

DEPARTMENT OF BUSINESS AND
ADMINISTRATION.

: Effect and meaning of Senate Bill
: No. 348 passed by the 63rd General
: Assembly on the duties and liabili-
: ty of the Department of Business and
: Administration, and the duties and
: responsibility of his subordinates.

April 28, 1947



4/30

Honorable Bert Cooper
Director
Department of Business and Administration
State Office Building
Jefferson City, Missouri

Dear Mr. Cooper:

This will acknowledge your letter requesting an opinion from this Department defining the terms and interpretation of sub-section (c) of Section 4 of Senate Committee Substitute for Senate Bill No. 348, with reference to the questions raised in your letter.

Your letter is as follows:

"Would you please give me your interpretation of subsection (c), Section 4, page 3, S.C.S.S.B. 348, with reference to the following questions:

"1. Is it mandatory that the Director of the Department of Business and Administration procure the items listed, or can he designate the Division heads to continue to do their own procurement, if it seems more economical to the State for them to do so, in as much as all items over \$50 must be purchased through the Procurement Division, whether purchasing is done by Director or Division heads?

"2. In case the Director of the Department of Business and Administration does not meet this requirement, would his bondsmen be liable, since there is no apparent shortage of funds or financial loss to the State resulting from his

failure to do so?

"3. In case you hold that the Director of the Department of Business and Administration must procure the items named in the law, would the requirement be met if he checked the requisitions and approved or rejected them? If approved, could he designate the Division head as his agent to purchase items where the bill amounted to less than \$50?

"4. In case the Director of the Department of Business and Administration disapproved all or part of the items in the requisition, is his decision final or does the Division head have the right of appeal? If so, to whom?

"5. Would, in your opinion, the Director of Business and Administration be required to keep a set of books covering the appropriations of all divisions, showing commitment and balance on hand in each fund for each of the Divisions, in as much as this record is kept by the Division, by the Comptroller and by the Auditor, and would be purely a duplication of effort?

"Your ruling on this particular section is pertinent to and will clarify the meaning of a similar section in S.C.S.S.B. 297. Mr. M. E. Morris, as well as myself, is much interested in your reply.

"I would greatly appreciate a reply at your earliest possible convenience."

It will be necessary, we think, to discuss and construe other sections of said Senate Bill No. 348, as well as sub-section (c) of Section 4, of said Senate Bill No. 348, in arriving at a reasonable construction of the intent of the Legislature in enacting said bill, and its ultimate directive effect upon the Department of Business and Administration and the different divisions thereof, respecting their duties and powers.

Section 4 of said Senate Bill No. 348 is as follows:

"Section 4. It shall be the duty of the director of the department of business and administration and he shall have power, except as to the public service commission, to:

"(a) Investigate, assemble, develop and study information regarding the structure and operation of the divisions in the department of business and administration and recommend to the head or heads of the divisions such changes, if any, in administrative practices, and recommend to the General Assembly such changes, if any, in the law as in the opinion of the director will result in coordination of the work of the divisions in the department and in greater efficiency and economy.

"(b) Prepare, with the cooperation of the various divisions included in the department, estimates included in the department, estimates of the requirements for appropriations for the department and for each division in the department.

"(c) Procure, on requisition of the heads of the various divisions, either through the purchasing agent or by other means authorized by law, supplies, materials, equipment, or contractual services for the department and for each division in the department.

"(d) Prescribe, as far as practicable, a central system for payroll and accounting for the several divisions in the department.

"(e) Recommend to the heads of the several divisions in the department cooperation with each other in the use of employees, land, buildings, quarters, facilities and equipment, and to this end the heads of the respective divisions in the department are empowered, subject to the approval of the director, to cooperate with each other in the use of employees, land, buildings, quarters, facilities and equipment.

"(f) Prepare and submit to each regular session of the general assembly and to the governor a report of the activities of the department, including the activities of each division in the department, which report shall be in lieu of any report now required by law for any department or office, the powers and duties of which are by this act vested in a division in the department."

The particular query of your letter, in which you submit five different and distinct questions to be answered is directed to the effect of sub-section (c) of said Section 4 of Senate Bill No. 348.

We will discuss and construe said sub-section (c) of said Section 4 accordingly, as it provides the basis for the questions to be answered in the five several paragraphs of your letter.

Your first question is, whether it is mandatory that the Director of the Department of Business and Administration under said sub-section (c) shall procure the items listed in requisitions from the departmental heads, or whether he may delegate such power and authority to the different heads themselves.

We believe it is necessary here to repeat the preamble, or introductory part, of said Section 4 and said sub-section (c) to intelligibly consider these questions submitted. Said preamble and said sub-section (c) are, respectively, as follow:

"Section 4. It shall be the duty of the director of the department of business and administration and he shall have power, except as to the public service commission, to:

* * * * *

"(c) Procure, on requisition of the heads of the various divisions, either through the purchasing agent or by other means authorized by law, supplies, materials, equipment, or contractual services for the department and for each division in the department."

Other sections of said Senate Bill No. 348 and sub-sections of Section 4 must be carried along, we believe, with the construction of said sub-section (c) as bearing upon the question as to whether the terms of said preamble of Section 4 and sub-section (c) are mandatory or directory.

There is no provision in said Senate Bill No. 348 declaring a penalty against the Director of the Department of Business and Administration, or which renders

his actions illegal or void as a consequence of failure to comply literally with the terms of said sub-section (c) of said Section 4 of Senate Bill No. 348, which there should be in order for said section, or any part thereof, to be mandatory.

The rule of construction of whether a statute, or any part thereof, is mandatory or directory is stated in 59 C.J. 1072, Section 630, as follows:

"A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding; * * * ".

The preamble to said Section 4 of said Senate Bill No. 348, states, as is hereinabove quoted, "It shall be the duty of the director * * * ". This phrase is stated in 59 C.J. 1087, to have the following import and meaning:

"* * * So the phrase 'it shall be the duty' is ordinarily merely directory. * * * ".

There is no Missouri case that we can find construing the phrase above quoted from 59 C.J. 1087. The case of County Commissioners vs. Meekins, 50 Md. 28, was a case in which there was a question before the Supreme Court of Maryland, whether the Legislature of that State had enacted laws strictly according to the requirements of the Constitution of the State. In holding that the statute, with respect to saying "it shall be the duty of the General Assembly," was directory and not mandatory, the Supreme Court of Maryland, l.c. 45, said:

"* * * Neither is a law inoperative and void, because it is not enacted in Articles and sections as directed by the 29th section of Article 3, of the Constitution. This section of the Constitution, so far as it was intended to be mandatory, uses language apt and appropriate for that purpose. In the first part of the section it is provided that

the laws passed by the General Assembly shall embrace but one subject, and that shall be described in their titles; that no law shall be revived or amended by its title only; that no law shall be construed by reason of its title to grant powers, &c., and so down to where it comes to provide for the amendment of laws already in existence, and for the enactment of original laws, when the mandatory language is changed, and provision is then made that 'it shall be the duty of the General Assembly.' &c. This is merely directory, and while in the passage of the Acts of 1870, ch. 449, and 1878, ch. 160, the Legislature may have failed to discharge the duty imposed upon it, the Acts themselves are valid."

The question of when a statute is to be construed as mandatory, or merely directory, was before our Supreme Court in Bane in the case of State ex rel. vs. Brown, 33 S.W. (2d) 104. The Court in its opinion, l.c. 107, distinguishing between a mandatory provision and a directory provision of a statute, which we believe is pertinent here, and decisive of the question, said:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those pro-

visions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R.C.L. Sec. 14 pp. 766, 767."

Again, our Supreme Court had before it the question of whether a statute was mandatory or merely directory in its terms in the case of *State vs. Bird*, 244 S.W. 938. That was a case where the question arose whether the signing by the county superintendent of schools of plats to be posted for a proposed consolidation of school districts was mandatory or merely directory. It appears that the county superintendent overlooked signing the plats. In holding that the statute providing that the county superintendent should sign such plats was directory and not mandatory, the Court, l.c. 939, said:

"Under a more general rule, this construction may be sustained, in that, if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. *State v. Cooke*, 14 Barb. (N.Y.) 259. By this we mean that if a fair consideration of the statute shows that, unless the Legislature intended compliance with the proviso to be essential to the validity of the proceedings, which nowhere appears, then it is to be regarded as merely directory. *People v. Thompson*, 67 Cal. 627, 9 Pac. 833; *Kenfield v. Irwin*, 52 Cal. 164; *Westbrook v. Rosborough*, 14 Cal. 180; *Jones v. State*, 1 Kan. 273."

It would be reasonable to conclude, we think, that since there is no other clause or sentence in said Section 4 of said Senate Bill No. 348 making Section 4, or the results of the authority therein directed to be used, invalid, if not carried out precisely as stated, and under the above cited authorities, distinguishing between mandatory and directory statutes, sub-section (c) of Section 4 of said Senate Bill No. 348 is directory and not mandatory.

This, we trust, will answer the first question in your request for this opinion.

Your second inquiry as included in the copy of your letter hereinabove made, is as to the liability of the director's bond in case the director does not do the procuring (purchasing, we assume is meant) of the supplies, materials, equipment or contractual services for the Department, himself, but delegates such duties to each division head in the Department, where there would occur no financial loss to the State.

Under the title of bonds, which would include official bonds, 11 C.J.S., Section 57, page 432, as to the amount and extent of liability of a bond, states the following text:

"The object of a penalty in a bond is to limit the obligation of the signers, and in the absence of a condition extending his liability a surety cannot be held liable for more than the penal sum named. Also, the liability of a surety on a statutory bond cannot be enlarged by implication beyond its terms and its statutory office.

The liability on a bond under early common law is stated in 11 C.J.S., page 508, Section 130, as follows:

"Under the early common law plaintiff, in an action on a bond, whether it was made to secure the performance of covenants or agreements or whether it was to be void on the performance of conditions named in it which the obligor was not otherwise bound to perform, if entitled to a recovery, was entitled to the penal sum, * * *".

This rule has been modified by statutes so that the measure and amount of recovery is confined to the actual damages proven. 11 C.J.S., page 509, states this text:

"The measure of compensatory damages for breach of a bond is determined by the principles applicable to contracts generally, as stated in the title Damages Secs. 73-79, 17 C.J. p 847 note 60 et seq; * * *".

11 C.J.S., page 510, respecting bonds to secure compliance with law, states the following text:

"Where a statute requires the execution of a bond to the state, or to the United States, for a fixed penalty, conditioned for a compliance with the laws in the respects named therein, the penalty named in the bond is the measure of damages for its breach, or rather is a punishment inflicted by the sovereign for the violation of a pledge to observe its law, unless the statute under which the bond is given or the bond itself, read in the light of the statute, indicates a less or different measure. It has been held, however, that such bonds are to be considered like any other penal bond, and that only the actual damages caused by the breach can be recovered by the state, * * *".

The question of the amount of recovery on a penal bond was before our Supreme Court in the case of Barnes vs. Webster, 16 Mo. 258. In holding that only such actual damages as are occasioned by breach of a bond may be recovered, the Court, l.c. 263, 264, said:

"By the common law, when a bond was given for the payment of money, with a defeasance to be void upon the performance of a collateral undertaking, if there was a breach of the condition, the whole penalty

was forfeited and might be recovered in an action on the bond. Courts of chancery, however, whose province it was to relieve against forfeitures, would restrain the collection of the penalty and compel the plaintiff to receive such damages as he had actually sustained. The statute of 8 and 9 of William III, dispensed with the necessity of resorting to chancery, by requiring the plaintiff to set out the breaches and show the damages occasioned thereby. Judgment was entered for the penalty, and a memorandum was endorsed on the execution, that it might be discharged by the payment of the damages assessed and the costs. * * *".

Our Supreme Court had the same question before it in the case of State ex rel. Ford vs. Ellison, 287 Mo. 683. The Supreme Court again said that only actual damages may be recovered for the breach of a bond. The Court's language, l.c. 693, 694, in so holding, is as follows:

"* * * The rule has never been recognized in this State that the obligee upon the breach of a condition was entitled to a judgment for the full penalty of a bond when a less sum was actually due. As was said in Burnside v. Wand, 170 Mo. l.c. 560: 'Our law is opposed to forfeitures. It has ever been considered unconscionable to demand the full penalty when a lesser sum is actually due. Hence, it has ever been the law in our State that in suits upon penal bonds the obligor can discharge himself by paying what is really due with interest and cost, and thereupon the cause is discontinued.' "

It would, therefore, be prudent and safe, we think, to conclude that since the terms of said Section 4 of said Senate Bill No. 348, hereinabove noted, are directory merely,

and, as it is assumed, there would follow no loss or damage to the State for the failure of the Director to actually procure or purchase the supplies, materials, etc., but instead, delegated that authority and the performance thereof to the division heads in his Department, there would be no liability on the Director's bond. We believe the above properly answers your second question.

This brings us to question three in your letter requesting this opinion as to whether the statute would be sufficiently complied with if the Director of the Department of Business and Administration checked the requisitions of the division heads in the procurement of necessities for the operation of the Department, and approved or rejected them.

We believe that it would be necessary for the Director of the Department of Business and Administration to carefully check the requisitions made by his subordinates in the procurement of any necessities for the Department. We believe that prudence and safety, to avoid loss and possible liability under his bond, would require that the Department heads keep a strict record of their actions and requisitions in procuring and purchasing items for the several Departments, and that reports thereof be periodically, and at reasonably frequent times, made to the Director, the same to be kept by him in properly indexed and systemized files, so that he may at all times have a check upon the actions of his subordinates, and have such data ready for filing consolidated reports to be made to the Governor and the Legislature as required in sub-section (f) of said Section 4 of said Senate Bill No. 348.

We believe that the observance of the above suggested precautions and measures will meet the requirements of said sub-section (c) of said Section 4 of Senate Bill No. 348. We do not see the necessity or advisability of designating a division head as the agent of the Director, as suggested in question three of your letter. All division heads in your Department are, both in effect, and authority, the "agents" of the Director. The Director of the Department of Business and Administration, is, by the terms of said Senate Bill No. 348, the over-all authority in the Department, and it seems that the intent of the Legislature was that the division heads should be, and are to be, considered as the agents of the Director of the Department. We believe, in keeping with their responsibility to the Director of the Department, and with his authority

over the actions of the division heads, the Director would have ample authority to authorize the division heads to purchase items where the bill amounted to less than \$50.

We believe this will answer question three in your letter.

The next question you submit is in paragraph four of your letter whether, in case the Director of the Department of Business and Administration disapproves all or any part of the items submitted in a requisition of a division head, his decision shall be final, or does the division head have the right of appeal? And, if so, to whom would he appeal?

Senate Bill No. 348 creates no right of appeal by the division heads from any order or decision by the Director of Business and Administration.

The right of appeal is purely statutory. If the statute does not provide for the right of appeal from any decision or action of a Court, administrative body, or any other public entity, there is no right of appeal. 3 C.J. 316, states the rule as follows:

"The proceeding by appeal was entirely unknown to the common law. It is of civil-law origin, and was introduced therefrom into courts of equity and admiralty. Consequently, the remedy by appeal in actions at law, and in this country in equity also, is purely of constitutional or statutory origin, and exists only when given by some constitutional or statutory provision.

* * * "

Our Supreme Court has ruled upon the principle that an appeal may only be had when provided by constitutional or statutory authority in many cases. One case is the case of Foster vs. Sayman, 257 Mo. 305. The Court, l.c. 308, 309, in sustaining its long established rule that appeals are purely statutory, said:

"It is a minor premise to this discussion that appeals are wholly creatures of the statute, and that the

right of appeal does not exist except where expressly given. This is fundamental, or if not fundamental well-settled, * * *".

Senate Bill No. 196 passed by the 63rd General Assembly does provide in Section 10 (a) and 10 (b) that any person aggrieved by the decision of an administrative body against him in a "contested case" may appeal, or have the decision reviewed by the proper Courts, unless some other provision for judicial review is provided by statute. The terms of Senate Bill No. 196 would not apply here.

We have seen that said Senate Bill No. 348 does not itself provide for an appeal from any order or decision of the Director of the Department of Business and Administration.

We take it that it will not be asserted that if a division head in the Department of Business and Administration should disagree with his chief on the question of procurement or purchase of supplies, materials or equipment for his division, it could not be properly called a "contested case". It might be an honest difference in opinion, but the opinion and decision of the Director of the Department of Business and Administration should, and would, control. There is no provision for an appeal from his decision provided in said Senate Bill No. 348, or elsewhere, as we view the situation.

This, then, brings us to the last question submitted in paragraph five of your letter, whether the Director of Business and Administration is required to keep a set of books covering the appropriations of all divisions, showing commitments and balance on hand in each fund for each division, inasmuch as this record is kept by the several divisions, by the Comptroller and Auditor.

We do not find any direct authority or requirement in said Senate Bill No. 348 requiring such a set of books to be kept by the Director of the Department of Business and Administration. We think this question is reasonably, or at least partially, answered in the reply herein to your question three. Inasmuch as your letter states that the divisions, the Comptroller and the Auditor keep such records showing the commitments, balance on hand in fund for each of the divisions, we do not believe that it

is required by the law, or that it is necessary for your Department to keep a general, separate, individual set of books. We refer again to the suggestions in this opinion in answer to your question three that reports of their activities should periodically be made by the division heads to the Director of the Department of Business and Administration, in part to supply the necessary facts for him to keep a proper check on the several divisions, and for the purpose of making his reports to the Governor and the Legislature as is provided in sub-section (f) of said Senate Bill No. 348.

It appears that it was the intention of the Legislature for the Director of the Department of Business and Administration, and the division heads, all employees, assistants, clerks and others, to co-operate in the administration of this Department, both as to the question of the saving of expense, and for the efficiency of the administration of the Department itself. Therefore, it appears that the terms of Senate Bill No. 348 which you have asked us to construe are directory and not mandatory, and that compliance with the terms of said Senate Bill No. 348 will be properly met as we have sought to outline them hereinabove.

CONCLUSION.

It is, therefore, the opinion of this Department:

1) That the terms and provisions of sub-section (c) of Section 4 of Senate Bill No. 348, are not mandatory, but directory.

2) That in case the Director of the Department of Business and Administration does not personally procure and purchase the supplies and necessary equipment for the divisions of his Department, there would be no liability on his bond, if there was no loss to the State by his so doing.

3) That it would comply with the requirements of said sub-section (c) of said Section 4 if the Director of the Department of Business and Administration checked the requisitions made by the divisional heads and approved or rejected such requisitions, as the case might require, and that when a requisition is approved, he may delegate

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to the division heads the authority to purchase items amounting to less than \$50.

4) That in case the Director of Business and Administration disapproves all, or a part of the items, in any requisition from any division head, his decision would be final, and there would be no appeal from his decision.

5) That it is not required in said Senate Bill No. 348 that the Director of Business and Administration keep a separate set of books covering appropriations of the several divisions, commitments, and balance on hand in each fund for any of the divisions since, as it is said, such records are kept by each division relating to its own activities, by the Comptroller and by the Auditor.

Respectfully submitted,

GEORGE W. CROWLEY
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APPROVED:

J. E. TAYLOR
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