

Opinion No. 137.**County Commissioners—Powers to Lease Property.**

HELD: 1. County Commissioners under Sec. 4465.21 and 4465.24, R. C. M. 1935, as amended, have power to lease and rent county machinery when in the discretion of the Board such leasing or renting is for the best interest of the county and the use of the machinery is not then necessary for county purposes.

2. Members of the Board of County Commissioners cannot become interested directly or indirectly in lease or rental agreements of county machinery, acting both as agent for machinery company and county.

August 13, 1937.

State of Montana
Division of Public Accounting
Office of State Examiner
The Capitol

Attention of Mr. A. M. Johnson,
Deputy State Examiner.

Gentlemen:

We have your letter, inclosing a copy of Machine Lease Agreement, also copies of statements of payments and copies of claims of the Town of Troy, pertaining to all of which you are asking three several and distinct questions which will be answered chronologically.

1. Is the above machine lease agreement legal?

The lease as presented is legal as to contractual form and comes within the implied powers of the commissioners to perform, provided other elements of the statute are complied with. Section 4465.21 provides that:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To represent the county, and have the care of the county property, and the management of the business and concerns of the county in all cases where no other provision is made by law.”

Section 4465.24 provides that:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government.”

Section 4465.27 provides that:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To lease and demise county property, however acquired, which is not necessary to the conduct of the county's business or the preservation of county property and for which immediate sale cannot be had. Such leases shall be in such manner and for such purposes as, in the judgment of the board, shall seem best suited to advance the public benefit and welfare, and all revenue derived therefrom, except as otherwise provided shall be paid into the county treasury. On the tenth day of January and the tenth day of July in each year the county treasurers shall distribute such revenues to the several county and trust and agency funds on the basis of the tax levy for the preceding calendar year. All such property must be leased subject to sale by the board, and no lease shall be for a period to exceed three (3) years.”

You will note from the above sections that the statute vested in the county commissioners very comprehensive powers over the business.

property, and affairs of the county. The Constitution provides that county commissioners may be invested with local administrative powers, and the statute invested them with authority over county property, business, and affairs.

Ransom v. Pingel, et al., (Mont.)
65 Pac. 2d. 616, 618.

Section 4605.1 requires that a request for bids is necessary in making purchases exceeding one thousand dollars, and the purchase under the Machine Lease Agreement, which is a lease agreement, exceeds this amount. This means to say that the contract cannot be held to be invalid, but under Section 446, R. C. M. of 1935, is voidable. So, if there are no objections, it is only reasonable to believe that the contract will stand regardless of the lack of calling for bids. It may be voided, however, at the instance of any party, excepting the officers interested therein. This may be stretching a point for the reason that the statute requiring a request for bids seems mandatory unless an emergency may exist, and I can see in a case like the one suggested it might be considered an emergency. In any event, it might be well said that the commissioners have gone to the limit in the making of the Machine Lease Agreement mentioned.

2. Is it legal for the county to rent this machinery?

From the statutes quoted under the answer to your first question, you will note that it is legal for the county to rent the said machinery. The board of county commissioners may exercise powers not specifically granted, if they are necessarily implied from those which are granted, and from the necessity of proper management of the county's business we are assuming that the commissioners in the exercise of this discretion rented this machinery, which, in our opinion, is within their power. This seems to be the general law.

Arnold et al. v. Custer County et al., 33 Mont. 130, 143;
15 C. J. 457, 459.

3. Is it legal and proper for the members of the board of county commissioners to rent this said machine as an agent of the machinery company, and for him to collect rental money

for the said machine and make payments direct to the machinery company?

Section 4604 of the Revised Codes of Montana, 1935, reads as follows:

"No member of the board must be interested, directly or indirectly, in any property purchased for the use of the county, nor in any purchase or sale of property belonging to the county, nor in any contract made by the board or other person on behalf of the county, for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or the purchasing of supplies, or for any other purpose."

Sections 444 and 445 read as follows:

"Members of the legislative assembly, state, county, city, town, or township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

State, county, town, township, and city officers must not be purchasers at any sale, nor vendors at any purchase made by them, in their official capacity."

You will note from the reading of the above sections that any commissioner acting as an agent, as in the case you cite, goes beyond the scope of his authority. Public policy demands that a public officer cannot be permitted to place himself in a situation where his personal interest will conflict with faithful performance of his duty. It matters not how fair a contract may be, the law will not suffer him to occupy a position so equivocal and so fraught with temptation.

Power v. May (Cal.) 46 Pac. 6;

Berka v. Woodward (Cal.) 57 Pac. 777.

Our Sections 444 and 445 are verbatim with California Codes, Sections 920 and 921.

There are several peculiar features connected with the case you present, and it is quite possible we do not have all the facts. In the first place, the lease agreement is executed October 7, 1935; nearly two years have passed; payments have been made and the lessee has been in possession of the property; and the commissioners of this particular county have gone to

quite some length and paid quite some sum of money, or at least the machinery company has received quite some sum of money. So, to rule differently might be working a hardship on the county. We feel that the county commissioners construed this agreement as a rental agreement, and since the requirement of rental is \$342.16 per month, they, undoubtedly, did not consider the necessity for bids since the amount is less than \$1000. That may have been the cause of their action. We do feel that Mr. Kensler, if he was a commissioner at the time of the execution of the contract, which is not a matter of record, had no right to represent the machinery company as their agent and comes within the provisions of Sections 444, 445 and 4606.

It is the opinion of this office, further, that whatever payments had been made for the rental of this machinery should have been paid to the county treasurer and distributed as provided for by Section 4465.27, above.