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CONSTABLES, DESIGNATION OF—§509.01 R.C.—TIME OF MAKING SUCH DESIGNATION—BOARD OF TOWNSHIP TRUSTEES MAY PROPERLY DESIGNATE THAT NO CONSTABLES BE ELECTED.

SYLLABUS:

1. A board of township trustees acting pursuant to the provisions of Section 509.01, Revised Code, may lawfully determine that no constables shall be elected in the township.

2. The designation of the number of constables to be elected in a particular township, made by the board of township trustees pursuant to Section 509.01, Revised Code, in order to be effective at the next succeeding election, must be made prior to the date for taking out nominating petitions for township offices.

Columbus, Ohio, March 30, 1959

Hon. John H. Barber, Prosecuting Attorney
Fulton County, Wauseon, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I would be pleased to have you give me your informal interpretation of Section 509.01 ORC in the following particulars:

“1. Under such section, may the trustees in their discretion designate that no constable shall be elected in the township, thereby in effect abolish the position of constable?

“2. What is the official procedure to be taken by the board of trustees in making this designation?”

Section 509.01, Revised Code, to which you have invited my attention provides:

“*Such number of constables as are directed by the board of township trustees shall be elected, biennially, in each township. Each constable shall hold his office for a term of two years, commencing on the first day of January next after his election.*”
(Emphasis added)

It is to be noted that the office of constable is not created by the General Assembly within each township of the state. Rather the board of township trustees is given the authority to determine the number, if any, of constables to be elected in the township. Based on the foregoing I deem the rule of *major continet in se minus* to be applicable, *i e.*, where a grant of a certain quantum of authority is made such grant also includes all powers of lesser degree. Since the board may, in its discretion, determine the number of constables necessary for the preservation of law and order in the township, it follows logically that they may determine that no constables are needed.

It is common knowledge that in numerous townships, although the designation of the number of constables to be elected has not been changed by the board of township trustees, there are now and have not been any persons elected and qualified as constables. Insofar as providing adequate police protection for the township in such a situation is concerned I invite your attention to Opinion No. 2292, Opinions of the Attorney General for 1958, p. —, the syllabus reading :

“Under the provisions of Section 307.15, Revised Code, a board of township trustees has authority to enter into an agreement with the board of county commissioners, whereby such board will furnish to the township such police protection as the township is authorized by law to furnish for itself, and to pay for such service out of township funds; but said county commissioners would have no authority to agree to have such police service performed by the sheriff or his deputies.”

It should be noted that the determination by a board of township trustees that no constable shall be elected within the township is subject to judicial review in a proper proceeding. In such a proceeding the court would be required to determine whether the discretion given to such board had been abused; and this determination, by necessity, would be made upon the basis of the facts of the particular case. The expression of an opinion on any particular instance of this sort would, of course, be beyond the scope of my office.

I invite your attention to the fact that the authority of the board of township trustees to designate a person as a *police constable* pursuant to the provisions of Section 509.16, Revised Code, is not involved in the questions raised by your inquiry and I do not consider such section to have any bearing upon the questions you submit with respect to *elected con-*

stables. Due to the methods of compensation and willingness of persons to serve as *police constables* rather than *elected constables*, a board of township trustees may determine that *no constables shall be elected* pursuant to Section 509.01, *supra*, but that a *police constable* or *police constables* shall be appointed as provided in Section 509.16, Revised Code.

I deem it advisable to invite your attention to one further consideration. In Opinion No. 7177, Opinions of the Attorney General for 1944, p. 580, it was held, reading the syllabus :

“Where township trustees, pursuant to authority of Section 3327, General Code, determine that the number of constables to be elected biennially shall be increased over the number previously authorized, the trustees are without authority to name an appointee to serve in the interim until a successor has been duly elected at the next biennial election.”

The theory of the holding in this opinion was that the designation of additional constables *to be elected* did not create a vacancy for which the board was authorized to make an appointment. Since the board of township trustees may appoint a constable under authority of Section 509.04, Revised Code, I should deem it foreclosed from argument that the board may not, on the one hand, determine that *no constable shall be elected* in the township and, on the other, *appoint a constable* under authority of Section 509.04, Revised Code. The right of the electors of the township to elect a constable should not be allowed to be so thwarted.

Therefore, in answer to your first question, I am of the opinion that a board of township trustees acting pursuant to the provisions of Section 509.01, Revised Code, may lawfully determine that no constables shall be elected in the township.

The answer to your second question is to be determined from the statutes applicable to township elections. It is apparent that the designation, if it is to be effective at the next election for township officials, must be made prior to the time for taking out nominating petitions for the office of constable, in order that persons may qualify as candidates for the office or offices so created and designated. See Sections 3505.03, 3505.04, 3513.01, 3513.02 and 3513.07, Revised Code.

Such designation should be in the same form as are other notifications which are required to be made from the board of township trustees to the county board of elections, *i.e.*, a copy of the resolution signed by the trustees and attested by the clerk and the record of proceedings relating thereto certified by the clerk.

Therefore, it is my opinion and you are accordingly advised :

1. A board of township trustees acting pursuant to the provisions of Section 509.01, Revised Code, may lawfully determine that no constables shall be elected in the township.

2. The designation of the number of constables to be elected in a particular township, made by the board of township trustees pursuant to Section 509.01, Revised Code, in order to be effective at the next succeeding election, must be made prior to the date for taking out nominating petitions for township offices.

Respectfully,

MARK MCELROY

Attorney General