

Opinion No. 64-74

June 2, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. John W. Flynn, State Planning Officer, State Planning Office, Santa Fe, New Mexico

QUESTION

QUESTIONS

- (1) May a state agency, department, bureau or commission enter into a lease for rental of office space or other similar facilities where no express statutory authority exists for such contractual agreements?
- (2) May a state agency, department, bureau or commission properly enter into a lease agreement which binds the state to pay rentals beyond a two year period?

CONCLUSIONS

- (1) Yes, in the absence of express statutory authority, an implied power exists to permit public bodies to contract for office space and similar office facilities by lease.
- (2) A state public body, in the absence of statutory power providing otherwise, may properly enter into a lease contract only for such period of time as there exists current legislative appropriations or other funds available to pay lease rental obligations falling due under the terms of the lease agreement.

OPINION

ANALYSIS

Your first question posits the issue of whether or not a state agency, department, bureau or commission may legally enter into a lease agreement for rental of office space or other similar facilities in the absence of express statutory authority to so contract. In our opinion, any agency, department, bureau, commission or other state public body may properly contract by lease for use of premises for office space, parking, or purposes necessary and incident to the carrying out of the objectives of such public authority.

As stated in **State ex rel. Ross, et al., v. Donahey**, 113 N. E. 263, 93 Ohio St. 414, acquisition of office space and quarters is a necessary requisite to carrying out the functions of government. This case stated in part:

"The sovereign powers of government cannot be exercised unless suitable quarters are provided for the various governmental departments in the performance of public duty and service. This is axiomatic. Manifestly it is within the sovereign power of the state and particularly is it a legislative function under that sovereignty, for the General Assembly to appropriately legislate so as to furnish the government and its various departments with suitable quarters. . ."

Under the 1964 General Appropriation Act (Chapter 1, Laws of 1964, Special Session), legislative line item appropriations in some instances specifically provide for rent to certain state agencies and offices, and appropriations in other cases generally cover the expense of such item for other state offices and departments. Notice may be taken that at present sufficient state owned buildings do not exist in which to house all state agencies, departments, bureaus or commissions, and long standing administrative practice has been to lease for specific periods of time, available private office accommodations for use as office space or other public purposes. Currently twenty-one state agencies are housed in privately owned structures in Santa Fe.

Although the statutes creating most state agencies and departments are silent in respect to the powers of such public bodies to contract generally, it is implicit that such bodies possess the implied authority necessary to contract for acquisition of office facilities. We believe that it is clearly within the implied authority of any public agency to enter into a lease for office space, if such is within the legislative appropriation or other funds available, to maintain an office, office equipment, files and records incident to the carrying out of such body's statutory function.

Such implied authority was previously recognized in our prior Attorney General's Opinion No. 62-87, dated July 11, 1962. Such Opinion, quoted in part from 81 C.J.S., "States," Section 58, at pages 977-8, where it was stated:

"Generally speaking, state officers, boards, commissions, and departments have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed on them. . ."

Consonant with the above authorities it is our opinion that any state public entity, within the scope of its available legislative appropriation or funds, may contract by lease for the acquisition of office space essential to enable such entity to carry out and perform the functions which such office has been charged with by law.

Secondly, you have inquired as to the permissible length of time which any state agency, department, bureau or commission may properly contract by lease to rent office space or other facilities. The New Mexico State Supreme Court has stated that a public agency may not enter into a lease for a period of time which would extend beyond the period for which legislative appropriations are made. In **State Office Building Commission v. Trujillo**, 46 N.M. 29, 120 P. 2d 434, the Court noted that one legislature may not so act as to bind the hands of a future legislature. In that case the

Court in passing upon a proposed lease purchase agreement for a state office building stated in part:

"The State Board of Barber Examiners and the other state departments mentioned in Section 9 of the Act are but agencies of the state, so that the lease agreements would be the contracts of the state. Subject only to the one condition set out in said section, the state would be obliged to continue payment of rentals until the indebtedness of the Commission was satisfied. This would mean, so long as the agencies did not recede from the lease agreements under the one specified condition, that future legislatures would be bound to provide appropriations for payment of rentals. Such would not be within the conception of expense under a lease as current expense; and a legislature cannot tie the hands of another legislature. *State ex rel. v. Griffith*, 135 Ohio St. 604, 22 N.E. 2d 200; *Boswell v. State*, 181 Okl. 435, 74 P. 2d 940. See also, on this proposition generally, *City and County of San Francisco v. Boyle*, 195 Cal. 426, 233 P. 965, and *Reynolds v. City of Waterville*, 92 Me. 292, 42 A. 553."

In a similar case, **Ohio v. Medbery, et al.**, 7 Ohio St. 522, the Supreme Court of Ohio considered whether the Board of Public Works in Ohio could legally bind the state to pay a contractual obligation for a period of five years. The court determined that no officers of a state board can enter into any contract, except as may be specifically provided by law, whereby the Legislature will two years after, be bound to make appropriations for a particular object or a fixed amount. The court in such case stated:

"The sole power of making appropriations of the public revenue is vested in the general assembly. It is the setting apart and appropriating by law a specific amount of the revenue for the payment of liabilities which may accrue or have accrued. No claim against the state can be paid, no matter how just or how long it may have remained overdue, unless there has been a specific appropriation made by law to meet it."

The Kentucky Supreme Court in **Preston v. Clements**, 313 Ky. 479, 232 S.W. 2d 85, recognized the right of state agencies to enter into lease agreements for rental of office facilities, which agreements were to be binding for any biennium for which the agreements were executed. The court noted, however, that such lease agreements could not bind any future legislature to appropriate money to pay for rentals longer than a biennium and for which period an appropriation had been made by the state legislature.

Similarly in **White v. Jones**, 352 Mo. 354, 177 S.W. 2d 603, the question was raised as to the permissible maximum period which a state agency could contract for rental under a lease agreement. In this case the court stated the purported lease agreement was void because it exceeded the permissible period which a state agency could contract for by lease. The court stated in part that:

"While Section 14590, supra, expressly authorizes the state purchasing agent to negotiate leases, there is no express authorization for him to incur obligations for rentals

or otherwise that will fall due and become payable after the lapse of two years from the date of passage of the appropriation out of which said indebtedness is to be paid.

. . . .

While there was no evidence that the amount of the debt incurred was not within the appropriation for the years 1935 and 1936, it appeared from plaintiff's evidence that only the rental for the first year would fall due during the years for which the 1935 appropriation was made. No part of that appropriation was intended for the rentals or other obligations accruing more than two years after the passage of the appropriation act. Article 10, Section 19, Constitution of Missouri. There was, therefore, no appropriation for these subsequently accruing rentals, nor for any obligations subsequently arising under Sections 3 and 4 of the lease, and the lease incurring these obligations was wholly unauthorized. . . ."

Again, in **Fort Worth Cavalry Club v. Sheppard**, 83 S. W. 2d 660 (Tex.), a closely related fact situation involving the permissible lease period applicable to state leases, was considered by the Texas court. The court stated that in the absence of any express statutory authorization permitting longer leases, a state agency was limited to the period for which the legislature had made an express appropriation to the agency. The court said in applicable part as follows:

"All public offices and officers are creatures of law. The powers and duties of public officers are defined and limited by law. By being defined and limited by law, we mean the act of a public officer must be expressly authorized by law, or implied therefrom. 22 R.C.L. p 555, Sec. 114. It follows from the above that public officers may make only such contracts for the government they represent as they are authorized by law to make.

From the statement we have made it appears that this lease contract was made by the Adjutant General on behalf of the state to run for a period of five years from September 1, 1931. The appropriation here involved was to pay the contract rentals under such contract. The Attorney General contends that the Adjutant General was without power to make a lease contract for a period of five years, and, therefore, the contract was, and is, illegal. In this connection, the Attorney General contends that there was no law, express or implied, in force at the time this contract was entered into to authorize its making. We are compelled to sustain this contention. . . .

A careful reading of the above quoted statutes clearly demonstrates that none of them contains any express language authorizing the Adjutant General to rent or lease armories for the National Guard for a period of five years, or for that matter, for any period. **When we come to construe such statutes, together with the above quoted appropriation act, it is reasonably clear to us that the Adjutant General had the implied power, within the reasonable limitations of such appropriation, to make contracts for the period and purposes covered thereby, and no further.** This holding renders this contract illegal." (Emphasis supplied).

Article IV, Section 30, of the New Mexico State Constitution specifies that excepting "interest or other payments on the public debt," no money shall be paid out of the treasury other than upon appropriations made by the legislature. Any effort by a state public body to contract to expend funds beyond the period for which the legislature has appropriated funds, seeks to bind the state to commit amounts of money and for purposes not approved by the legislature.

By recent enactment, Section 22-23-1, N.M.S.A., 1953 Compilation (Laws 1963, Chapter 152, Section 1) the legislature has waived the defense of sovereign immunity of the state on all contracts entered into by state agencies. This statute provides as follows:

"Actions not otherwise provided by law, may be maintained and any judgment enforced against the state and any of its agencies when based on a written contract. The Rules of Civil Procedure for the district courts govern and service of process on the attorney general constitutes service on the state or its agencies. All actions under this section are barred unless brought within two years from the time of accrual."

Such statute does not permit the state or any of its agencies to enter into a lease agreement in excess of the period for which legislative appropriations or other funds are available for rental of office space or other accommodations, but such law does make the state or its public agencies subject to suit for breach of its contracts which are lawfully entered into.

Based on the above authorities, it is our opinion that in the absence of express statutory provision otherwise providing, a state agency, department, bureau or commission may enter into a lease for rental of office space or other similar facilities only for such period of time as there exists legislative appropriations or other funds which are available to cover rental payments which will become legally due under the provisions of the lease contract. Thus, in most instances lease agreements must either coincide with or contractually bind the public body to pay rentals only within the amounts of current legislative appropriations or other available funds, and upon a fiscal year basis or a fiscal biennium, dependent upon the period of time which the legislature has made appropriations or other funds available for such purposes. It would appear that a lease contract could be entered into for a longer period of time, only if it expressly provided that the public body was under no obligation to continue such contract or to pay rental sums if legislative appropriations were not available, or if the legislature by subsequent enactment restricted, reorganized or abolished such agency. It is clear, however, as stated in **State Office Building v. Trujillo**, supra, that a state agency may not undertake to legally obligate itself or the state to pay sums by contract beyond such amounts as are currently appropriated to such agency, nor may it purport in any manner to bind future legislatures to provide appropriations for payment of rentals for such public body.