

RIGHT OF OFFICER TO MAKE CONTRACT BEYOND HIS TERM.
RIGHT OF PENAL BOARD TO MAKE CONTRACT WITHOUT APPROVAL
OF GOVERNOR.

February 28, 1933



Honorable Paul V. Renz
Farms Commissioner
Jefferson City, Missouri

Dear Mr. Renz:

We have your letter dated February 25, 1933, in which you state and inquire as follows:

"Enclosed herewith find copies of lease for the years 1932 and 1933 by which the Department of Penal Institutions at Jefferson City, Missouri, acquired the Dr. Jose farm (148 $\frac{1}{2}$ acres) in Calloway County, Missouri. The Department of Penal Institutions operated this farm during the year 1932 and have made and signed contract for the same farm for the year 1933, extending over into the new administration.

We would like an opinion from your Honorable Office as to whether it is legal for the old Board to contract for the lease of this farm extending into the new administration.

Your opinion before March 1st would be much appreciated".

One of the attached leases expires by its terms March 1, 1933, the other on March 1, 1934.

Section 8316 establishes the department of penal institutions, which department shall be under the control and management of a Commission composed of five members to be known as commissioners of the department of the penal institutions. The commissioners are appointed by the Governor, and the Governor shall designate one of the commissioners as director of penal institutions, one as warden of the penitentiary, one as superintendent of industry, one as superintendent of prison farms and one as commissioner of paroles and pardons.

After giving the commissioners certain powers and authority in the direction, control and management of the penal institutions it is provided in Section 8339, that the commissioners of such department, with the approval of the Governor, has authority to lease or purchase lands suitable for farming, rock quarries or grazing purposes or for any or all of said purposes if deemed by said board necessary and proper for said purposes, which land is to be used by the board for the employment at useful work of the prisoners of the penitentiary and for training such prisoners.

It will be noticed that neither of the attached leases bears the approval of the Governor of the State of Missouri at the time such contracts were entered into.

The force and effect of the word approval as used in Section 8339 is stated in *Brown v. City of Newburyport*, 95 N. E. 504. The quotation following shows the connection in which the word was used in that case, it is said, page 507:

"The crucial word to be construed is "approval". This word, like many others, has different meanings, depending upon the connection in which it is found and the subject-matter to which it is applied. It is used here by a municipal legislative body in a formal order to express a supervisory power reposed in one of its sub-committees as a restraint upon the action of an executive officer of the city, which might serve the purpose of enlightening his judgment, controlling his discretion and limiting his opportunity for folly or dishonesty. It occurs in a vote relating to the borrowing of money for municipal purposes. This is no simple matter, but involves a high degree of skill in order to determine the time and conditions, under which most favorable rates of interest and discount may be secured in the light of the actual financial necessities of the city. It does not show an intention to confer a perfunctory commission to be exercised once for all at the beginning of the year. That would be an idle ceremony, and would accomplish none of the results which the use of the language imports. The finance committee, as its name indicates and the ordinances of the defendant city provided, was the general legislative guardian of the financial affairs of the city. Approval, in this connection, means that the members of the finance committee, acting upon their official responsibilities and having in view the public welfare, shall investigate and sanction according to their own independent judgment, each separate borrowing made under the order. It implies reflection and sound business discretion as to each loan proposed. It did not confer a mere ministerial function, but imposed active and important prudential obligations."

If the Governor did not, in fact, approve the leases so made then the same would not have any validity.

We are assuming the board authorized the making of the leases.

Could the predecessors of the present commissioners of the department of penal institutions bind their successors by or compel observance of a lease made by such predecessors?

The question seems to turn on whether it was necessary, such as under a building contract, to make an agreement beyond the term of the then officers and whether such contract was entered into in good faith and with an honest intention to serve the best interest of the state.

The general rule in this regard is stated in 15 C. J. page 542, in the following language:

"The general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity of good faith and public interest".

The case of Moore v. Luzerne County, 262 Pa. 216, was a suit on contract made by the officers of the county, the fulfillment of which ran beyond the terms of the officers making the contract. On that point the court at pages 220 and 221 of the opinion held:

"The contract was made by the county commissioners but a few days preceding their retirement from office and the induction of their successors, and related to work, all of which was to be performed after they had ceased to be public officials. As the record now is, it is barren of any explanation of that material fact. It is a mistake to suppose that, because a public official, or indeed any other agent for a known limited term, has power to make a contract, he is authorized thereby to make one for an indefinite or long extended term. If the agency itself does not expressly limit the extent of the agent's power, then the facts and circumstances of each case must be considered in determining it. Ordinarily it is limited in time to the term of the agent who makes it. Necessity, or its equivalent of great advantage to the principal, may furnish a

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reason for enlargement beyond the term, but he who asserts the existence of the necessity of great benefit has the burden of proving it. This is particularly true of public officials, else those going out of office might so tie the hands of those coming in as to cause serious embarrassment and loss to the public. Every one would concede, for instance, that an outgoing board of county commissioners might well contract for the coal needed in the county offices during the existing or ensuing winter, although their terms ceased on the first of January; and every one would likewise concede that their contract for coal to cover a decade would ordinarily be wholly beyond their powers."

To the same effect are a great number of cases cited in 15 C. J. 542.

It seems a fair statement of the rule to say that under some contracts, such as one for the erection of a building, a contract might be made by officers to extend beyond their terms, but generally speaking we think the rule is that a contract made by officers to be wholly performed beyond the term for which such officers will continue in their official capacity, is prima facie void, with the burden on and the right in those who are entitled to assert the validity of the contract to show that the same was entered into in good faith and with an honest intention to serve the best interest of the state, that of course would be a question of fact for a court or jury to pass upon.

In our opinion unless the then Governor of the State of Missouri actually approved the contracts so made the same did not have validity and we are further of the opinion that the contract dated October 15, 1932, expiring on its face March 1, 1934, was and is prima facie void and unenforceable.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

Attorney General.