

relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same to you herewith, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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4642.

LIQUOR CONTROL DEPARTMENT—CONTRACT INCREASING COMPENSATION OF AGENT ILLEGAL WHEN—IDENTICAL DUTIES INSUFFICIENT CONSIDERATION FOR NEW CONTRACT.

**SYLLABUS:**

*There is no consideration for a new contract entered into between an agent of the Department of Liquor Control and the department whereby the agent receives increased compensation for the performance of the same duties he was already bound to perform under a contract which had been mutually canceled prior to its date of termination, where the new contract is identical in terms with the canceled contract except as to the compensation to be paid to said agent.*

COLUMBUS, OHIO, September 9, 1935.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads in part as follows:

“An examination of the records and accounts of the Department of Liquor Control, State of Ohio, discloses that the Department has, in several instances, increased the annual salary of its agents that were appointed under Section 6064-11 of the General Code by substituting new contracts for ones which have not yet expired. The facts are substantially as follows:

Under authority granted by Section 6064-11 of the General Code of Ohio, the Department has deemed it advisable to establish, in certain localities, agencies for the sale of spirituous liquor and have fixed the agent's compensation in the form of an annual salary

for a definite period of time. Prior to the expiration of the contract for a definite period of time, and upon allegations by the agent that he has been insufficiently paid for the services he was rendering, the Department deemed it advisable to cancel the agency contract which had not expired and to enter into a new contract, identical to the cancelled contract except with regard to the item of salary, which is increased, with the same agent.

Some question has arisen as to whether there has been sufficient consideration for the cancelling of the contract which had a definite period to run and the entering into by the Department of a new contract with an increase in the annual stipend due to the fact that the agent has not been required by the new contract to render any services or to do anything that he was not required to do under the previous contract.

We desire an official opinion as to whether such new contracts are binding upon the Department and can the Department enter into such contracts?"

Section 6064-11, General Code, reads in part:

"\* \* \* In any location in which the department may deem it inadvisable to establish and maintain a state liquor store as a separate establishment, and in every municipality in which there is no such state liquor store, the department may appoint a person who is engaged in a mercantile business thereat as its agent for the sale of spirituous liquor and fix his compensation, which shall be in the form of an annual salary and not otherwise. The department shall require every such agent to give bond with surety to the satisfaction of the department, in such amount as the department may fix, conditioned for the faithful performance of his duties as prescribed by the department. \* \* \*"

Under the provisions of this section, the Department of Liquor Control is authorized to appoint a person who is engaged in a mercantile business as its agent for the sale of spirituous liquor.

According to the tenor of your letter, I am advised that the Department of Liquor Control has entered into contracts of agencies with persons selected by the Department of Liquor Control to act as the agents of the department in the sale of spirituous liquor.

According to the form of contract enclosed in your letter, provision is made for the payment of a definite salary as compensation of said agent. The contract also provides that the agent shall act for the department for a definite and fixed period of time. The contract, among other provisions, contains a

clause providing for the mutual cancellation of said contract by the Department of Liquor Control and its agent, and the contract further provides that the terms of the contract cannot be varied, changed or modified except in writing by the parties to the contract.

A valuable consideration is necessary to make a binding contract and this is so even when the contract is modified. It was held in the case of *Thurston and Hays vs. Ludwig*, 6 O. S., 1, as follows:

“A verbal agreement, to be effectual as a *waiver, variation, or change* in the stipulations of a prior written contract between the parties, must rest upon some new and distinct legal consideration, or must have been so far executed or acted upon by the parties that a refusal to carry it out would operate as a fraud upon one of the parties.”

See also 9 *O. Jur.*, 289, 293. A promise which was made without consideration is of no binding force. A valuable consideration consists in the acquisition of some legal right by the promisor in return for which the promisor makes some promise, or it may consist in the giving up of some legal right by the promisee in return for which the promise is made to him. In other words, a valuable consideration may consist either of some right, interest or benefit accrued to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. See *Fowler vs. Smith*, 24 O. App., 156.

The sole question raised by your inquiry is whether there is a valuable consideration for the contract entered into between the Department of Liquor Control and its agent after the original contract was mutually rescinded and which new contract is identical with the original contract except for the amount of compensation to be paid the agent. It has been held that a mere promise to carry out a subsisting contract or the performance of a contractual duty is no sufficient consideration to make a binding contract inasmuch as the party was already under obligation to perform such duty and hence sustains no detriment nor does the other party receive any benefit. In other words, a promise to do a thing or the actual doing of such thing is not a valuable consideration for a contract if the promisor by contract or by law is at the time already bound to do the thing promised. The performance of a duty which a person is bound to do is not sufficient consideration for a binding contract. See 13 C. J., 353; 9 *O. Jur.*, 312; and *Ward vs. Board of Education*, 11 O. C. D., 671.

In the case of *Ward vs. Board of Education*, supra, the third and fourth paragraphs of the syllabus read:

“3. Neither the promise to do a thing, nor the actual doing

of it, will be a good consideration if it is a thing which the promisor is already bound to do, either by the general law or by a subsisting contract with the other party.

4. A promise not supported by a consideration creates no legal obligation and hence its non-performance creates no legal liability. Therefore, a superintendent of schools having accepted the position at a stated salary for a time certain, being under a legal contractual obligation to serve that time, has no claim against a board of education on a voluntary promise of an increase of salary, for meritorious services, during his term, there being no rescission of the original contract, no new or additional service to be rendered or other consideration moving in support of the new promise."

The rule is also stated as follows in 13 C. J., 353:

"The promise of a person to carry out a subsisting contract with the promisee or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment, nor has the other party to the contract obtained any benefit. Thus a promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration."

Under the facts stated in your letter, the agent has contracted with the department to perform certain services as agent for the department in the sale of spirituous liquor at retail for a fixed and definite period of time for which the agent is to receive a fixed compensation. The new agreement contains all the terms of the old contract, except it provides for additional compensation for the performance of duties which the agent was legally bound to render under the old contract and contains no provision which in any wise alters the duties that the agent has already legally bound himself to perform. Likewise, it is clear from your letter that the new contract was not entered into because of some unforeseen condition or substantial difficulty in the performance of the old contract which was not known or anticipated by the parties when the original contract was entered into. Thus, there is no change in the relationship of the parties or a change in the duties to be performed by the parties under the original contract.

From a reading of your letter it is clear that there is no consideration for the new contract, the terms of which, as previously stated, are identical with the original contract except as to the amount of compensation to be paid the agent. Since the agent was already bound to perform the same duties at a lower compensation in the original contract and his promise to do some-

thing under the new contract which he was already bound to do by contract does not constitute sufficient consideration for the new contract, therefore it necessarily follows that the same is not a binding contract.

This conclusion is not altered by the fact that the original contract contains a clause which provides for the cancellation of said contract either by the department or the agent on giving thirty days prior notice to either party. The effect of such a clause is to permit the cancellation of the contract without damages because of such cancellation. However, the right to mutually rescind or cancel said contract is not sufficient consideration for the new contract entered into by the department and the agent.

Likewise, in determining the question presented by your letter, it will be well to bear in mind that under the terms of the contract public money is to be expended and that the Department of Liquor Control of the State of Ohio in expending such funds is acting as trustee for the public. It is a very familiar rule of law that public money should not and must not be expended without consideration or authority and it is against public policy to expend public money where the public receives no valuable thing in return for such expenditure. The rule is stated in *Ward vs. Board of Education*, supra, as follows:

“A voluntary increase of the salary of superintendents or teachers in public schools, given as a reward, is not only without consideration but against public policy, for the board is dealing with public funds and acting with respect thereto as trustees for the public.”

Specifically answering your inquiry, it is my opinion that there is no consideration for a new contract entered into between an agent of the Department of Liquor Control and the department whereby the agent receives increased compensation for the performance of the same duties he was already bound to perform under a contract which had been mutually canceled prior to its date of termination, where the new contract is identical in terms with the canceled contract except as to the compensation to be paid to said agent.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*