

OPINION 65-80**Syllabus:**

1. By reason of Section 22, Article II, and Section 3, Article VIII, Ohio Constitution, and Section 131.17, Revised Code, the Bureau of Unemployment Compensation is without legal authority to enter into contract to lease or purchase equipment where such contract purports to obligate either such bureau or the state to make eight annual payments for either the use or purchase of such equipment.

2. A contract by which the Bureau of Unemployment Compensation acquires the use of equipment for a period of eight years and agrees to pay for such use in eight annual payments, reserving the right to cancel the contract or to exercise an option to purchase on any anniversary date of the agreement, and by which it is agreed that a portion of each annual payment shall be allowed as part of the purchase price in the event of the exercise of the option to purchase, so that the entire purchase price will be allowed during the eight year period, creates a present obligation for the eight annual payments and is in fact an installment purchase contract not authorized by law.

To: Willard P. Dudley, Administrator, Bureau of Unemployment Compensation, Columbus, Ohio

By: William B. Saxbe, Attorney General, May 12, 1965

Your request for my opinion reads in part as follows:

"We request your formal opinion relative to the legal right of a State Agency, specifically the Bureau of Unemployment Compensation, to enter into a lease-purchase agreement with a manufacturer of data processing equipment whereby a portion of the annual lease cost is to be applied to the purchase price. At the expiration of a specified period of time, the equipment will belong to the State of Ohio under the terms of such agreement.

"We recognize that such an agreement involves specific problems:

"1. The right of a State Agency to become indebted for a period of time beyond the current biennium.

"2. Whether a rental-purchase agreement for equipment of this nature must conform with statutes relating to competitive bidding."

You have inquired only concerning the problems presented by the duration of this lease agreement and the possible requirement for competitive bidding, and I shall, therefore, assume that there has been full compliance with Section 125.13, Revised Code, which reads:

"No elective or appointive state officer, board, or commission, other than those excepted in section 125.11 of the Revised Code, shall procure or purchase any supply or equipment or make contracts for or operate data processing machine services other than from or through the department of finance. When the department determines that it is impractical for any officer, board, or commission to obtain any supply or equipment or to contract for or operate data processing machine services from or through the department, it may issue to such officer, board, or commission a release and permit to secure such supply or equipment or to contract for or operate data processing machine services other than from or through the department. A release and permit for supply or equipment shall specify the items of supply or equipment, the office or institution to which the release and permit applies, and the time during which such release or permit is operative, and may specify the quantity of each item of supply or equipment to be procured by such officer, board, or commission, and shall also state the reason for its issuance. A release and permit for data processing machine services shall specify the type of services to be rendered, the number and type of machines to be employed, the office or institution to which the release and permit applies, and the time during which such release and permit is operative, and may specify the amount of such services to be performed, and shall also specify the reason for its issuance. Every release and permit shall be in triplicate, one copy to be filed with the officer, board, or commission to whom it is issued, one copy to be filed with the auditor of state, and one copy to be filed with the department."

You have forwarded to me a copy of the proposed agreement presented on behalf of the seller of this data processing equipment. That contract reads in part:

"Radio Corporation of America, hereinafter called RCA, agrees to furnish the Customer use of its equipment of the models and in the quanti-

ties listed on the attached Schedule A and maintenance services upon the following terms and conditions.

"1. TERM OF AGREEMENT. This agreement is effective from the date it is accepted and shall remain in force for ___ years from the date the equipment is installed ready for use, except for the State's right to cancel on any anniversary upon 60 days prior written notice to RCA.

"2. PAYMENT, TITLE, RISK OF LOSS. For use of said equipment and maintenance services /except as to services for which Customer will pay separate charges pursuant to paragraph 5 (c)/ Customer shall make the annual payments set forth on Schedule B. The first annual payment shall be payable when the equipment is installed ready for use, and the subsequent payments shall be made annually on that date.

"All transportation, f.o.b. shipping point and rigging and drayage charges at Customer's location will be paid by the Customer. If Customer requests, RCA will prepay transportation charges, which shall then be payable by Customer to RCA upon receipt of RCA's invoices therefor.

"Title to the equipment shall remain with RCA until the Option to Purchase is exercised and all amounts due have been fully paid, and thereupon title to the equipment shall pass to the Customer without further action on the part of RCA. Risk of loss or damage to the equipment shall pass to the Customer with title.

"3. OPTION TO PURCHASE. Customer shall have the option to purchase the equipment on any payment date upon payment to RCA of amounts due on that date plus any arrearages, and ___ less the Allowance for Purchase Option shown on Schedule B applicable to that payment date. The option shall be exercised by Customer giving RCA written notice on or before that date."

Schedule B, referred to in the portion of the contract quoted hereinbefore, shows the required annual payments and the allowance in the event of the exercise of the option to purchase. This schedule shows payments to be made over an eight-year period, and it appears that the total of such annual allowances to be applied on the purchase price will equal the full cost of the equipment by the time the eighth payment is made. I, therefore, must conclude that any such lease agreement would extend for that period of time.

It is quite clear that at the inception of this contract there could not be funds appropriated to cover the eight annual installments required by the contract. Section 22, Article II, Ohio Constitution, reads:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

Also apparent is the fact that there could not be compliance with Section 131.17, Revised Code, to the extent that there would be a certification for the full period of the agreement. That section reads:

"No officer, board, or commission of the state shall enter into any contract, agreement, or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance first certifies that there is a balance in the appropriation, not otherwise obligated to pay precedent obligations, pursuant to which such obligation is required to be paid."

In my opinion, the two basic questions to be resolved are whether this proposed contract is one which involves the expenditure of money and which would fall within the prohibition of Section 131.17, Revised Code, and whether such contract would create a debt proscribed by the Ohio Constitution.

We do not have in this situation an enactment of the General Assembly authorizing a contract extending beyond the maximum two-year period for which an appropriation has been made. This was the situation which existed in The State of Ohio vs. Medbery, 7 Ohio St., 522, decided in 1857. In that case it was held that certain contracts entered into pursuant to a statute enacted in 1845 created a debt which was in violation of Section 3, Article VIII, Ohio Constitution, effective in 1851. Section 3, supra, reads:

"Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state."

You, as Administrator of the Bureau of Unemployment Compensation, are authorized by Section 4141.02, Revised Code, to provide the rooms, equipment, and supplies necessary to carry out your statutory duties, but I find no provision of law which would authorize any contract for the expenditure of money without meeting the requirements of Section 131.17, Revised Code. If, then, this is a contract which would attempt to bind the Bureau of Unemployment Compensation, or the state itself, to make payments for the eight-year period, I must conclude that you are without authority to enter into such contract and that any attempt to do so would be void.

By the terms of the sample contract furnished me, the Bureau of Unemployment Compensation would contract to pay eight annual installments. This entire obligation would be assumed at the inception of the agreement, subject to the right of the Bureau to exercise the option to purchase on any payment date or to cancel the contract on any anniversary of the contract. There is nothing which makes this contract subject to an appropriation by the state legislature. In my opinion, the question you have presented is similar to that which I had for consideration in Informal Opinion No. 93, Informal Opinions of the Attorney General for 1958, page 424, issued June 26, 1958, to the Director of the Department of Public Works. At that time, the Bureau of Unemployment Compensation was investigating the possibility of leasing buildings for office space with the leases to extend for more than two years.

Much of the discussion in that opinion seems equally pertinent here. After quoting Section 22, Article II, Ohio Constitution, I said this, beginning at page 425:

"As to the application of this provision to contracts extending beyond a two year period, it was held in *State v. Medbery*, 7 Ohio St., 522:

"The board of public works made contracts on behalf of the state, stipulating to pay defendants in error and others yearly, for the period of five years, for materials and repairs of the canals of the state, an amount in the aggregate of \$1,375,000. Held -

"* * *2. That no officers of the state can enter into any contract, except in cases specified in the constitution, whereby the general assembly will, two years after, be bound to make appropriations either for a particular object or a fixed amount -- the power and the discretion, intact, to make appropriations in general devolving on each biennial general assembly, and for the period of two years.

"3. The contracts of the board of public works, creating a present obligation to pay the defendants and others, for the period of five years, a certain amount do not come within said constitutional exceptions, and are in contravention of the provisions of article 8, section 3, and article 2, section 2.* * *' (Emphasis added)

"This case was distinguished, however, in *State ex rel. Ross v. Donahey*, 93 Ohio St., 414, the syllabus in which reads:

"1. Where the general assembly of Ohio has authorized some department or subdepartment of the state government, such as the industrial commission of Ohio, to secure suitable quarters necessary for the transaction of its business pursuant to law, and a contract is regularly executed and signed by the proper parties, which contract by its terms is made subject to an appropriation by the state legislature, and such legislature makes the necessary appropriation pursuant to said contract; Held: Mandamus is the proper remedy to compel the auditor to issue a warrant for any amount due from the state pursuant to such contract.

"2. The necessary and current expense growing out of the rental of suitable and necessary quarters for the transaction of the state's business, for which appropriation has been made by the state legislature, is not a debt or liability within

the inhibition of the provisions of the constitution.' (Emphasis added)

"In the opinion by Judge Wanamaker in the Ross case, the earlier ruling in the Medbery case, supra, was noted and distinguished as follows:

"* * *The case at bar is clearly distinguishable from the syllabus of the Medbery case, supra. In the first place, on December 31, 1914, the date of the lease, there was no "present" obligation, because by the terms of the lease it was expressly provided that the whole lease--all its terms and provisions--was subject to the appropriation by the state legislature. The language of the lease in this respect is as follows:

" "This lease is made subject to the appropriation by the state legislature and the individual members of the industrial commission are relieved from all liability for the payment of rent, if such appropriation is not made." * * *

"Following the decision in the Ross case (1916) the General Assembly enacted Section 2288-2, General Code, the substance of which is now found in Section 131.17, Revised Code, as follows:

"No officer, board, or commission of the state shall enter into any contract, agreement, or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance first certifies that there is a balance in the appropriation, not otherwise obligated to pay precedent obligations, pursuant to which such obligation is required to be paid.' (Emphasis added)

"This provision is held by the courts to be mandatory (State, ex rel. Miller v. Guthery, 125 Ohio St., 603) but I do not consider that this enactment affects the rule announced in the Ross case, supra. I take this view for the reason that where a contract of lease contains a proviso making it 'subject to' appropriate legislative appropriations such contract is not one which validly creates a 'present obligation' involving the expenditure of money within the meaning of Section 131.17, Revised Code.

"This being so, it is evident that as your question is worded a negative answer must be given; but it is possible to enter into a lease arrangement for periods in excess of two years if the contract includes the proviso of contingency which was approved by the court in the Ross case, supra."

I have considered the possibility that the right of the state to cancel this contract on any anniversary date, the so-called "escape clause," may remove this proposed contract from constitutional and statutory prohibitions, but I am unable to reach such a conclusion. In my opinion this contract would from the date of its execution be an attempt to bind the state for the entire period. Although this proposed contract is for a fixed term and contains no option for either renewal or extension, I believe the following language, found in The State, ex rel. Preston vs. Ferguson, 170 Ohio St., 450, page 457, is pertinent here:

"Also in this regard, a distinction must be made between contracts containing options to 'renew' for a given term or terms and those containing options to 'extend' for a given term. A contract containing an option to renew has the effect of granting a right to execute a new contract upon exercise of the option and the new contract is operative immediately after the terminal date of the original agreement. In other words, a contract containing a renewal option constitutes a present grant only for the original term, and a new contract must be executed at the end of such term if the option to renew is to be exercised. On the other hand, a contract which may be characterized as one containing an option to extend an agreement constitutes a present grant which, upon exercise of the option, operates to extend the term of the original agreement and the contract then becomes one for both the original and the extended term. 24 Cyc., 1008; 16 R.C.L., 885, Section 389; Helena Light and Ry. Co. v. Northern Pacific Ry. Co., 57 Mont., 93, 186 P. 702; Leroux & Co., Inc. v. Merchants Distilling Corp., 165 F. (2d), 481; Flynn v. Bachner, 168 Mich., 424, 134 N.W., 451, Ann. Cas. 1913c, 641."

It is, it seems, unnecessary to do more than mention here that I am of the opinion that this proposed contract is in reality an installment purchase contract which creates the debt at the inception of such agreement, subject only to the right to cancel. This office has, from time to time, been requested to examine rather similar agreements proposed to be executed on behalf of subdivisions of the state. Although the statutes there involved are not applicable here, the reasoning used in analyzing the terms of the contracts is equally pertinent here. For example, in Opinion No. 65-30, Opinions of the Attorney General for 1965, issued March 2, 1965, I said this:

"A continuing contract is a present agreement intended to cover or apply to successive similar obligations, the payment to be made upon the performance of each successive obligation. An installment contract, on the other hand, is an agreement for present performance with payment to be made in the future at designated times. Because title to the instruments would vest in the school after a period of time, it is in legal effect a present agreement with successive future payments."

In Opinion No. 2820, Opinions of the Attorney General for 1958, page 597, I held that a contract designated as a lease-purchase contract was in fact one for an installment purchase.

In view of the conclusion as to the right of a state department to enter into a contract such as that proposed, it is not necessary to consider the Ohio law relative to the requirement of competitive bidding.

It is, therefore, my opinion and you are advised:

1. By reason of Section 22, Article II, and Section 3, Article VIII, Ohio Constitution, and Section 131.17, Revised Code, the Bureau of Unemployment Compensation is without legal authority to enter into contract to lease or purchase equipment where such contract purports to obligate either such bureau or the state to make eight annual payments for either the use or purchase of such equipment.

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