



STATE OF KANSAS

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February 16, 1976

ATTORNEY GENERAL OPINION NO. 76- 55

The Honorable Vincent E. Moore  
State Senator  
3rd Floor - State Capitol  
Topeka, Kansas

Re: Water Resources Board--Water Purchase Contract No. 76-1--  
Validity

Synopsis: The water purchase contract no. 76-1 dated January 5, 1976, between the State of Kansas by and through the Water Resources Board, and Kansas Gas and Electric Company and Kansas City Power and Light Company, is invalid and unenforceable, by reason of violations of K.S.A. 1975 Supp. 46-233(a) in its making and execution.

\* \* \*

Dear Senator Moore:

You inquire whether the validity and enforceability of a water purchase contract, no. 76-1, dated January 5, 1976, between the State of Kansas by and through the Kansas Water Resources Board, and two corporations, the Kansas City Power and Light Company and Kansas Gas and Electric Company, whereby the two corporations have agreed to purchase water from the John Redmond Reservoir, is affected by participation in either the making or execution of this contract by two members of the Water Resources Board, Mr. Keith Martin and Mr. Frank Groves.

This question is raised on the basis of information contained in the completed statements of substantial interest filed by each of the two members with the Secretary of State. In a statement filed February 12, 1976, Martin listed Kansas City Power and Light Company as a "client or customer who pays fees or commissions to a business

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or combination of businesses from which fees or commissions . . . [he] received an aggregate value of \$1,000 or more in the preceding calendar year." K.S.A. 1975 Supp. 46-229(e) defines "substantial interest" as the following:

"If an individual's compensation is a portion or percentage of each separate fee or commission paid to a business or combination of businesses, such individual has a substantial interest in any client or customer who pays fees or commissions to such business or combination of businesses from which fees or commissions such individual received an aggregate of one thousand dollars (\$1,000) or more in the preceding calendar year."

In a report filed January 15, 1976, Groves listed Kansas Gas and Electric Company as a "business or combination of businesses from which . . . [he] or . . . [his] spouse received in the preceding calendar year, individually or collectively, compensation in an aggregate value of \$1,000 or more," identifying stock in that company as the source of the income. K.S.A. 1975 Supp. 46-223(a) defines "substantial interest" as

"The ownership by an individual or spouse, either individually or collectively of a legal or equitable interest exceeding five thousand dollars (\$5,000) or five percent (5%) of any business, whichever is less."

It is reasonable to assume that the stock holdings from which the reported income of \$1,000 or more derives constitute a legal or equitable interest exceeding in value \$5,000.

On the basis of the reported information, it appears that Martin held a "substantial interest" in Kansas City Power and Light Company of Kansas City, Missouri, as defined by K.S.A. 1975 Supp. 46-229(e), and that Groves held a "substantial interest" in Kansas Gas and Electric Company, as defined by K.S.A. 1975 Supp. 46-229(a).

Martin was appointed to the Board in 1972, and confirmed by the Kansas Senate on April 2, 1973. Groves was first appointed to the Board in 1969. His reappointment in 1973 was announced by Governor Robert Docking on or about June 15, 1973. There is no written certificate of reappointment on file in the office of the Secretary

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of State, and the journals of the Senate do not reflect that the appointment was messaged to or that the Senate acted upon it in 1974. There appears to be no question but that Groves was in fact reappointed in 1973, as announced by Governor Robert Docking. At 63 Am.Jur.2d, *Public Officers and Employees*, § 99, the writer states that "[t]o constitute an appointment to office there must be some open, unequivocal act of appointment on the part of the officer or body empowered to make it." A certificate or other written memorial is evidence of appointment, but not the appointment itself. In *Marbury v. Madison*, 1 Cranch (U.S.) 137, 2 L. Ed. 60 (1803), Justice Marshall wrote thus:

"This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it."

So far as I am advised, the facts are not disputed that Mr. Groves was in fact reappointed by Governor Docking, that Groves was notified thereof and that it was announced publicly, and that Groves accepted reappointment. Given these facts, the lack of a written certificate of reappointment is not legally a requisite to the validity thereof. I have no basis upon which to conclude other than that Frank Groves was duly appointed and, at all times material herein, a lawful member of the Board. The lack of senate confirmation of the reappointment does not affect its validity. *State ex rel. Griffith v. Matassarini*, 114 Kan. 244, 217 Pac. 930 (1923); *Barrett v. Duff*, 114 Kan. 220, 217 Pac. 918 (1923).

The contract in question was approved by the Board at its December 12, 1975, meeting, as reflected in the following excerpt from the minutes of that meeting:

"Mr. Fugate moved that the Kansas Water Resources Board, acting on behalf of the State of Kansas, approves Water Purchase Contract No. 76-1, with the Kansas Gas and Electric Company and the Kansas City Power and Light Company for a water supply from state water storage space

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in John Redmond Reservoir on the Neosho River and authorizes the Chairman and the Executive Director of the Board, provided it is approved by the Attorney General, to sign the contract on behalf of the state and further, directs the staff to transmit to the House of Representatives, the Senate of the State, and the Secretary of State, copies of the executed contract in accordance with K.S.A. 82a-1307. Mr. Robinson seconded. Motion carried unanimously."

The minutes reflect that Groves was absent from this meeting, and I am advised that Martin, as chairman of the Board and presiding officer at this meeting, did not vote. However, pursuant to this authorization, he did execute the contract thereafter for and on behalf of the Board. It may be argued that Martin did not participate in the making of the contract, because as presiding officer, he did not participate in the votes of the Board upon the matter. However, the second clause of the first sentence of K.S.A. 1975 Supp. 46-233(a) disqualifies a company from entering into a contract when any state officer, acting in his or her official capacity, is *either* a signatory to or a participant in the making of the contract.

Groves was present at a meeting of the Board on September 11, 1975, the minutes of which report the following action:

"Mr. Power presented a draft of a proposed water user contract to the Board. In his discussion of the contract, he pointed out the provisions related to the term of the contract; billing procedures; manner of delivering water to the user; and users' option for renewal of the contract. Mr. Martin raised questions about individual Board member liability in the event of suit. Following discussion by the Board of the contract, Mr. Power recommended that the staff be authorized to review the contract format with potential purchasers. Mr. Yunghans moved to approve the general format of the contract and to allow the staff to enter into preliminary negotiations with potential customers such as Kansas Gas and Electric, etc. Mr. Criters seconded. Motion carried.

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Accordingly, it appears that Martin was a signator to the contract and that Mr. Groves was a participant in Board action leading to the approval of the contract.

The question arises, then, whether the contract remains a valid and binding agreement. K.S.A. 1975 Supp. 46-233(a) provides in pertinent part thus:

"No state officer or employee shall in his or her capacity as such officer or employee participate in the making of a contract with any person or business by which such officer or employee is employed or in whose business such officer or employee has a substantial interest *and* no such person or business shall enter into any contract where any state officer, 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."

This provision contains a twofold prohibition. The first is directed at state officers and employees, who are prohibited from acting in that capacity to participate in the making of a contract with any person or business by which the officer or employee is employed or in which such officer or employee has a substantial interest, as that term is defined by the act. The second prohibits any person or business from entering into any contract where any state officer or employee, acting in that capacity, either is a signatory thereto or participates in the making of such contract, and such state officer or employee is employed by or has a substantial interest in such contracting person or business.

Because Groves holds a "substantial interest," as defined by the act, in one of the contracting corporations, Kansas Gas and Electric Company, and Martin holds a "substantial interest," again as defined by the act, in the other contracting party, Kansas City Power and Light Company, both were legally prohibited from participating in the making of the contract. However, the contract was approved by a clear majority of the member of the Board whose votes, to my present knowledge, are free from any legal interest in the matter, and thus, it may be argued that the action of the Board is not defective because of Groves' participation in the making of the contract.

However, as stated above, the prohibition is twofold. Not only does K.S.A. 1975 Supp. 46-233(a) prohibit state officers and

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employees from participating in their official capacities in the making of a contract with a person or business in which they may hold a substantial interest, as defined by the act, it also prohibits any person or business from entering into any contract where any state officer or employee who participates in its making or is a signatory thereto is employed by or has a substantial interest, as defined by the act, in such contracting person or business.

This statute is commonly said to be designed to prohibit self-dealing, *i.e.*, to prevent a company from contracting with the state when the company's own employees or persons otherwise financially interested in the company act also for the state in the matter. This provision was drafted so as to implement this prohibition fully. As pointed out by the Kansas Supreme Court in *State ex rel. Londerholm v. Schroeder*, 199 Kan. 403, 430 P.2d 315 (1967),

"Today our concern for honest and faithful public service is probably no where more evident than in the area of conflict of interest; no acts are more universally deemed inimical to the public welfare."

In this instance, plainly, two members of the Board held "substantial interests" in the contracting companies, Groves in Kansas Gas and Electric, and Martin in Kansas City Power and Light, at the time of its execution. Groves participated in the making of the contract, and Martin was a signator thereto. Both Martin and Groves were legally disqualified from participation and execution, and the two companies, as a result, were legally disqualified from entering into the contract. Having determined that the contract was made and executed in violation of K.S.A. 1975 Supp. 46-233, the question arises whether the contract is unenforceable. A similar question was considered in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 5 L. Ed. 2d 268, 81 S. Ct. 294 (1961), where the Court determined that the activities of one Wenzell were in violation of 18 U.S.C. § 434, a penal conflict of interest statute, which did not provide expressly for the invalidation of contracts made in violation thereof, although prison and a fine were penalties for its violation. The Court stated thus:

"It is true that Section 434 does not specifically provide for the invalidation of contracts which are made in violation of the statutory prohibition. However, that fact is not determinative of the

question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead to enforcement to offend the essential purpose of the enactment. . . .

As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agency may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, . . . then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred." 364 U.S. at 563.

Unlike the federal statute involved in that case, the Kansas act is not enforceable solely by criminal penalties. The prohibition of K.S.A. 1975 Supp. 46-233 operates regardless of the intention of the public officer or employee, and regardless of the intention of the private contracting party. Martin and Groves are men of substantial professional and business reputations in their respective communities. There has been no suggestion that either participated in the deliberations of the Board respecting this contract, or concerning water purchase contracts generally, with a view to personal enrichment or to obtain undue advantage for either of the two utility companies. However, as the Supreme Court pointed out in *Mississippi Valley, supra*,

"The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. The broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the

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most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." 364 U.S. at 549-550.

The Kansas act does include criminal penalties. Intentionality is an element of any actionable violation:

"No act, action or conduct of any person shall constitute a violation of this act *which is actionable by complaint before the commission, or by criminal complaint*, unless such act, action or conduct is intentionally violative of a provision of this act or intentionally violative of more than one provision of this act." [Emphasis supplied.]

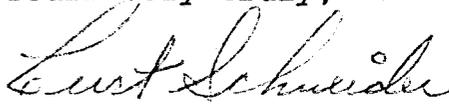
However, the prohibition in K.S.A. 1975 Supp. 46-233 is framed without reference to intention of the parties. It is an objective prohibition, plain and unequivocal. Any contract made or executed in violation of its terms is tainted at its very inception with illegality, and in my opinion, is invalid and unenforceable. The law reflects both a declared public policy and an express statutory prohibition. Both would be an empty letter if the state were burdened with enforceable contractual obligations incurred in plain violation of its express terms.

Accordingly, to recapitulate, it is my judgment, based upon the facts presently available to me and as recited herein, that Frank Groves, as a member of the Water Resources Board, was legally disqualified from participating in the making of water contract no. 76-1, by virtue of the "substantial interest," as defined by K.S.A. 1975 Supp. 46-229(a), reported in his statement of substantial interests filed with the Secretary of State, Kansas City Power and Light Company was disqualified from executing the contract because it was executed for and on behalf of the Water Resources Board by its chairman, Keith Martin, who possessed a "substantial interest" in that company, as defined by K.S.A. 1975 Supp. 46-229(e),

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reported by him on the statement of disclosure of substantial interest filed with the Secretary of State. Kansas Gas and Electric Company was legally disqualified from entering into the contract because of the participation in the making thereof by Frank Groves, who was himself legally disqualified from acting in the matter as stated above. The prohibition against the making or execution of this contract which is imposed by K.S.A. 1975 Supp. 46-233 operates irrespective of any intention of the parties involved. Because the companies are legally disqualified from entering into the contract, and Groves and Martin are legally disqualified from participating in either the making or execution of the contract, in my opinion the contract is invalid and unenforceable.

Yours very truly,



CURT T. SCHNEIDER  
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