

3394.

ADVERTISEMENT—FOR BIDS FOR CONSTRUCTION OF COUNTY TUBERCULOSIS HOSPITAL—IN WHAT NEWSPAPERS AND EDITION OF SUCH PAPERS PUBLICATION MUST BE MADE—NEWSPAPERS OF OPPOSITE POLITICS DISCUSSED.

*SYLLABUS:*

1. *In advertising for bids for the construction of a tuberculosis hospital, the provisions of Sections 2352, 6251 and 6252 of the General Code, require that publication be made in two of the principal newspapers in the county having the largest circulation therein, and also in two newspapers of opposite politics at the county seat; and accordingly, where the two newspapers having the largest circulation are not of opposite politics, it is necessary, to make publication in a third newspaper of opposite politics to one of the two newspapers having the largest circulation.*

2. *Whether or not newspapers are of opposite politics is a question of fact to be determined from all the pertinent circumstances by the public official charged with the duty of having publication made, and the decision of such question of fact is final, in the absence of fraud or gross abuse of discretion.*

3. *Advertisements need not be published in every edition of a newspaper, provided that they are published in an edition which contains substantially the same general news as the other editions and is distributed generally among the subscribers of the newspaper.*

COLUMBUS, OHIO, July 2, 1931.

HON. ROBERT N. GORMAN, *Prosecuting Attorney, Cincinnati Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication requesting a construction of Sections 2352, 6251 and 6252 of the General Code, with reference to the selection of proper newspapers for advertising by the Trustees of the Hamilton County Tuberculosis Hospital in connection with a building project.

Your letter states, among other things, that the advertisement was published in three papers. The first paper claims to be an independent Republican paper, the second an independent Democratic paper, and the third claims to be Independent, but supported more Democratic candidates in the last election than Republican, and thereby contends it should be considered a Democratic paper, for the purposes of political advertising.

Your inquiries are in substance, as follows:

(1) Whether the county auditor may make payment to all three papers.

(2) By what method are county officials to determine the politics of newspapers, and what is meant by the term 'Newspapers of opposite politics?'

(3) Can advertisement be made in one edition of the papers, or must it be made in all three or four editions of the papers, as the case may be?"

Section 2352, *supra*, which is part of Chapter 1, Title IX, which title deals with "Public Buildings" provides that:

" \* \* the county commissioners shall give public notice in two of

the principal papers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received. \* \*

This section further provides that if there is only one paper published, the notice shall be published in such paper.

Section 6251, *supra*, which is found in Chapter 18, Title II, under the heading "Legal Advertising" sets forth the rates that may be charged by publishers of newspapers for the publication of advertisements required by law to be published. After setting forth the rate that may be charged, the section contains the proviso that newspapers having a circulation of over twenty-five thousand shall charge and receive for such advertisements rates charged on annual contracts by them for like amount of space to other advertisers who advertise in the general display advertising columns.

Section 6252, General Code, reads as follows:

"A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

As suggested in your letter, the Attorney General in an opinion found in Opinions of the Attorney General for 1919, page 766, held as disclosed by the syllabus:

"Sections 2352 and 6252 G. C. are cumulative and the publication of notice to contractors under section 2352 must comply not only with that section but also with section 6252 G. C."

The question in said opinion was well considered, and the conclusion was supported by the authorities therein cited. It therefore is believed unnecessary to consider the question herein. It follows, therefore, that in connection with a building project such as is under consideration, it is necessary to publish notices of the letting of the contract in "two of the principal papers in the county having the largest circulation therein." It also is necessary, by reason of the provisions of Section 6252, *supra*, to have such notice published in "two newspapers of opposite politics at the county seat, if there be such newspapers published thereat." Also in counties having cities of eight thousand inhabitants or more, not the county seat a similar publication shall be made in two newspapers of opposite politics, in such city.

From the foregoing, it is evident that if the two leading newspapers are not of opposite politics, then it would be necessary to have a publication so as to bring about the publication in two newspapers of opposite politics.

The question as to when two newspapers are of opposite politics, within the meaning of statutes such as Section 6252, *supra*, is not so easy of solution. As a general rule, it may be stated that such a newspaper must profess to uphold the cause of some political party and carry out such profession by disseminating information intended to advance the interests of such party. In 20 R. C. L. p. 207, it is stated:

"A newspaper to be of a political party must profess to be so or be so known. It is not sufficient that it has, while professing to be an independent newspaper, supported a political party."

This authority, standing alone, would seem to require either a specific profession or party affiliation or a general reputation to that effect.

In an opinion found in the Annual Report of the Attorney General for the years 1909-1910, at page 22 this problem was discussed and the conclusion reached that a single profession of party affiliation is sufficient, although reputation alone without open profession might be insufficient. The opinion further suggests as a possible test the support of a partisan ticket at state and national elections.

A case much cited by text books is that of *Reefy vs. Elyria*, 30 O. C. A. 273, wherein the Court of Appeals reached the conclusion that a newspaper although of established political reputation generally, might by its conduct in one campaign be deprived of its right to claim affiliation with the party with which, prior thereto, it had by general reputation been affiliated. In that case, which involved the participation of the newspaper in the 1912 campaign, the paper had supported the third party movement and the court accordingly held it ineligible for advertising.

Still another yardstick which may be applied is that which the legislature has adopted for the determination of party affiliation of voters in the primary. Section 4785-82, of the General Code, has as its last sentence the following:

"\* \* Party affiliation shall be determined by the largest number of candidates of any one party voted for by the electors at the last general election held in even numbered years."

This test, as you suggest, has the benefit of legislative sanction, but it clearly is arbitrary and may be regarded as somewhat objectionable in that it makes the answer depend upon the mere number of candidates supported without any consideration of the relative importance of the offices to be filled.

From this cursory review of the authorities it is evident that the following have been recognized as legitimate criteria of party affiliation:

- (1) General reputation.
- (2) Public profession of allegiance.
- (3) The attitude taken with respect to candidates at the preceding election.

To these may perhaps be added expressions by way of affidavit or otherwise by those having charge of the publishing of the newspapers in question.

It does not seem possible, in the present state of the authorities to select any one of the criteria mentioned as controlling. The best that may be said is that the determination of party affiliation is a question of fact, and the public officials charged with the duty of making the determination must take into consideration all of these factors and give to each such weight as is proper under all the circumstances.

The problem of the public officials is, it must be confessed, becoming increasingly difficult. The trend, especially in the urban centers is quite definitely away from editorial policies of settled adherence to the principles of particular parties. The word "independent," used either alone or in conjunction with the name of one or the other of the principal political parties, has become increasingly popular as a method of self-description by newspapers. It may well be questioned whether any newspaper voluntarily assuming such a position, does not deny to itself the right to be regarded as a newspaper "of opposite politics"—for independence, in one sense at least, is the opposite of partisanship. I feel, however, that because of the definite trend above mentioned, the cloak of partisanship may

be more lightly assumed now than in the past, and that a newspaper, merely because of an avowed independence, is not necessarily precluded from eligibility with respect to publications which must be made in newspapers having definite party affiliations.

The conclusion just stated casts upon the public authority charged with the duty of causing publication to be made, the responsibility of determining, without any very definite criteria, whether or not a particular newspaper is partisan in character and, if so, what its political adherence is. This task must be undertaken without the assistance of any rule of thumb but, if the determination be honestly and sincerely made, public officers will be protected by the rule that such determination will not be disturbed in the absence of fraud, collusion or gross abuse of discretion. This rule is set forth in 46 Corpus Juris, page 27, as follows:

“\* \* The finding by the official or board that a particular newspaper supported a particular party will not be disturbed by the courts in the absence of fraud.”

In the specific instance concerning which you inquire, it is obvious, from what has been said, that publication in a third newspaper is permissible where the judgment of the county officials has determined as a matter of fact, that the two newspapers having the largest circulation in the county are not definitely of opposite politics. Under such circumstances, in order that the legal requirements may be met, it would be necessary for a third publication in a newspaper of politics definitely opposed to the political affiliations of one of the two largest newspapers, since otherwise the requirements of Section 6252, of the Code would not be met. The commission in this instance having acted in good faith, and upon advice from your office, it would seem that its conclusion should not be disturbed, and accordingly, the auditor may properly pay for the advertisements in the three publications described. The determination of party affiliation is, after all, a question of fact, and unless the conclusion be unsupported by any substantial evidence at all, it should not be disturbed.

Since the determination of the political affiliation of a newspaper is one of fact, as has been indicated, it would be improper for this office to express any conclusion thereon unless there were submitted a statement of facts clearly showing an abuse of discretion on the part of the public officials involved which, in a case of this character, would mean that there was no evidence at all at hand to justify the conclusion reached. Such not being the case here, and since under the authorities heretofore cited the finding of the public officials is final in the absence of fraud or gross abuse of discretion, it is both unnecessary and improper to express any opinion upon the issues of fact as a matter of first impression, since the questions have already been resolved by action of the proper authority.

Coming to your third question, as to whether or not when a newspaper issues a number of editions daily the publication shall be made in all the editions in order to comply with the law, you are referred to 20 R. C. L., page 202, wherein the following is stated:

“When a newspaper issues a number of editions daily, as for instance an early morning, a morning, a noon, and an evening edition, the editions may be held to be distinct newspapers if the matter published in each edition is not substantially the same, and each edition has a different heading or name and is sent to different subscribers. But an extra number of a paper published on a particular occasion to announce the happening of some important event is not a regular issue of the paper. And under

a statute providing for the publication of ordinances, it has been held that the insertion of an ordinance in an extra edition of a newspaper consisting of a limited number of copies issued late at night, and not mailed to subscribers or otherwise distributed, except as sold by persons directly interested, did not comply with the statute."

Attention is also directed to Volume 7, Permanent Supplement of Ruling Case Law, page 4861, wherein it is stated:

"It is the general rule that a publication in a single or extra edition of a newspaper is a sufficient publication providing the single or extra edition contains substantially the same general news as the other editions, and is distributed generally among the subscribers of the newspaper." *People v. Snow*, 279 Ill. 289, 116 N. E. 670, Ann. Cas. 1917 E. 992 and note.

It therefore would appear that the publication of an advertisement in any regular edition of a newspaper which contains substantially the same general news as the other editions, and is delivered to its subscribers generally, would sufficiently comply with the law. In specific answer to your inquiries, in the order presented, it is my opinion that:

First, in advertising for bids for the construction of a tuberculosis hospital, the provisions of Sections 2352, 6251 and 6252 of the General Code, require that publication be made in two of the principal newspapers in the county having the largest circulation therein, and also in two newspapers of opposite politics at the county seat; and accordingly, where the two newspapers having the largest circulation are not of opposite politics it is necessary to make publication in a third newspaper of opposite politics to one of the two newspapers having the largest circulation.

Second, whether or not newspapers are of opposite politics is a question of fact to be determined from all the pertinent circumstances by the public official charged with the duty of having publication made, and the decision of such question of fact is final, in the absence of fraud or gross abuse of discretion.

Third, advertisements need not be published in every edition of a newspaper, provided that they are published in an edition which contains substantially the same general news as the other edition and is distributed generally among the subscribers of the newspaper.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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3395.

MIAMI AND ERIE CANAL LANDS—ABANDONED FOR CANAL AND HYDRAULIC PURPOSES BY AMENDED SENATE BILL NO. 39, 87TH G. A.—MUST BE MAINTAINED BY SUPERINTENDENT OF PUBLIC WORKS UNTIL ESTABLISHED AS PUBLIC HIGHWAY BY STATE HIGHWAY DIRECTOR.

*SYLLABUS:*

*Miami and Erie Canal lands abandoned for canal and hydraulic purposes by the act of the 87th General Assembly, passed April 21, 1927, 112 O. L. 388, remain*