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Legislative Bodies—Conflict of Interest—Legislators Prohibited From Contracting With State

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COMMENTS

Legislative Bodies—Conflict of Interest—Legislators Prohibited From Contracting With State*

A proper and timely interpretation of article 4, section 28 of the New Mexico Constitution could solve the conflict of interest problem concerning legislators who enter into contracts with the state. The relevant part of the section provides:

> nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

Several other states have similiar provisions[1] and at least one state has a statute to the same effect.[2] Unfortunately there are few cases construing these provisions.[3]

A concise statement of the principle against conflicts of interest is found in the Bible. "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one and despise the other."[4]

This principle is embedded in the common law.[5] It has long been applied in cases where public officers other than legislators have entered into contracts with the state. These contracts have been

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* N.M. Att'y Gen. Op. No. 208 (1965).

1. See, *e.g.*, Neb. Const. art. 3, § 16; Okla. Const. art. 5, § 23; S.D. Const. art. 3: §12; Tex. Const. art. 3, § 18.

2. Nev. Rev. Stat. § 218.580 (1965).

3. The following cases deal with the problem directly: Berney v. Alexander, 42 Nev. 423, 178 Pac. 978 (1919); State *ex rel.* Maryland Cas. Co. v. State Highway Comm'n, 38 N.M. 482, 35 P.2d 308 (1934); State *ex rel.* Baca v. Otero, 33 N.M. 310, 267 Pac. 68 (1928); State *ex rel.* Settles v. Board of Educ., 389 P.2d 356 (Okla. 1964); Norbeck & Nicholson Co. v. State, 32 S.D. 189, 142 N.W. 847 (1913); Lillard v. Freestone County, 23 Tex. Civ. App. 363, 57 S.W. 338 (1900).

4. *Matthew* 6:24; *Luke* 16:13.

5. This is a basic principle in the law of agency. See Abernathy v. Oklahoma, 31 F.2d 547, 550 (8th Cir. 1929), *cert. denied,* 280 U.S. 599 (1929).

> It is the duty of an agent, even of a private party, to look singly to the good of his principal—not to attempt to line his own pockets with ill-gotten gains. That he cannot serve two masters and serve both faithfully is as true in law as in Holy Writ. He should not be permitted to occupy a position where duty is likely to be forgotten in the quest for personal gain. How vastly more is this true as to one who occupies a public position of trust and confidence.

See also Robertson v. Chapman, 152 U.S. 673 (1894); Wardell v. Railroad Co., 103 U.S. 651 (1880); Brotherhood of Locomotive Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951); Cheney v. Unroe, 166 Ind. 550, 77 N.E. 1041 (1906).

declared to be against public policy and hence void.[6] The reasoning is that the officers are agents of the state and stand in a fiduciary relationship to the public. Any act which breaches, or could potentially breach this trust is not allowed. Thus, a public officer should not have any personal interest in any relations with the state which might have an effect on his actions or decisions.

That this policy includes state legislators is shown in the case of *Norbeck & Nicholson Co. v. State.*[7] In this case the South Dakota court held that a contract entered into by a state legislator with the state was void.

> A member of the state Legislature, by virtue of his office, stands in fiduciary and trust relation towards the state; in other words, he is the confidential agent of the state for the purpose of appropriating the state's money in payment of the lawful contractual obligations of the state, and it seems to be almost universally held that it is against sound public policy to permit such an agent, or any agent occupying a like position, to himself be directly or indirectly interested in any contract with the state or other municipality, during the period of time of the existence of such trust and confidential relationship.[8]

Several other cases have held specifically that a member of the legislature is a public officer.[9] There seems to be little doubt then that these common law principles against conflict of interest situations are as valid for a state legislator as they are for any other public officers.

The question of whether there is a conflict of interest when a state legislator enters into a contract with the state is raised in Attorney General Opinion Number 65-208.[10] The specific question was whether a member of the state legislature could bid on a state contract for the purchase of furniture to equip the new state capitol buildings.

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6. Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69 (Sup. Ct. 1863); Goodyear v. Brown, 155 Pa. 514, 26 Atl. 665 (1893). The Court in Cheney v. Unroe, *supra* note 5, at 1043, quoting from Greenhood, Public Policy 337, said: "Any contract by one acting in a public capacity, which restricts the free exercise of a discretion vested in him for the public good, is void."

7. 32 S.D. 189, 142 N.W. 847 (1913).

8. 142 N.W. at 849.

9. Lamar v. United States, 241 U.S. 103 (1916); State *ex rel.* v. Lockhart, 76 Ariz. 390, 265 P.2d 447 (1953); State *ex rel.* Grant v. Eaton, 114 Mont. 199, 133 P.2d 588 (1943); *In re* Ricker, 66 N.H. 207, 29 Atl. 559 (1890); Morril v. Haines, 2 N.H. 246 (1820). *Contra, In re* Speakership of the House of Representatives, 15 Colo. 520, 25 Pac. 707 (1891).

10. N.M. Att'y Gen. Op. No. 208 (1965).

The senator had been a member of the state legislature in 1963[11] when the State Capitol Expansion Act was passed.[12] The act gave new powers to the Capitol Buildings Improvement Commission and authorized the sale of severance tax bonds to raise money to carry out the provisions of the act.[13]

The senator was also a member of the legislature in 1965[14] when section 6-2-23 of the New Mexico statutes was passed.[15] This statute authorized the State Board of Finance to issue additional severance tax bonds to provide funds for carrying out the State Capitol Expansion Act and to "equip, remodel and furnish capitol facilities . . . ."[16]

The other important act involved in the question was passed in 1945.[17] The relevant portion of this act established the Capitol Buildings Improvement Commission.[18] The Commission was authorized to purchase "all necessary furniture and equipment necessary and requisite for the furnishing and equipping of the capitol building, as reconstructed and altered, and any new building . . . ."[19]

The specific question dealt with by the Attorney General in his opinion was whether article 4, section 28 of the New Mexico Constitution prohibited the senator from entering into a contract for the purchase of furniture to equip the state capitol buildings. The Attorney General ruled that article 4, section 28 of the New Mexico Constitution did not prohibit the senator from entering into such a contract.[20] The Attorney General said that the State Capitol Expansion Act passed in 1963 did not specifically mention the furnishing of any new or improved capitol buildings and therefore had no bearing on the question. He reasoned that section 6-2-23 of the New Mexico statutes simply provided for a method of financing to carry out the objectives of equipping, remodeling, and furnishing capitol facilities, but did not specifically authorize these objectives.[21] The Attorney General reasoned that because article 4, section 28 prohibits a legislator from entering into only those contracts authorized during his term and that because the contract was author-

11. N.M. Laws 1963, at vi.
12. N.M. Stat. Ann. § 6-2-14 (Repl. 1966).
13. *Ibid.*
14. N.M. Laws 1965, at vi.
15. N.M. Stat. Ann. § 6-2-23 (Repl. 1966).
16. *Ibid.*
17. N.M. Stat. Ann. §§ 6-2-1 to -12 (Repl. 1966).
18. N.M. Stat. Ann. § 6-2-3 (Repl. 1966).
19. N.M. Stat. Ann. § 6-2-10 (Repl. 1966).
20. N.M. Att'y Gen. Op. No. 208 (1965).
21. *Ibid.*

ized by the 1945 act when the senator was not a member of the legislature, he was not prohibited from entering into the contract.[22]

In construing a constitutional provision, one must look at the principles and reasons for its existence rather than strictly apply the words of the provision to the facts.[23] "Constitutions and statutes are declarations of public policy by bodies of men authorized to legislate."[24] This statement is especially true of a constitutional provision. A constitutional provision is a statement of public policy and cannot be expected to provide for every contingency in every area that it covers. Its provisions must be flexible and not be allowed to become narrow, rigid rules of law.

In construing the last clause of article 4, section 28 one must consider what the draftsmen had in mind when they included it in the section. One must attempt to discover what kind of contracts the draftsmen intended to prohibit.

The intent was not to prohibit legislators from entering into every possible contract with the state. The presence of the qualifying phrase, "authorized by any law passed during such term"[25] is evidence of this. That courts generally appreciate this fact is indicated in a Nevada case, *Berney v. Alexander*,[26] which involved a state statute substantially similiar to the New Mexico constitutional provision. In this case a member of the state legislature was allowed to enter into a contract with the state. There was no connection between his function as a legislator and the contract in question. During his term there had been no legislation which had any relation to the contract.[27]

This decision was politically and practically sound. Many legislators are also businessmen who have had, and will continue to have, business transactions with the state. To prevent these men from entering into any contracts with the state would hurt their businesses and probably would prevent them from running for

22. *Ibid.*

23. The New Mexico Supreme Court in State *ex rel.* Ward v. Romero, 17 N.M. 88 100, 125 Pac. 617, 621 (1912) said,

> Where the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, and the strict letter should not control if the letter leads to incongruous results clearly not intended.

See also, Jarrolt v. Moberly, 103 U.S. 580 (1880); Woodson v. Murdock, 89 U.S. 351 (1874).

24. 6A Corbin, Contracts § 1375, at 15 (1962).

25. N.M. Const. art. 4, § 28.

26. 42 Nev. 423, 178 Pac. 978 (1919).

27. *Ibid.*

office.[28] This would restrict further an already limited class of people from which state legislators are elected.[29]

Moreover, for the same reasons stated above, the draftsmen did not intend to prohibit legislators from entering into contracts when their only official relation to the contract was the fact that they voted on a *general appropriation bill* which appropriated money to the agency which authorized the contract. General appropriation bills, limited by the constitution,[30]

> embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools, and other expenses required by existing laws . . . .[31]

These are all basic functions of government. It is necessary that funds be appropriated for these functions every year. To prohibit legislators from entering into contracts which were affected only by these bills in a very indirect manner would prohibit them from entering into many contracts which from a practical standpoint, they had no connection with in their official capacity. This is the distinguishing factor in the New Mexico case of *State ex rel. Baca v. Otero,*[32] which the Attorney General relies on in his opinion. *State ex rel. Baca v. Otero* held that a contract under a general appropriation bill does not offend article 4, section 28 of the New Mexico Constitution. In this case the contractor was a legislator who also held an office as "rural school supervisor." It was argued that there was no such office as "rural school supervisor" and thus, the contractor must be employed on the basis of a contract. The respondent State Auditor argued that the general appropriation bill of 1927 granted the authority for the contract of employment. Therefore, since the contractor was a member of the 1927 legislature which passed the bill, he could not enter into the contract. The New Mexico court ruled that the contract was not authorized by the general appropriation bill but by an earlier bill passed in 1923 which gave the Superintendent of Public Instruction the power to supervise rural schools.[33]

The *Otero* case, which is relied upon as an authority by the

28. Comment, 76 Harv. L. Rev. 1209 (1963).
29. *Ibid.*
30. N.M. Const. art. 4, § 16.
31. *Ibid.*
32. 33 N.M. 310, 267 Pac. 68 (1928).
33. *Ibid.*

Attorney General,[34] is easily distinguished from the specific situation to which he was addressing his opinion. The State Capitol Expansion Act of 1963[35] and the bill passed in 1965[36] are not general appropriation bills.[37] They do not meet the criteria listed in article 4, section 16 of the New Mexico Constitution. Instead, they provide for a special fund to be created by the sale of bonds to finance special projects which do not have to be carried out at any particular time or at all. Thus, whether or not these bills were passed determined in fact whether there would be any contracts to carry out these projects. In the fact situation of the Attorney General's opinion, the senator would not have been able to enter into the contract for the sale of furniture to the state if section 6-2-23 had not been passed while he was a member of the legislature in 1965. The Capitol Building Improvement Commission would not have had any money for the purpose of furnishing the new capitol buildings. By providing money "to equip, remodel and furnish capitol facilities"[38] this bill *enabled* the commission to enter into a contract for that purpose. The contract with the senator to furnish the new capitol buildings would not have been possible without the passage of section 6-2-23.

The Attorney General relies on the word "authorized" in article 4, section 28 of the New Mexico Constitution without ever defining it. To "authorize" is "to empower; to give a right or authority to act."[39] "Authority" is synomymous with "permission."[40] Thus, a contract that was authorized by an act passed during a term of the legislature is one that was permitted by that act. Section 6-2-23 was certainly the bill which permitted or authorized the contract with the senator. In this respect as well, the contract would not have been possible without the passage of the bill.

The Attorney General also relies on the New Mexico case of *State ex rel. Maryland Cas. Co. v. State Highway Comm'n.*[41] In this case the contractor, an insurance company, sought a writ of mandamus to force the State Highway Commission to pay premiums of over 5,000 dollars. The State Highway Commission had cancelled the policy before the period for which the insurance was

34. N.M. Att'y Gen. Op. No. 208 (1965).
35. N.M. Stat. Ann. § 6-2-14 (Repl. 1966).
36. N.M. Stat. Ann. § 6-2-23 (Repl. 1966).
37. See text accompanying notes 30-31 *supra.*
38. N.M. Stat. Ann. § 6-2-23 (Repl. 1966).
39. Black, Law Dictionary 169 (4th ed. 1951).
40. *Id.* at 168.
41. 38 N.M. 482, 35 P.2d 308 (1934).

bought had passed. They had a right to cancel, but at the cost of short rates. At the short rate cost the Commission owed over 5,000 dollars in addition to the premium paid in advance. The Commission refused to pay and said that the contract was void because of article 4, section 28. The Commission contended that the president and a stockholder of the local agency had been a member of the legislature in 1929 when the contract was authorized. The contractor argued that the contract was authorized by a bill passed in 1927 when the president of the agency was not a member of the legislature.

The New Mexico Supreme Court said that the 1929 act was really a collation of an older 1917 act and the 1927 act with a few minor amendments in the wording. The court talked about which act granted the authority for the contract and, to determine this, the real question seemed to be whether the contract could have been entered into if the 1929 act had not been passed. The court found that the same contract could have been entered into even if the 1929 act had not been passed; therefore the 1929 act did not grant the authority for the contract.[42] That situation is decidedly different from the situation being considered in the Attorney General's opinion. In this situation the state senator could not have entered into the contract if section 6-2-23 had not been passed.[43]

The above suggests a test which could be applied in questions involving article 4, section 28. The test would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is "yes," the act had no bearing on the contract and did not authorize it. If the answer is "no," the act made the formation of the contract possible. It permitted and therefore *authorized* the contract within the meaning of the provision.

If the Attorney General's interpretation of article 4, section 28 were to become law in New Mexico, this constitutional provision would be rendered largely impotent to prevent the situation for which it was designed. Only the most direct conflict of interest situations would be affected by the provision. Under the Attorney General's interpretation, the creation of any Commission or office could be considered to have authorized later contracts made under its authority no matter how much the existence of those contracts depended on later legislation.

42. *Ibid.*
43. See text accompanying notes 38-40 *supra.*

In the last paragraph of the opinion the Attorney General states one of the reasons for the provision: "We must remember that Article 4, Section 28 is designed to prevent a member of the legislature from benefiting from an act of the legislature of which he is a member at the expense of the general welfare."[44] Then in the face of the facts he says: "Such could hardly be the case here."[45] But that is exactly the case here. The senator benefited greatly from an act of the legislature of which he was a member. No matter what else the senator had to do to get the contract,[46] he was still directly interested in a bill passed during his term.

By construing article 4, section 28 in the strictest possible manner, the Attorney General has rendered this constitutional provision practically useless. If the Attorney General had construed the provision in the light of the above mentioned purposes and reasons, the senator who wanted to enter into the contract with the state might have brought an action in court. The New Mexico Supreme Court would then have had an opportunity to clarify the law in the area.

Since it does not appear that the New Mexico Supreme Court will have the chance to review this particular situation, perhaps the legislature will enact clear and unambiguous legislation to achieve the same effect.

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44. N.M. Att'y Gen. Op. No. 208 (1965).

45. *Ibid.*

46. The Attorney General in his opinion explained that in order to get the contract, a person would have to bid through the State Purchasing Agent. He also noted that the Capitol Building Improvement Commission and the State Board of Finance had "considerable control" over the bidding and contracting.