to the contract." [Underscored portion added by amendment.]

You question whether, "[i]f a public officer or employee is also an officer, director, or employee of, or has a substantial interest in, a bank, may the public agency contract with the bank for deposits or services if the public officer or employee abstains from any action by the public agency in regard to the contract."

In opinion no. 74-87, we considered this precise question in light of the statute prior to its 1974 amendment. We pointed out the fact that a board member abstained from voting was not necessarily conclusive upon the question whether he had "par-

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icipated" in the making of the contract. In this connection, we cited opinion no. 4 of the Committee on Governmental Ethics, as follows:

"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 that he had not 'participated' in the making of the contract."

The opinion recognized that under the then existing statute, a persuasive argument could be made that one may be deemed to participate in the making of a contract by urging its adoption and taking any number of possible steps to persuade other members to agree to its execution short of voting formally upon its adoption oneself. Certainly, one who holds a "substantial interest" in a banking corporation and also sits as a member of the governing body of a political subdivision which must seek a depository for its funds is in a position to influence the selection of that depository by informal argument and persuasion, short of voting upon the designation himself.

This interpretation placed a burden of some circumspection upon a public official holding a "substantial interest" in a bank and who is called upon in his official capacity to vote upon the selection of a bank for the deposit of public funds. The apparent purpose of the language added by amendment in 1974 is to relieve such a public official of that burden to some extent. To reiterate, that language provides thus:

"A public officer or employee does not make or participate in the making of a contract if he abstains from any action in regard to the contract."

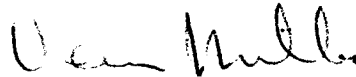
The term "action" requires some construction. Inasmuch as this provision is one for violation of which penal consequences may attach, the language must be strictly construed. The term "any action" must be taken, in our view, to refer to corporate action of the board or other governing body toward the making of a contract. The term "abstain" is one that is commonly used in parliamentary parlance to describe a formal and deliberate forbearance to participate in a decision. The use of this phrase in conjunction with "any action" suggests that the latter term refers only to corporate action of the board or other governing body.

Certainly, it may be argued that the term "any action" should be given a broader compass, and include not merely action of the governing body toward the making of the contract, but all argument and advocacy, whether public or private, put forth by

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business in which such officer or employee holds a substantial interest, and who has not theretofore filed a disclosure of substantial interests, need not file such a disclosure when he so abstains from any action in his capacity as public official in regard to a contract with a business in which he holds a substantial interest.

Yours very truly,



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a member thereof in support of the award of a particular contract for banking services. However, because of the penal consequences which may follow from a violation of the statute, the general rule would doubtless be invoked that the most restrictive of possible constructions must be put upon the statute.

Thus, the effect of the statute is to interpose a conclusive and irrebuttable presumption that one who abstains from any deliberative or corporate decision of the governing body in regard to a contract for banking services must conclusively thereby be deemed not to have made or participated in the making of the contract.

Accordingly, in response to your first question, we conclude that if a public officer or employee is also an officer, director or employee of, or has a substantial interest in, a bank, the public agency may contract with the bank for deposits or services if the public officer or employee abstains from any action by the public agency in regard to the contract.

Similarly, in response to your second question, we conclude that where such a relationship exists, the bank may contract with the public body if the public officer or employee abstains from any action by the public body in regard to the contract, and is not a signatory to the contract.

Section 2 of Senate Bill 993 amends K.S.A. 1973 Supp. 75-4305 thus:

"Any public officer or employee who has not filed a disclosure of substantial interests and who, while acting in his official capacity, shall pass upon any matter which will affect any business in which such officer or employee shall hold a substantial interest, shall, before he acts upon such matter, file a written report of the nature of said interest with the office of the secretary of state, if such person is a state officer or employee, or if such person is an officer or employee of a municipal or quasi-municipal corporation, with the county clerk of the county in which all or the largest geographical part of such municipal or quasi-municipal corporation is located. A public officer or employee does not pass or act upon any matter if he abstains from any action in regard to the matter." [Underscored language added by amendment.]

In response to your third question, a public officer or employee who abstains from any action in regard to a matter affecting any