

Senator Brenda Stanely
State Capitol Room 529.2
2300 N. Lincoln Blvd.
Oklahoma City, OK 73105
Office 405.521.5584
brenda.stanley@oksenate.gov

Senate District 42
Senate Committees
Chair- Veterans and Military Affairs
Health & Human Services
Finance
Aeronautics & Transportation
Rules
Appropriations Subcommittee of Education

Oklahoma State Senate
STATE OF OKLAHOMA

To: The Honorable Gentner Drummond
Attorney General of the State of Oklahoma

From: Senator Brenda Stanely

Date: February 28, 2024

The Attorney General is requested to issue an Official Opinion as to the following Questions.

I. Questions Concerning the Oklahoma Constitution.

Article X, Section 11 of the Oklahoma Constitution states:

The receiving, directly or indirectly, by any officer of the State, or of any county, city, or town, or member or officer of the Legislature, of any interest, profit, or perquisites, arising from the use or loan of public funds in his hands, or moneys to be raised through his agency for State, city, town, district, or county purposes shall be deemed a felony. Said offense shall be punished as may be prescribed by law, a part of which punishment shall be disqualification to hold office.

The answer to Question 1. will inform the answers to Questions 2. 3. 5-A. and 5-B.

QUESTION 1. What standard is to be applied in interpreting the Article X, Section 11 of the Oklahoma Constitution?

Background

Two Opinions of the Oklahoma Attorney General set forth conflicting standards for application of Article X, Section 11 of the Oklahoma Constitution.

A. The 1985 Opinion.

Attorney General Mike Turpin issued 1985 OK AG 138, dated January 30, 1986 (“1985 Opinion”), which among other things stated as the official opinion of the Attorney General:

Whether an unlawful conflict of interest arises where a contract is entered into between a municipality and a bank where the president of the bank is the father-in-law of a member of the city council,

pursuant to Okla. Const. Article X, Section 11, 21 O.S. 344 (1981) and 62 O.S. 371 (1981) depends on whether the city council member has a direct or indirect pecuniary interest in the transaction or direct or indirect profit in the transaction, the determination of which is a question of fact. The interest must be of a financial or pecuniary nature. Title 21 O.S. 355 (1981) would require a direct pecuniary interest in the transaction for a conflict to exist, the determination of which is also a question of fact.

B. The 2001 Opinion.

Attorney General Drew Edmondson issued 2001 OK AG 32 on July 18, 2001 (“2001 Opinion”) which among other things stated as the official opinion of the Attorney General:

Pursuant to Article 10, § 11 of the Oklahoma Constitution, it is a conflict of interest for an elected city official to have an interest that arises from the use of city funds by a private entity, even if the city official does not have a proprietary interest in the private entity, and even if the city official's compensation is not paid out of any funds received by the private entity from the city. Whether such an interest exists is a question of fact which is beyond the scope of an Attorney General Opinion. 74 O.S. Supp.2000, §18b(A)(5).

The 1985 Opinion and the 2001 Opinion are compared and contrasted in the *Appendix* below, along with further background and commentary.

QUESTION 2. Can the City of Midwest (“City”) lawfully enter into a contract with the Mid-Del School District of Oklahoma County (“Mid-Del”) while a member of the City Council of Midwest City is an employee of Mid-Del without the Council member violating Article X, Section 11 of the Oklahoma Constitution?

QUESTION 3. Can the City of Midwest City lawfully enter into a contract with Mid-Del while a member of the City Council of Midwest City is an employee of Mid-Del without the Council member violating Article X, Section 11 of the Oklahoma Constitution if the contract (“Contract”) is for Community Resource Officer services based on the facts and analysis appearing in the *Appendix* below?

QUESTION 4. As used in Article X, Section 11 of the Oklahoma Constitution, what does “directly or indirectly” mean, and especially, what does “indirectly” mean?

II. Questions Concerning the Midwest City Charter.

Article VII, Sec. 12 states (“Sec. 12”) of the Midwest City Charter, with emphasis added, states:

No officer or employee of the city, elective or appointive, shall be interested, directly or indirectly, in any contract for job, for work or for materials or supplies or the profits thereof or in any purchase made for or sales made by, to or with the city, or own stock in any corporation having and [any] contract or subcontract for doing any contract job or work, and all such contracts with such city officer or employee shall be absolutely void, and the violation of this provision shall be deemed a cause for the removal from office or employment of such officer or employee.

QUESTION 5-A. Can the City of Midwest City lawfully enter into a contract with Mid Del while a member of the Midwest City Council is an employee of Mid-Del without violating Sec. 12 and resulting *qui tam* exposure and liability for that Council member and for other City officials?

QUESTION 5-B. Can the City of Midwest City lawfully enter into a contract with Mid Del while a member of the Midwest City Council is an employee of Mid-Del without violating Sec. 12 and resulting *qui tam* exposure and liability for that Council member and for other City officials if the contract is for Community Resource Officer services based on the facts and analysis appearing in the *Appendix* below with respect to Question 3 (“Contract”)?

Background for Questions 5-A and 5-B.

If it is determined that by reason of employment by Mid-Del a Council member is “interested, directly or indirectly” in a contract, the contract is “absolutely void.” Payments in violation of a void contract subjects the City itself, other council members, and other City officials to possible liability, including personal liability, for payments made pursuant to the contract. Such liability may arise in a lawsuit filed by taxpayers and others under *qui tam* laws. See further background discussed in the *Appendix* below.

APPENDIX

Each of the four questions now presented to the Attorney General arise with respect to the following facts, further supplemented by facts specific to Question 3. appearing below in this *Appendix*:

A member of the Midwest City Council is an employee of the Mid-Del School District of Oklahoma County (“Mid-Del”), and the City and Mid-Del desired to enter into a contract for services to be provided to Mid-Del by the City.

QUESTION 1.

A. 1985 Opinion

The facts this 1985 Opinion dealt with was the father-in-law of a member of the city council, and with trustees of a public trust, the concepts advanced are equally applicable to a member of the city council.

The 1985 Opinion also states:

Article X, Section 11 prohibits such public officers from receiving a direct or indirect profit from the use of public funds. It also prohibits the officer from receiving pecuniary interests arising from the loan or use of public funds. It is the officer himself who must receive the direct or indirect profit or interest. The type of interest subject to the prohibition is a private or personal interest of a financial or pecuniary nature. A.G. Opin. No. 79-267 (September 28, 1979). *See also, Baskin v. State ex rel. Short*, 232 P.388 (Okl.1925); *Mackey v. Crump*, 153 P.1128 (Okl.1915).

Without question a bank receives a profit from loaning out money and collecting interest. The bank stockholders and potentially the officers and employees of the bank itself may also profit directly or

indirectly from such loans. While it is theoretically possible that an individual could profit or be interested in the financial gain of one's father-in-law, the existence of such a family relationship does not, in and of itself, establish such interest. The bank loan to the public trust as outlined in your opinion request would only be improper if a member of the Board of Trustees would directly or indirectly profit from said loan or if he or she had a direct or indirect interest in the loan transaction pursuant to Okla. Const. Article X, Section 11. Whether such profit or interest exists is a question of fact.

The 1985 Opinion holds that violation of Article X, Section 11 by a council member depends on whether he or she has a direct or indirect pecuniary interest in or profit from the transaction, which is qualified by the following:

- a. The type of interest subject to the prohibition is a private or personal interest of a financial or pecuniary nature.
- b. The council member himself or herself must receive the direct or indirect profit or interest; benefit to an employer does not cause a violation of Article X, Section 11.

B. The 2001 Opinion.

The 2001 Opinion further states:

The constitutional prohibition is plain and unconditional. No city official may receive, directly or indirectly, any interest, profit, or perquisite that arises from the use of public funds in his hands. A conflict of interest exists when a city official has any interest that arises from the use of city funds by a private entity even if the city official does not have a proprietary interest in the private entity, and even if the city official's compensation is not paid out of any funds received by the private entity from the city.

In examining a statute where a public officer is prohibited from having an interest directly or indirectly in any contract, a New York court stated:

The interest need not, however, be one directly flowing from the contract itself. . . The general welfare and prosperity of the company of an officer may be an "interest" therein.

Absence of financial return during the period of such public service is not a complete answer to the sweeping prohibition of the statute.

An interest "directly or indirectly" in a contract may include an interest the fruition of which is postponed or implicit as well as one which is immediate and in stated terms.

Yonkers Bus, Inc. v. Maltbie, 23 N.Y.S.2d 87, 90-91 (N.Y. Sup. Ct. 1940) (citations omitted).

B. 1985 Opinion and 2001 Opinion Compared and Contrasted.

The 1985 Opinion and 2001 Opinion are compared and contrasted as follows with respect to Midwest City and Mid-Del:

- i. Both 1985 Opinion and the 2001 Opinion prohibit a council member from receiving a direct or indirect interest or profit from the Contract.
- ii. Applying the 1985 Opinion, for there to be a violation of Article X, Section 11, the interest must be personal to the Council member and he or she must receive the direct or indirect profit or interest, which must be of a financial or pecuniary nature; and, benefit to Mid-Del does not necessarily result in violation.
- iii. The 2001 Opinion above provides additional circumstances by which a Council member may receive a prohibited interest arising from a contract, specifically the advancement of the general welfare and prosperity of Mid-Del, the employer of a Midwest City Council member, which may implicitly benefit that Council member.

The 1985 Opinion and the 2001 Opinion are in conflict. It is requested that the Attorney General resolve this conflict by issuing an opinion of broad application, thereby providing guidance to municipalities state-wide.

While the 1985 Opinion is practical and workable in day-to-day municipal operations, the reach of the 2001 Opinion is so broad and limitless in its scope that it posed great difficulty in its application and places public official at great risk of felony violation without meaningful guidance as to the true reach of Article X, Section 11. For example, the 2001 Opinion quotes a 1940 New York case, *Yonkers Bus, Inc. v. Maltbie*, 23 N.Y.S.2d 87, 90-91 (N.Y. Sup. Ct. 1940) which states:

The interest need not, however, be one directly flowing from the contract itself. . . The general welfare and prosperity of the company of an officer may be an "interest" therein.

Application of this rule results in a public official being responsible for interests which are so uncertain, remote and theoretical as to impose an unreasonable risk on public service.

QUESTION 2. No addition information is provided in this Appendix for Question 2.

QUESTION 3.

Facts of Contract

A School Resource Officer Mutual Cooperation Agreement (“Contract”) proposed to be entered into by the City of Midwest City (“City”) and Mid-Del provides for Mid-Del to pay \$169,884.04 to the City for two police officers of the City to serve as School Resource Officers at Midwest City High School and Carl Albert High School, each located within the corporate limits of the City. The Contract further includes the following provisions:

Assignment of School Resource Officer (“SRO”):

2. The primary function of the School Resource Officer shall be to insure the safety of the students and faculty and provide campus security. Specifically, the School Resource Officer shall assist in limiting access to the school grounds to authorized persons, provide police protection of school property, personnel and students, investigate criminal acts on school

grounds and serve as liaison between the school, the police department, juvenile officials, probation officials, courts and other agencies of the juvenile justice system.

Duties of School Resource Officer:

- C. To act as the designee of the campus Administrator in maintaining the physical plant of the assigned campus to provide a safe environment as to law enforcement matters and school code violations. This includes building(s), grounds, parking lot(s), lockers and other public school property.
- H. The SRO will not be involved in ordinary school discipline.
- M. The SRO is first and foremost a Law Enforcement Officer. This fact must be constantly reinforced.

Employment of School Resource Officer:

- A. The SRO shall be an employee of the Police Department and shall be subject to the administration, supervision and control of the Police Department.
- B. The SRO shall be subject to all personnel policies and practices of the Police Department except as such policies or practices may be modified by the terms and conditions of the Agreement.
- C. The Police Department, in its sole discretion, shall have the power and authority to hire, discharge, and discipline the SRO.

Analysis of Contract.

Police officers serving as School Resource Officers are at all times serving as police law officers of the City, at locations within the corporate limits of the City, and are at all times subject to the control of the City. As such, the police officers serving as school resource officers are essentially providing law enforcement services just as they do at other locations within the City. Mass shootings occur with frequency on school campuses; accordingly, the City has elected to station police officers on school campuses.

As a part of its general law enforcement authority, the City could lawfully station police officers on public school campuses without the Contract, although such is best done in coordination with Mid-Del, which is accomplished by the Contract. And, by means of the Contract, Mid-Del is defraying the cost of stationing police officers on school campuses, thereby providing sufficient financial resources for the City to choose on place police offices on school campuses.

Approval of the Contract will facilitate the deployment of police resources in furtherance of the general law enforcement authority of the City for the purpose of protecting lives and property within the City, which is a lawful exercise of the municipal police power.

QUESTION 4. No addition information is provided in this Appendix for Question 4.

QUESTIONS 5-A AND 5-B

Liability under *qui tam* laws.

Payments in violation of a void contract subjects the City itself, other council members, and other City officials to possible liability, including personal liability, for payments made pursuant to the Contract. Such liability may arise in a lawsuit filed by taxpayers and others under *qui tam* laws. See 62 Oklahoma Statutes Supp 2022, Sections 372 (“Section 372”), 373 and 374.

Section 372 as relevant to Questions 5-A and 5-B is summarized as follows:

Every officer of any city who shall order or direct the payment of any money belonging to such city, in pursuance of any unlawful contract made for any such city by any officer thereof, known by such officer to be void, and every person, having notice of the facts, with whom such unlawful contract shall have been made, or to whom, or for whose benefit such money shall be paid, shall be jointly and severally liable to the city affected, for triple the amount of all such sums of money so paid, as a penalty, to be recovered at the suit of the proper officers of such city, or of any resident taxpayer thereof, pursuant to Section 373 of this title; provided, however, no action for personal liability shall lie against any such officer for a transaction approved in good-faith reliance on advice of legal counsel for the public entity authorizing the transaction or which has been submitted to a court of competent jurisdiction for determination of legality.

Applying Section 372 to Questions 5-A and 5-B, if it is determined that a violation of Sec. 12 has occurred, every officer of the City, including council members, the City Manager and others, who shall order or direct the payment to Mid-Del, if the contract is known by such officer to be void, shall be jointly and severally liable to the City for triple the amount of money paid to Mid-Del pursuant to the contract. Mid-Del may also be jointly and severally liable to the City for triple the amount of money paid to Mid-Del.

Rules of Interpretation for City Charters.

The rule to be applied for the interpretation of a city charter is stated by *Sallee v. City of Oklahoma City*, 2011 OK CIV APP 5, 247 P.3d 750 (2011), to wit:

We must look to the specific language found in the Charter in order to determine the intent of its framers. If that language is plain and unambiguous, we must enforce the interpretation and effect its language dictates.

Also in *Sallee*, the Court said:

According to the Attorney General, Art. 10, § 11 of the Oklahoma Constitution, unlike the Charter, is penal in nature and, therefore, is to be strictly construed against the State. Furthermore, the Charter is wholly distinguishable from Art. 10, § 11 of the Oklahoma Constitution. We must look to the specific language found in the Charter in order to determine the intent of its framers. If that language is plain and unambiguous, we must enforce the interpretation and effect its language dictates.

Sallee further states, with emphasis added:

The Oklahoma Supreme Court has recently stated:

The fundamental rule of statutory construction is to ascertain and give effect to legislative intent. That intent is first divined from the language of a statute. If a statute is plain and unambiguous, it will not be subjected to judicial construction but will receive the interpretation and effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as when ambiguity or conflict with other statutes is shown to exist, may rules of statutory construction be invoked. When possible, different provisions must be construed together to effect a harmonious whole and give intelligent effect to each. An absurd result cannot be presumed to have been intended by the drafters.

Rogers v. QuikTrip Corp., 2010 OK 3, ¶ 11, 230 P.3d 853, 859 (footnotes omitted).

Mindful of all of the foregoing, it is suggested that application of a strict construction interpretation to Sec. 12 of the Midwest City Charter will produce an absurd result, resulting in *qui tam* liability for many City officers and employees, the City itself and Mid-Del. It is therefore urged that for purposes of answering Questions 5-A and 5-B, a practical interpretation be given to Sec. 12 of the Midwest City Charter by the Attorney General by applying the rules of the 1985 Opinion used for Article X, Section 11 of the Oklahoma Constitution.

Sec. 12 of the Midwest City Charter prohibits a council member from being “interested...directly or indirectly” in a City contract. The contract provides for co-ordination of the general law enforcement authority of the City, with the cost thereof defrayed by Mid-Del. The possibility of a council member being “interested” in the Contract in a manner prohibited by the Charter is too remote and speculative to have practical application.

In addition, the contract provides for Mid-Del to pay money to the City; the City does not pay money to Mid-Del. Thus, a Council member will not receive a benefit because Mid-Del receives money.

Respectfully,

A handwritten signature in blue ink, appearing to read "Brenda Stanley", written in a cursive style.

The Honorable Brenda Stanley
Senate District 42