

Law 1933 p. 410

January 29, 1934



Mr. Orville M. Barnett  
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My Dear Mr. Barnett:

In response to your request for an opinion of this office respecting the construction of the State Purchasing Agent Act as applied to the University of Missouri, we render you an opinion on the following questions:

First - That the duties and powers of the Purchasing Agent extend only to appropriations made by the General Assembly. It would seem that Section 4, of the Act necessarily leads to that conclusion.

Second - That the provisions of the Act, properly construed, exempts printing contracts and printing purchases entered into or made by the boards of educational and eleemosynary institutions. That the Legislature has recognized that printing for the various institutions named should be left to the judgment and discretion of the several boards is clearly indicated by Section 13999 R. S. No. 1929. Further Section 2, of the Act of 1933, expressly indicates that printing and printing contracts should be distinguished from purchases or contracts for the purchase of ordinary needs and supplies.

Third - That expenditures through purchases made from Federal funds received by the Board of Curators for use of the University, and from trust funds, gifts and other items of that character are not subject to the authority of the State Purchasing Agent, because of the character of the funds and because of the further fact that they are earmarked by the donor or covered by directions

and instructions under the terms of the law or grant creating the fund."

We shall treat your inquiries in the order named.

I.

PURCHASING AGENT ACT APPLIES  
ONLY TO EXPENDITURE OF FUNDS  
APPROPRIATED BY GENERAL ASSEMBLY.

The State Purchasing Agent Act found at page 410 Laws of Missouri 1933, is a comprehensive act intended to concentrate all state buying through one agency, to place all such buying on the basis of competitive bids, and to place such purchasing on a cash basis. However, there are certain limitations upon the operation of the Act. One of these limitations arises from a mandatory requirement of the Act. Section 4 reads as follows:

"No department shall make any purchase except through the Purchasing Agent as in this Act provided. The Purchasing Agent shall not furnish any supplies to any department without first securing a certification from the auditor that an unencumbered balance remains in the appropriation and allotment to which the same is to be charged and that an unencumbered balance remains in the fund from which payment is to be made, each sufficient to pay therefor. The Purchasing Agent shall be liable personally and on his bond for the amount of any purchase made without such certification and the auditor shall be liable personally and on his bond for the amount of any false certification."

From the foregoing requirement it is apparent that before the purchasing agent can act in taking bids or making contracts to purchase supplies for any department he must act upon a certification of the State Auditor that there remains an unexpended balance in the appropriation for that department for that purpose. It is accordingly apparent that the act would not operate upon any purchases not made by virtue of an appropriation of the General Assembly, as the purchasing agent is not authorized to make any purchases without such certification. Accordingly, by this requirement

The act has excluded from its terms any purchase made by the department from funds which were not appropriated to that department by the Legislature.

II.

STATE PURCHASING AGENT ACT, WHEN  
PROPERLY CONSTRUED, DOES NOT APPLY  
TO UNIVERSITY OF MISSOURI.

Although your inquiry concerns itself only with the printing contract of the University we found ourselves confronted with a constitutional provision respecting the control and management of the University. In other words, upon deeper investigation we arrived at the conclusion that the statutory provision as found in Chapter 115 R. S. Mo. 1929, and Section 2 of the Purchasing Agents Act were not entirely controlling so far as the University of Missouri was concerned. Section 5 of Article XI of the Constitution of Missouri provides:

"The General Assembly shall, whenever the public school fund will permit and the actual necessity of the same may require, aid and maintain the State University, now established, with its present departments. The government of the State university shall be vested in a Board of Curators, to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate."

The above constitutional provision is a direct mandate to the General Assembly to aid and maintain the State University by the appropriation of funds for its support whenever the condition of the public school fund will permit. It likewise is a constitutional guarantee that the management and control of the University shall be in the Board of Curators. Needless to say, in the event of any conflict between these constitutional provisions and the state purchasing agent act, the act must give way to the constitutional provisions. We shall first consider whether or not the University is a department within the meaning of the Act. Section 11 of the Act defining the terms therein used provides in part as follows:

"The term 'department' as used in this act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agencies of the state."

The Supreme Court of Minnesota in the case of State ex rel. University vs. Chase, State Auditor, 230 N. W. 951, determined that the University of Minnesota was a state institution or agency of the State within the meaning of the law establishing a Commission of Administration and Finance, whose duties were closely akin to that of the State Purchasing Agent in this State. At page 952 the Court stated:

"That the university is a state institution, in the legal as well as the colloquial sense, admits of no doubt. In Regents v. Hart, 7 Minn. 61, it was said that the board of regents is a public corporation, a 'trustee or agent' of the state with a 'specified and limited powers' for use in a 'particular manner for a given end.' That language was construed in State ex rel. Smith vs. Van Heed, 125 Minn. 194, 145 N. W. 967, as recognizing the University to be a 'public institution \* \* \* merely an agency of the state to exercise certain limited and specified powers.' "

Having determined that the State University is a department within the meaning of the State Purchasing Agent Act we are confronted with the interpretation which is to be given the word "government" as used in the constitutional provision hereinbefore referred to.

In examining the decisions of other states we find this identical situation arose in the State of Minnesota. A few years ago a law was passed in that state establishing a department of Administration and Finance. This act worked a radical, drastic and far-reaching change upon the State Government. It was intended to draw within its provisions all of the activities of the State respecting the expenditure of state funds, except insofar as restrained by constitutional limitations. See State ex rel. Filler vs. Rines, 239 N. W. 670, l. c. 671. In the Chase case supra, the board of regents of the University brought a suit against the State Auditor to require him to issue a warrant in payment of a group insurance for all of the employees of the University. This expenditure had not been authorized by or in accordance with the Act providing for the Department of Administration and Finance. In determining this case the Court considered the constitutional provision respecting the University. The University of Minnesota was established under the territorial laws of 1851. Section 4 of the Act provided:

"The government of this university shall be vested in a board of twelve regents."

When the territory was admitted to statehood the constitution of the state confirmed and perpetuated this provision. The Minnesota Courts in determining the construction to be placed upon the above provision held it synonymous with control and management, stating l. c. 956:

"The people were the 'corporators of this institution of learning' and 'by their Constitution, conferred the entire control and management of its affairs and property' upon the board of regents. *Weinberg v. Regents*, 97 Mich. 246, 254, 56 N. W. 605. All that power having been put in the regents, none of it remained to be exercised by any other body - not even the Legislature itself. \* \* \* \*"

And at page 957 stated:

"With the policy we have nothing to do - except that, recognizing the mandate of the Constitution, we must give it effect as litigation before us furnishes the occasion and imposes the duty of deciding which of two conflicting laws we must enforce, the paramount rule of the Constitution or the subordinate law of the Legislature. The Constitution of the state has declared, in effect, that the management of the University shall be, until the people themselves say otherwise, in a relatively small, slowly changing board, chosen for their special fitness for an interest in the work. The early working of the plan did not justify it. The board was considered so large as to be cumbersome and the method of its election 'a most pernicious one'. *Forty Years of the University of Minnesota*, Johnson, 26. But whatever or however just the criticism, the purpose of the Constitution remains clear. It was to put the management of the greatest state educational institution beyond the dangers of vacillating policy, ill-informed or careless meddling and partisan ambition that would be possible in the case of management by either Legislature or executive, chosen at frequent

intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher education."

The Supreme Court of Minnesota held that by Constitutional provision the management and control of the State University had been vested in the board of regents. See also Fanning et al. vs. University of Minnesota, 236 N. W. 317. West vs. Board of Trustees of Miami University et al. 181 N. E. 144.

Our own Supreme Court has had occasion to discuss the meaning of the word "government" as used in this section. In the case of State ex rel. vs. Board of Curators of the University of Missouri, 267 Mo. 598, the Court considered the power of the General Assembly to enact legislation providing for additional departments of the State University. In determining that the power to govern did not include the power to create the Court stated on page 619:

"\* \* \* The real question therefore, is whether the exclusion of legislative authority arises by necessary implication from the word "government" as employed in section 5 of article 11. As stated in the beginning, the words of the Constitution must be given their natural signification in the connection in which they are used. The primary meaning of 'government' according to the Century Dictionary and Encyclopedia is 'guidance; direction; regulation; management; control; as, the government of one's conduct.' Its primary meaning, according to Webster's New International Dictionary, is: 'Act or fact of governing; exercise of authority in regulating the action of something; control; direction; rule; regulation; specif. the direction of affairs of state; the ruling and administration of a political body.' \* \* \*"

We direct particular attention to the use of the word "management" as one of the synonyms of government. But before leaving the above case we wish to remark that the issue there determined was the distinction between the power to manage and control that which is in existence and the power to create. In our opinion this decision is not controlling of the issues here involved.

In Words and Phrases, 3rd Series, we find "government" to be defined:

"Thus, 'management' means administration, control, etc. and one of the synonyms of management is 'government.' City vs. Howard 119 Mo. 41. l. c. 46."

In Webster we find management defined as:

"Act or art of managing; the manner of treating; directing, carrying on or using, for a purpose; conduct; administration; guidance; control; management of state affairs.\* \* \* \* \*  
a business dealing; negotiation."

In the case of State ex rel. McDowell vs. Smith, Auditor, not yet reported, the Court considered the constitutional provision which provided that the State Highway Commission should "acquire material" for the construction of the State Highways. The Court remarked:

"The grant conferring this power contains no delegation to the legislature or authority for legislative delegation of that power or any part of it to any other state officer or agent.\* \* \*  
It need only be noted that the negotiation for purchase by advertisement for bids, the acceptance of the bid and the entering accordingly into a contract in writing are parts of the transaction and together constitute the purchase, and that the commission cannot be shorn of any part of its plenary discretion and power in the premises."

In the foregoing case the Court held that the power to acquire included the power to advertise for bids or negotiate for them, to accept such bid as was lowest and best, and to make a contract accordingly. So in the instant case it is our opinion that the word "government" means the management and control of the University and, as was held by the Minnesota Supreme Court, preserved in the Board of Curators the power of purchasing supplies, which could not be divested by the Purchasing Agent Act.

III.

EXPENDITURES OF TRUST FUNDS, GIFTS  
AND OTHER DONATIONS UNDER THE CONTROL  
OF THE BOARD OF CURATORS.

While it is apparent from our foregoing statement that the expenditures of such funds should in no way be construed to be in the State Purchasing Agent, there is still the question as to whether or not these funds are required to be deposited in the State Treasury under the provisions of Senate Bill 124 found at page 414, Laws of 1933. Portions of this act read as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. \* \* \* \* \* provided, that in the case of the state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

In the first place, the only funds required to be deposited are those which are received "by virtue of any law or rule or regulation made in accordance with any law." It is apparent that most donations or gifts could in no way be included within this phase. Also, by the specific wording of the Act, we find that all such gifts, donations or grants are particularly excluded from the operation of the Act. We direct attention to the extracts from this law hereinbefore quoted.

Mr. Orville M. Barnett.

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CONCLUSION.

It is the opinion of this office that the State Purchasing Agent Act does not modify or effect the expenditures of University funds by the Board of Curators.

Respectfully submitted,

HARRY G. WALTNER, JR.  
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APPROVED:

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ROY McKITTRICK,  
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