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ARMORIES, LEASE—ADJUTANT GENERAL AUTHORIZED TO ENTER INTO CONTRACTS OF LEASE FOR PERIODS IN EXCESS OF TWO YEARS—SECTION 5238 G. C.

SYLLABUS:

The Adjutant General of the state is authorized by Section 5238, General Code, to enter into contracts of lease for armories for periods in excess of two years.

Columbus, Ohio, March 13, 1947

General Chester W. Goble, Adjutant General
State of Ohio, Columbus, Ohio

Dear General Goble:

I have before me your letter of March 4, 1947, requesting my opinion and reading as follows:

“This department requests an opinion from the Attorney General relative to whether or not the Adjutant General is empowered under existing laws, to enter into contracts for the lease of armories, for periods greater than two (2) years.”

Under the provisions of Section 5238, General Code, the duties of the Adjutant General relative to state armories are defined. That section reads as follows:

“The Adjutant General shall be the director of state armories. He shall provide grounds, armories and other buildings for the purpose of drill and for the safe-keeping of arms, clothing, equipment and other military property issued to the several organizations of the Ohio National Guard, the Ohio State Guard or the Ohio State Naval Militia and may purchase or build suitable buildings for such purposes when, in his judgment, it is for the best interest of the state so to do. He shall provide for the management, care and maintenance of such grounds, armories and buildings and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable.”

It will be observed that no reference is made in this section to *leasing* armories, nor do I find any other provision expressly authorizing buildings

to be leased for such purpose. However, the language of the section whereby the Adjutant General is commanded to “*provide* grounds, armories and other buildings”, appears to me to be broad enough to include leasing the same notwithstanding the fact that he is expressly authorized to “purchase or build suitable buildings”. Leasing is certainly one method of providing. It will be noted that the language of the section is that he *shall provide* armories, etc. and that he *may purchase* buildings. In other words, the duty to “provide armories” is mandatory, whereas the matter of purchase and erecting is merely authorized when, in his judgment, it is for the best interest of the state.

My understanding is that it has been a long established practice to provide armories in many cases by leasing rather than by purchase or erection. In an opinion of one of my predecessors, found in 1932 Opinions of the Attorney General, page 812, the then Attorney General had under consideration the rights and obligations of the state under a lease which had been procured by the Adjutant General, and while no direct question was raised as to the right of the Adjutant General to provide an armory by lease, the opinion appears to have assumed that to be the law and it was remarked in the course of the opinion :

“The Adjutant General of Ohio, has the authority, as lessee, to lease premises for the purposes set forth in the indenture of lease. Section 5238, General Code.”

Assuming then that you have full power to secure an armory by lease, the question arises whether you have authority to take such lease for a period greater than two years. It will be observed that there is nothing in the statute quoted which in any wise imposes any limitation. The only possible limitation would be that which is implied from the fact that moneys available for the payment of rental must be met out of biennial appropriations. Section 2288-2, General Code provides as follows :

“It shall be unlawful for any officer, board or commission of the state to 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 shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations.”

Section 5625-33, General Code, carries a similar provision in regard to contracts and expenditures by the various subdivisions or taxing units of the state. To take care of a lease running for a term of years Section 5625-36, General Code, makes the following provision:

“In the case of contracts or leases running beyond the termination of the fiscal year in which they are made, the fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases the amount of the obligation remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for such next year as a fixed charge.”

The provision last quoted appears to recognize without explicitly so stating, that leases may run for a considerable number of years and that the sum which may be required to pay the annual rental in future years will have to be appropriated from year to year by the taxing authority in its annual appropriation. Regardless of the fact that the subdivision may not have funds available for such appropriation or may decline or neglect to appropriate same, the lease would nevertheless be binding upon both parties. Likewise, in the case of a lease to the state, such lease for a term of more than two years would be binding upon both parties notwithstanding the fact that a suit could not be maintained against the state and notwithstanding the fact that the failure of the General Assembly to include the rental charge in its future biennial appropriations might make it impossible to pay the rent.

In effect, the lessor who makes a lease with the state for a term of years must be considered as taking the chance that the lease may fall by reason of the refusal or failure of the General Assembly to make the appropriation. However, that does not in my opinion affect the right of the officer of the state who is properly authorized in the premises, to enter into such lease. My understanding is that leases made to the state or any of its departments generally carry in them a provision recognizing that the continued payment of the rental agreed upon beyond the current biennium is subject to and conditioned upon appropriations being made by the General Assembly.

Accordingly, and in specific answer to your question it is my opinion that the Adjutant General of the state is authorized by Section 5238, Gen-

eral Code, to enter into contracts of lease for armories for periods in excess of two years.

Respectfully,

HUGH S. JENKINS,
Attorney General.