

Opinion No. 63-77

July 8, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Dr. Stanley J. Leland Director Department of Public Health State Capitol Building
Santa Fe, New Mexico

QUESTION

FACTS

The Village of Central and the Village of Bayard have entered into a contract whereby the Village of Bayard will treat the sewage from the Village of Central. The contract is mutually beneficial since the Village of Central would otherwise dispose of its sewage in the same draw where the Village of Bayard secures its water supply. Consequently, the contractual agreement protects the water supply of the Village of Bayard. The contract by its terms extends beyond the terms of office of the present mayor and council of each village.

QUESTIONS

1. Is this contract valid inasmuch as it extends for a period of time beyond the terms of office of the present mayor and council of each village?
2. Is it necessary to insert a severability clause in this contract?

CONCLUSIONS

1. Yes.
2. No.

OPINION

{*160} ANALYSIS

It is frequently said, and very often it is true, that **in the absence of specific authority** a board of public officers cannot, in the exercise of its governmental powers, enter into a contract which extends beyond the term of the public officers who execute the contract.

There are a number of exceptions to this doctrine, even when statutory authority is lacking, and in our opinion the proposal submitted would be such an exception. **Board of County Commissioners v. Simmons**, Kans., 151 P. 2d 960; **Plant Food Co. v.**

City of Charlotte, N.C., 199 S. E. 712; **Fisk v. Board of Managers of Kansas State Soldiers' Home**, Kans., 5 P. 2d 799; **Daly v. Stockwell**, Fla., 63 So. 2d 644.

However, we ground our opinion in this instance upon the fact that statutory authority **does** exist for the execution of the contract. Section 14-40-90.1, N.M.S.A., 1953 Compilation (P.S.) provides in part as follows:

"Cities, towns and villages in the state of New Mexico shall have the power **by ordinance to authorize and enter into contracts extending over a period of years** with the United States government or any of its agencies, with the state of New Mexico or any of its agencies, boards or instrumentalities or with any person, association or corporation for the purpose of obtaining, securing or supplementing *{*161}* their water supply and to provide for the storage, **treatment**, distribution and transportation of water by pipe lines, conduits, ditches or any other means. . ." (Emphasis added.).

It is clear that under this provision two villages can, by ordinance, enter into contracts with each other which extend over a period of years since a portion of the title reads as follows:

"and permitting two or more municipalities to join and become parties to such contracts."

Water supply systems and sewage disposal systems being so interrelated, it is our opinion that the contract in question is authorized by Section 14-40-90.1, *supra*, so long as each village enacts an enabling ordinance.

Further, Section 14-40-22, N.M.S.A., 1953 compilation, provides that incorporated villages of 500 or more inhabitants "shall have power **by ordinance to contract for**, establish, construct and maintain water-works and sewers. . ." (Emphasis added). It also provides that the sewer pipes and appurtenances can be located within or without the village. It will be noted that this statutory power to contract is not limited to short-term contracts. See also the power of cities, towns and villages to protect their water supplies from pollution. Section 14-40-26, N.M.S.A., 1953 Compilation.

Your second question asks whether a separability clause is necessary in the **contract**. The effect of a contract which is partially valid and partially invalid is determined by the entire law of contracts, including the doctrine of divisibility, and not by the insertion therein of a so-called separability clause. I believe that what you have in mind is whether the enabling ordinances should contain a separability clause. Such clauses are a comparatively modern legislative device, the courts having separated statutes and ordinances long before its innovation. Nowadays the separability clause is regarded as little more than a mere formality and has been said to be merely declaratory of the established principal that statutes may be separable. **Schneider v. Duer**, 170 Md. 326, 184 Atl. 914. While a separability clause is sometimes said to be an aid in determining legislative intent, actually it is little more than a codification of an established canon of statutory construction. **Rash v. Louisville & Jefferson County Metropolitan Sewer**

District, 309 Ky. 442, 217 S.W. 2d 232; **Willcox v. Penn Mutual Life Ins., Co.**, 357 Pa. 581, 55 A. 2d 521.

By: Oliver E. Payne

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