

Opinion No. 216.**Public Welfare—Contracts—Duty
of Officers—Misconduct.**

HELD: A contract made by the officers of the Welfare Department with the Federal Surplus Commodities Corporation, in which the former agree to abide by the decision of the latter concerning the interpretation or construction of the contract permitting the latter to determine all questions of fact and to determine the qualifications and number of employees for the state, is invalid.

March 15, 1940.

Hon. I. M. Brandjord
Administrador, State Department of
Public Welfare
Helena, Montana
Dear Mr. Brandjord:

You have submitted a proposed contract between the Federal Surplus Commodities Corporation and the State Department of Public Welfare. This contract, among other things, contains the following provisions:

(1) "Administrative interpretations or constructions by the Secretary of Agriculture or the Corporation of the regulations and con-

ditions shall be conclusive upon the State Department immediately upon notice of such interpretation or construction received by the State Department from the Corporation's representative.

(2) "All disputes concerning questions of fact arising under this agreement shall be decided by the Corporation, or its duly authorized representative whose decision shall be final and conclusive upon the parties hereto as to such questions of fact, but nothing contained in this article shall excuse the State Department from diligently proceeding with performance.

(3) "The State Department shall provide such bonded and other personnel as the Corporation may deem necessary."

You request my opinion as to the legality of these provisions.

The members of the board and the State Administrator of Public Welfare are state officers. It is their duty to protect the best interests of the state by insisting upon the correct and just interpretation of a contract made for the state, and, in case of dispute, to submit it to the courts for construction. Likewise it is their duty to correctly determine questions of fact arising under the contract where the interest of the state is involved. It is also their duty to select state employees on the basis of competency and to determine the number required and not to permit this to be done by someone else. Failure to discharge such duties, either negligently or wilfully, in my opinion, would amount to misconduct in office. To wilfully abdicate their trust by entering into a contract agreeing to not discharge their duties would also be misconduct. Such provisions in a contract are beyond the power of public officers to make; they are also contrary to public policy.

It is my opinion that these provisions are not valid.