

VOLUME NO. 38

OPINION NO. 55

CONFLICT OF INTEREST - County Commissioners, membership on boards receiving or disbursing county contract funds;

CONTRACTS - County contracts, conflict of interest, what constitutes interest in;

COUNTIES - Contracts, county commissioners interested in;

COUNTY COMMISSIONERS - Conflict of interest, board membership in organizations receiving county contract funds, Code of Ethics;

MONTANA CODE ANNOTATED - Sections 2-2-102(1), 2-2-102(4)(f), 2-2-125, 2-2-131, 7-5-2106(3), 45-7-401.

HELD: 1. A county commissioner who is a voting member of a board that channels county contract funds to other organizations but does not itself derive any economic benefit from the contract does not have a prohibited interest in the contract under section 7-5-2106(3), MCA, and does not breach his fiduciary duty under section 2-2-125(2)(b), MCA, by acting officially to allocate funds to the board for subsequent disbursement.

2. A county commissioner who is a voting member of the board of an organization that actually receives county contract funds does not have a prohibited conflict of interest under section 7-5-2106(3), MCA, unless the commissioner receives a personal pecuniary or proprietary benefit from the contract. He does, however, breach his fiduciary duty under section 2-2-125(2)(b), MCA, by acting officially to award county contracts to the organization unless he complies with the voluntary disclosure requirements of section 2-2-125(3), MCA.

5 November 1979

J. Fred Bourdeau, Esq.
Cascade County Attorney
Cascade County Courthouse
Great Falls, Montana 59401

Dear Mr. Bourdeau:

You have requested my opinion on the following question:

Whether members of the board of county commissioners have a conflict of interest because they sit on the boards of organizations that receive or disburse county contract funds.

According to your inquiry, the commissioners in question sit as voting members on two types of boards. One type is a regional governing board acting as a conduit of federal and county funds to organizations that provided services for the county. The other type of board presented in your inquiry is the board of a nonprofit organization that actually enters into contracts with the county and receives county funds for its services. The commissioners sitting as members on both types of boards are reimbursed for their expenses, but do not receive any other form of compensation for their activities.

Section 7-5-2106(3), MCA, relating to conflicts of interest of members of the board of county commissioners, provides:

No member of the board must be directly or indirectly interested:

(3) in any contract made by the board or any person on behalf of the county for the erection of public buildings, the opening or improvement of roads, the building of bridges, or the purchasing of supplies or for any other purpose.

Persons violating this statutory proscription may be liable to criminal prosecution for official misconduct under section 45-7-401, MCA.

The Montana Supreme Court has not as yet addressed the question of what specific type of interest is prohibited by section 7-5-2106, MCA. Other courts, however, have generally held that only monetary or proprietary consideration is included in statutes prohibiting public officials from having an interest in public contracts. See, e.g., Appeal of Yenerall, 67 A.2d 565, 566 (Pa. Super. 1949); Githens v. Butler County, 165 S.W.2d 650, 652 (Mo. 1942). As stated in Yetman v. Naumann, 492 P.2d 1252, 1255 (Ariz. App. 1972):

We do not believe...that the legislature intended that the word "interest" for purposes of disqualification was to include a mere abstract interest in the general subject or a mere possible contingent interest. Rather, the term refers to a pecuniary or proprietary interest by which a person will gain or lose something as contrasted to general sympathy, feeling or bias.

Moreover, the prohibited economic consideration must flow directly or indirectly to the official himself, not merely to a person or organization to which the official may have a sentimental or intellectual attachment. See Appeal of Yenerall, 67 A.2d at 566; Chadwell v. Commonwealth, 157 S.W.2d 280, 283 (Ky. 1941).

The basic reason for limiting the prohibition in conflict of interest statutes to interests of a pecuniary or proprietary nature is to provide a clear and workable standard for application of the statutes, a particularly important consideration in view of the possible imposition of criminal sanctions against officials violating the prohibition. See Commonwealth v. Albert, 29 N.E.2d 817, 820 (Mass. 1949). Based on the reasoning and holdings of the cases dealing specifically with conflict of interest statutes, it is my opinion that the definition of "interest" in section 7-5-

2106, MCA, must also be limited to a commissioner's personal pecuniary or proprietary benefit or loss from the contract with the county.

When section 7-5-2106(3), MCA, is applied to the facts set forth in your inquiry, it is apparent that the commissioners' membership on the boards in question does not constitute a conflict under that statute. The regional governing boards do not actually receive any contract funds from the county, but merely channel funds to other organizations.

Neither the boards nor their members derive any economic benefit from the county contracts. The other board you described does receive funds from contracts with the county. Its members, however, do not personally profit from the contracts. Therefore, although a commissioner serving as a member of that board may be inclined to award county contracts to the board on the basis of personal preference and involvement, he does not have the type of pecuniary or proprietary interest in the contracts that is prohibited by section 7-5-2106(3), MCA.

In 1977, the Legislature enacted a code of ethics for persons holding public office in Montana. Section 2-2-125, MCA, applies specifically to the conduct of local government officers and employees. Subsection (2)(b) of that section prohibits an officer or employee of local government from "perform[ing] an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent." For purposes of the code of ethics, a "financial interest" is defined in part as "a directorship or officership in a business." § 2-2-102(4)(f), MCA. A "business" is further defined as including "a corporation ...or any other individual or organization carrying on a business, whether or not operated for profit." § 2-2-102(a), MCA.

It is clear from the facts you have presented that membership on the regional governing boards does not bar a county commissioner from performing official acts involving those boards. Although the commissioners are officers on those boards, their actions in awarding contract monies does not benefit the boards economically. The boards simply funnel the awarded funds to organizations that provide services to

the county. On the other hand, a county commissioner who is a voting member of the board of a private, nonprofit corporation that actually receives money from the county must be seen as violating his fiduciary duty under section 2-2-125(2)(b), MCA, if he acts officially to award county contracts to the organization. By his official act, the organization of which he is an officer is directly and substantially affected to its economic benefit.

Subsection (3) of section 2-2-125, MCA, however, goes on to provide that notwithstanding his interest in an organization or business, a county commissioner may perform an otherwise prohibited official act if his participation is necessary to commission action and if he complies with the voluntary disclosure requirements of section 2-2-131, MCA. Thus, a commissioner must reveal the nature of the private interest creating the conflict prior to voting to award a county contract to an organization of which he is a voting board member.

THEREFORE, IT IS MY OPINION:

1. A county commissioner who is a voting member of a board that channels county contract funds to other organizations but does not itself derive any economic benefit from the contract does not have a prohibited interest in the contract under section 7-5-2106(3), MCA, and does not breach his fiduciary duty under section 2-2-125(2)(b), MCA, by acting officially to allocate funds to the board for subsequent disbursement.
2. A county commissioner who is a voting member of the board of an organization that actually receives county contract funds does not have a prohibited conflict of interest under section 7-5-2106(3), MCA, unless the commissioner receives a personal pecuniary or proprietary benefit from the contract. He does, however, breach his fiduciary duty under section 2-2-125(2)(b), MCA, by acting officially to award county contracts to the organization unless he complies with the voluntary disclosure requirements of section 2-2-125(3), MCA.

Very truly yours,

MIKE GREELY
Attorney General