3261.

DISAPPROVAL, CONTRACT FOR ROAD IMPROVEMENT IN SUMMIT COUNTY, OHIO.

COLUMBUS, OHIO, May 27, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval, contract covering the following improvement:

Section—Part of "Akron"
State Highway No. 572
Summit County.

I am returning the contract without my approval, for the reason that it is a cooperative contract between the county and the state, and it appears that the proposed improvement is only twenty feet in width. In view of the holding of the Lucas County Court of Appeals, in the case of *John Niemeyer, Sr.* v. *Commissioners,* it would appear that such contracts are invalid except to the extent that they obligate a county to participate in payment for the construction of that portion of such an improvement which is in excess of twenty feet in width. It may be noted that said case is now pending in the Supreme Court, being case No. 22761. However, unless and until the Supreme Court reverses the decision of the Court of Appeals, it is believed such contract may not be safely approved.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3262.

BOARD OF ELECTIONS—RIGHT TO REMOVE ASSISTANT CLERK WITHOUT CAUSE PRIOR TO EXPIRATION OF DEFINITE TERM FOR WHICH HE HAD BEEN APPOINTED.

SYLLABUS:

When a board of elections has appointed an assistant clerk for a definite term, such clerk may be summarily removed by the board at any time prior to the expiration of said term, there being no legal authority for the appointment for a definite term and the board having express authority to remove its assistant clerks.

COLUMBUS, OHIO, May 27, 1931.

HON. DONALD J. HOSKINS, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"We respectfully request your written opinion on the following case:

On May 5th, 1930, the board of elections adopted a motion appointing

an 'assistant clerk,' and the motion recites that the appointment was made 'for the term of 2 years.' On March 28, 1931, which was before the expiration of the said two years period, the board adopted another motion reciting that the services of said assistant clerk be dispensed with on April 15th, 1931.

The assistant clerk whose services were dispensed with is contending that inasmuch as the motion under which he was appointed recites that he was appointed for a term of two years, that the board of elections was without legal authority or power to dispense with his services without cause before the said two years period was up.

The question then is, May an 'assistant clerk' be removed by the board of elections without cause at any time at the pleasure of the board, in a case where the board prescribed a 'term of two years' when making the appointment?"

Section 4785-15, General Code, provides in part as follows:

"The board may, when necessary, appoint a deputy clerk of the political party opposite to that of the clerk, and one or more assistant clerks and other employes, prescribe their duties and fix their compensation as provided herein. * * * * *."

The legislature, in the enactment of this section authorizing a board of elections to appoint one or more assistant clerks, has obviously granted no authority to make such appointments for a definite term as it has, for instance, in the case of the appointment of a clerk of the board who shall, under Section 4785-10, General Code, be appointed for two years. The apparent intention of the legislature to authorize the appointment of such assistant clerks to serve only during the pleasure of the appointing power, is further evinced by reference to Section 4785-13, General Code, defining the powers and duties of boards of elections. Paragraph d of that section provides that such boards shall have the power:

"To appoint and remove its clerk, assistant clerks, and employes, and all registrars, judges, clerks and other officers of elections, and to fill vacancies, and to designate the ward or district and precinct in which each shall serve."

When an office is created to be filled by appointment and the legislature does not designate the term of the office of the appointee, it is the general rule that such appointee will hold office only during the pleasure of the appointing power and may be removed at any time without notice or hearing.

In 22 Ruling Case Law 562, Sections 266 and 267 read as follows:

"When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal is incident to the power to appoint. The tenure not having been declared by law the office is held during the pleasure of the authority making the appointment. Hence, in the absence of all constitutional or statutory provisions as to the removal of public officers, the power of removal is considered as incident to the power of appointment. In such cases no formal charges or hearings are required in the absence of some statute on the subject.

The general rule is that when an office is created to be filled by

appointment, if the legislature does not designate the term of the office the appointee will hold only during the pleasure of the appointing power, and may be removed at pleasure, at any time without notice or hearing."

This rule has been followed in this state, particularly when the power of removal is expressly given to the appointing authority by the legislature as in the case of assistant clerks of boards of elections under Section 4785-13, supra. In the case of *State* v. *Roney,* 82 O. S. 376, the Supreme Court commented upon the power of the mayor of a municipality to summarily remove the chief of police under a law which authorized the appointment of such official without prescribing or fixing the term of office. The section there under consideration also gave the mayor the power to remove such an official. The language of the court at p. 381 is as follows:

"Section 129 gives the mayor power to appoint and to remove the heads of the sub-departments of the department of public safety. By Section 147 the police department is a sub-department of the department of public safety, and by Section 148 the chief of police is the head of that sub-department. The power in the mayor to appoint and to remove is a continuing power, and, no term of appointment of the chief of police being fixed, the chief of police holds his office at the pleasure of the mayor and in the absence of statutory regulation may be summarily removed by the mayor."

This principle that where the statute fails to prescribe the term of office of a public appointee, such appointee holds only at the pleasure of the appointing authority and may be dismissed at any time, has been followed also in the case of *State* v. *Massillon,* 2 C. C. (N. S.) 167.

The case here under consideration is, of course, one where the appointing authority has attempted to fix the term of the appointee. When a term has been designated without authority, there is some conflict in the decisions of courts as to the effect of such attempted designation. The weight of judicial authority, however, seems to be to the effect that the power of removal, especially when expressly conferred by the statute, may be exercised at any time notwithstanding the fact that the appointing authority may have attempted to fix a definite term when making the appointment. The case of *State* v. *Craig,* 69 O. S. 236, is in point. The Board of Health of the City of Mansfield had appointed Craig as health officer under a section authorizing the appointment of such officer during the pleasure of the board. The term of office, however, was attempted to be fixed as one year. Prior to the expiration of that year, a succeeding board of health appointed Dr. McCullough as health officer. The court held that the subsequent appointment was valid and that it terminated and ended the term of service of Dr. Craig.

Possibly one of the leading cases on this subject is the case of *Wright* v. *Gamble,* decided by the Supreme Court of Georgia in 1911 and reported in 35 L. R. A. (N. S.) 866. The syllabus is as follows:

"Where the tenure of an office is not prescribed by law, the power to remove is an incident to the power to appoint. In such case the appointee holds at the pleasure of the appointing power, although it attempts to fix a definite term; and no formalities, such as the preferring of charges or the granting of a hearing to the incumbent, are necessary

to the lawful exercise of the authority of removal. The provision of Civil Code 1910, §264, Par. 3, is not applicable to such a case."

To the same effect, see *Abrams* v. *Horton,* 18 App. Div. 208, 45 N. Y. Supp. 887; *Parsons* v. *Breed,* 126 Ky. 759, 104 S. W. 766; *State, ex rel. Moore* v. *Archibald,* 5 N. Dak. 359, 66 N. W. 234; *Barber* v. *County Judge,* 85 W. Va. 359.

In 46 Corpus Juris, p. 964, it is stated that when the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power "even though the appointing power attempts to fix a definite term." Again at p. 985 of the same volume, it is said that:

> "The implied power to remove cannot be contracted away, so as to bind the appointing bodies to retain an officer for a definite fixed period."

As heretofore indicated, however, the authorities on this point are not uniform. In Michigan a different rule prevails, since in that state appointments for fixed periods appear to be favored, and the policy of removal at all is almost entirely rejected. *Hallgren* v. *Campbell,* 82 Mich. 255; *Speed* v. *Detroit,* 97 Mich. 198.

The case of *Wiyiarch* v. *Newark,* 4 O. A. 294, is contrary to the general weight of authority established in the other states upon this subject and also contrary to the decision of the Supreme Court in the case of *State* v. *Craig,* supra. This appellate case held as set forth in the syllabus:

> "The statutory provision that all appointees of the board of health 'shall serve at the pleasure of the board,' does not give authority to the board to discharge without cause one appointed for a specified term, and one so discharged may upon tender of his services recover the salary accruing for the remainder of the term."

In its opinion, the Court of Appeals did not refer to or mention a single case in support of its decision, and since the decision is contrary to the weight of authority outside of Ohio and contrary to the principles established by the Supreme Court in the case of *State* v. *Roney* and *State* v. *Craig,* supra, it is not, in my view, controlling.

It is therefore my opinion in specific answer to your inquiry that when a board of elections has appointed an assistant clerk for a definite term, such clerk may be summarily removed by the board at any time prior to the expiration of said term, there being no legal authority for the appointment for a definite term and the board having express authority to remove its assistant clerks.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3263.

BOARD OF EDUCATION—RURAL AND VILLAGE SCHOOL DISTRICTS —POWER TO EMPLOY TEACHER BY MAJORITY VOTE WHEN NOMINATION NOT MADE BY COUNTY SUPERINTENDENT OF SCHOOLS OR HIS ASSISTANTS.