

OFFICIAL OPINION NO. 87-02, Sales to schools by teachers and board members

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Maurice Christiansen, C.P A.
Auditor General
Department of Legislative Audit
435 South Chapelle
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 87-02

Sales to schools by teachers and board members

Dear Mr. Christiansen:

You have requested an official opinion from this Office in regard to the application of SDCL 13-20-2.1 and Article VIII, §17 of the South Dakota Constitution to the following factual situation:

FACTS:

(1) A teacher at a local school district also owns and operates a sporting goods store. From time to time he is asked to provide various supplies, materials and equipment to various school districts in the area. Which of the following items could he legally sell to the various school?

- a. Footballs, Basketballs, Soccer Balls, etc.
- b. Sports Uniforms (jerseys, pants, sweatsuits, etc.)
- c. Football Helmets, Pads, etc.
- d. Scorebooks
- e. Wrestling Mats
- f. Trophies, Awards, Ribbons, etc.

g. Weight Lifting Devices

h. First Aid Kits, Ankle Wraps, Kneebraces and similar supplies and materials.

(2) A member of a local school board is also a plumber and the owner/operator of a hardware and appliance store. He is the only plumber and hardware and appliance dealer located within the school district. If the school district is desirous of obtaining the following, may they be purchased from the board member if the purchases do not exceed the bid limit?

a. The school district wishes to buy two electric ranges for the Home Ec Department. Could these be purchased from the board member?

b. The school district's air conditioner system goes out. Can the district contract with the board member for labor and materials to repair the problem?

c. A complete failure of the school district's heating system occurs. The board declares that an emergency exists and wishes to contract with the board member for new furnace and the attending labor and materials to install it. Would this be permissible?

d. Given the prohibitions in the statute and constitution could this board member, being an officer of the school district, provide any of the above services to another school district in this state?

APPLICABLE STATUTES:

SDCL 13-20-2.1 provides:

No school district officer or employee may be interested in the sale, proceeds or profits of any book, apparatus or furniture used or to be used in any school of this state. A violation of this section is a Class 2 misdemeanor.

Article VIII, § 17 of the South Dakota Constitution provides:

No teacher, state, county, township or district school officer shall be interested in the sale, proceeds or profits of any book, apparatus or furniture used or to be used in any school in this state, under such penalties as shall be provided by law.

In addition, I believe that SDCL 6-1-1 and 6-1-2 affect this situation. SDCL 6-1-1 provides:

It shall be unlawful for any officer of a county, municipality, township or school district, who has been elected or appointed, to be interested, either by himself or agent, in any contract entered into by said county, municipality, township or school district, either for labor or services to be rendered, or for the purchase of commodities, materials, supplies, or equipment of any kind, the expense, price or consideration of which is paid from public funds or

from any assessment levied by said county, municipality, township or school district or in the purchase of any real or personal property belonging to the county, municipality, township or school district or which shall be sold for taxes or assessments or by virtue of legal process at the suit of such county, municipality, township or school district. Such contract shall be null and void from the beginning.

SDCL 6-1-2 provides:

The provisions of §6-1-1 are not applicable when the contract is made pursuant to any one of the conditions set forth in the following subdivisions hereof, without fraud or deceit; but, the contract is voidable if the provisions of the applicable subdivision were not fully satisfied or present at the time the contract was entered into:

(1) Any contract involving one hundred dollars or less regardless of whether other sources of supply or services are available within the county, municipality, township or school district, provided that the consideration therefor is reasonable and just;

(2) Any contract involving more than one hundred dollars but less than the amount for which competitive bidding is required,

and there is no other source of supply or services available within the county, municipality, township or school district provided that the consideration therefor is reasonable and just and further provided that the accumulated total of such contracts paid during any given fiscal year shall not exceed five thousand dollars;

(3) Any contract with any firm, association, corporation, or cooperative association for which competitive bidding is not required and where other sources of supply and services are available within the county, municipality, township or school district, and the consideration therefor is reasonable and just, unless the majority of the governing body are members or stockholders who collectively have controlling interest, or any one of them is an officer or manager of any such firm, association, corporation, or cooperative association then any such contract shall be null and void;

(4) Any contract with any firm, association, corporation, or cooperative association for which competitive bidding is required by law, and where more than one such competitive bid is submitted.

IN RE QUESTION NO. 2:

At the outset, it would be my opinion that all of the items listed in (a) through (d) of fact scenario number two would be encompassed within the prohibitions found in SDCL §§6-6-1, 13-20-2.1 and Article VIII, § 17 of the South Dakota Constitution set out above. This conclusion is based in part upon the dictionary definition of the words in question:

Book - A set of written, printed, or blank pages bound together in a volume; a written or printed narrative or record; a collection of tablets; a major division of a treatise or literary work; anything that may be studied like a book; the text of a play, etc.

Apparatus - Materials, implements, etc. for a given work; instrument or appliance designed for a specific operation; machinery.

Furniture - A furnishing or state of being furnished; necessary equipment, furnishings; specifically (a) a set or supply of articles constituting the fittings of a bed, ship, automobile, equipment that is necessary or useful; (b) movable articles, as chairs, tables, beds, etc., used in furnishing a room or rooms.

This is not, however, the end of the inquiry. In my opinion, the Legislature has identified certain situations under which the prohibitions do not apply.

In Official Opinion No. 70-47, 1971-72, Report of the Attorney General page 39, then Attorney General Gordon Mydland issued an opinion to Roger L. Wollman, then state's attorney for Brown County, South Dakota. In that opinion the Attorney General addressed the situation where a township supervisor leased a gravel pit to the township in violation of SDCL 8-9-2 but within an exception found in SDCL 6-1-2. The opinion notes that the famous "City of Faith Case," Carlson v. Donnenwirth, 75 S.D. 432, 67 N.W.2d 149 (1954), required a certain city councilman who furnished coal to the City of Faith to reimburse the payments for the coal to the city. In response, in 1955, the Legislature enacted SDCL 6-1-1 and 6-1-2. The Attorney General then concluded that if a particular contract was covered by one of the exceptions set out in SDCL 6-1-2, the contract was

not an award of a contract fraught with 'fraud and stealth,' but rather such is a valid contract by virtue of statutory enactments passed by the Legislature and approved by the Governor subsequent to the enactment of SDCL 8-9-2. Being a subsequent

enactment, insofar as the particular problem in regard to competitive bidding is concerned, SDCL 6-1-2(4) is the controlling law. Compliance with it would result in a valid contract.

Report of the Attorney General, 1971-72 page 41.

Since the issuance of that opinion local governmental entity officers have continued to do business with their governmental entity provided the contract in question fell within the scope of SDCL 6-1-2. Without opining upon the ultimate constitutionality of that enactment, I see no reason not to continue that practice regarding sales by school board members to their particular school.

The foregoing rationale does not, however, apply to sales by a school board member to other public schools within this State. I am unable to identify any legislative exception from the clear words of SDCL 13-20-2.1 and Article VIII, § 17 of the South Dakota Constitution that would allow for such sales. While it is tempting to artificially construe this statute to avoid this result, given the basis of the language in a specific constitutional provision, I am compelled to give a strict reading to the matter.

IN RE QUESTION NO.1:

As an initial matter it is my opinion that all of the items identified in (a) through (h) in scenario number one fall within the broad ambit of the phrase "book, apparatus, furniture." Unlike the application of the exception found in SDCL 6-1-2 regarding sales by board members, it does not appear that this same result applies to the sales by teachers.

The basis for this conclusion is the fact that SDCL 6-1-1 identifies contracts involving "any officer" of a school district "who has been elected or appointed." While school board members are clearly "officers" of a school district, teachers must be seen only as employees of the district. Because the exceptions found in SDCL 6-1-2 apply only to those contracts identified in SDCL 6-1-1, there is no way, under the plain words of the statutes, to apply these exceptions to sales by school teachers. Accordingly, it is my opinion that any sales of items such

as you identify must fall to the prohibition contained in SDCL 13-20-2.1. Since such sales would be contrary to law it would further be my opinion that contracts by school boards for such purposes would be void. Finally given the wording of the statute I believe the misdemeanor identified therein would be committed by both teacher and the board members approving the contract.

Sincerely,

Roger A. Tellinghuisen
ATTORNEY GENERAL