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COUNTY COMMISSIONERS — AUTHORIZATION FOR COUNTY ENGINEER TO PROCEED BY FORCE ACCOUNT—§ 5543.19 RC—POWER TO HIRE EMPLOYEES AND MATERIALS GIVEN TO ENGINEER UNLESS BOARD RESERVES TO ITSELF THE POWER TO PURCHASE MATERIALS—WITHOUT AUTHORIZATION THE COUNTY ENGINEER MAY PROCEED IF FUNDS ARE AVAILABLE IN MAKING EMERGENCY REPAIRS—§ 315.13 RC—TOTAL COST OF SUCH REPAIRS CANNOT EXCEED ONE THOUSAND DOLLARS—NO AUTHORIZATION NECESSARY FROM COUNTY COMMISSIONERS.

SYLLABUS:

1. Under authority of Section 5543.19, Revised Code a resolution of a board of county commissioners, duly adopted and entered in the minutes, authorizing a county engineer to proceed in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account, grants to him the power to hire and discharge employees and, unless the board specifically reserves to itself the right to purchase materials, to make such purchases without supervision or interference.

2. Under authority of Section 315.13, Revised Code, with or without a resolution authorizing force account methods, if sufficient funds are available in the county engineer's emergency repair fund, the county engineer may proceed at once to make any emergency repair by force account, without preparing plans, specifications, estimates of costs, or forms of contracts. In so doing he may hire and discharge employees and make petty purchases, but the total cost, including labor or materials or both may not exceed one thousand dollars.

Columbus, Ohio, October 7, 1957

Hon. Frank H. Cox, Prosecuting Attorney
Morgan County, McConnelsville, Ohio

Dear Sir:

I have before me your request for my opinion on the following question:

“Is it necessary that a motion be passed and entered in the minutes of said Board of Commissioners, that the County Engineer be empowered to hire and discharge employees and make petty purchases in a transaction being done by force account?”

Section 5543.19, Revised Code, formerly Section 7198, General Code, originally enacted, reads as follows:

“The county engineer may, when authorized by the board of county commissioners, employ such laborers and teams, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads, bridges, and culverts by force account.”

Section 5549.01, Revised Code, formerly Section 7200, General Code, reads in pertinent part as follows:

“The board of county commissioners *may* purchase such machinery, tools, or other equipment, including special wearing apparel, for the construction, improvement, maintenance, or repair of the highways, bridges, and culverts under its jurisdiction as it deems necessary.” (Emphasis added.)

Section 5549.04, Revised Code, formerly Section 7214, General Code, reads, in part as follows:

“The board of county commissioners or board of township trustees *may* contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining, or repairing any highways, bridges, or culverts within the county, * * *” (Emphasis added.)

Opinion No. 1260, Opinions of the Attorney General for 1927, p. 2250, at p. 2253, says of these statutes:

“Thus we find from the provisions of the sections of the code immediately above quoted that the county commissioners may purchase such machinery, tools, equipment, automobiles and ma-

terial as may be necessary to construct, improve, maintain or repair county roads, bridges and culverts, but nowhere in the statutes do we find authority vested in the county commissioners to employ laborers and teams.

It follows, then, that in the first instance the commissioners may exercise their discretion as to whether in proceeding under the provisions of Section 7198, supra, they will permit the county surveyor to purchase materials and to lease equipment and tools or whether they themselves will purchase such materials and the machinery, equipment and tools that may be necessary in carrying on work by force account."

In Opinion No. 4767, Opinions of the Attorney General for 1935, at p. 1307, we find this language :

"When the Board of County Commissioners has authorized the surveyor to proceed under section 7198, it appears that he takes the sole responsibility for the purchasing of material or leasing of equipment, unless, as pointed out in my Opinion No. 4139, supra, the board sees fit to limit his powers in the resolution granting him authority to proceed by force account. The board may decide to reserve the right to purchase the material itself.

* * * If the board of county commissioners grants to the surveyor power to proceed under section 7198 without reservation, then, of course, it becomes the duty of the surveyor to hire labor, lease machinery and purchase materials. On the other hand, if the power is reserved in the board, it is believed that it may do so. However, it would appear that while the board may lease equipment and buy materials, it should follow the provisions of sections 7184 and 7192 of the General Code in giving the surveyor general charge and supervision of the construction work."

On page 1310 of the same opinion it is said that the entire responsibility rests upon the engineer when the board of county commissioners has once told him to proceed by force account, "*unless restricted in the authority granted by the board of county commissioners.*"

Opinion No. 5275, Opinions of the Attorney General for 1955, reads at page 270 :

"* * * It is to be noted first, that the commissioners must decide what procedure to take, and the statute provides that when they give authority for the county engineer to construct a bridge by force account, then it is the county engineer and not the commissioners who employs the necessary laborers and purchases the necessary materials and constructs the bridge by force account.
* * *"

After a discussion of the above quoted statute and two earlier opinions of the Attorney General, *viz.*, Opinion No. 2106, Opinions of the Attorney General for 1930, p. 1136, and Opinion No. 3139, Opinions of the Attorney General for 1931, p. 527, the above opinion continues, at p. 271, as follows:

“These opinions plainly point to the conclusion that while the county commissioners have full authority, if they so choose, to retain control over the erection of a bridge, and to proceed under the laws above referred to, to advertise for bids and let a contract for such work, yet where they elect to turn the work over to the county engineer, to be performed by force account, they must permit the engineer to proceed without dictation or interference from them. In other words, they cannot relinquish their control and at the same time keep it. * * *”

Considered out of context, we might conclude that this opinion is not in accord with previously cited opinions. However, a reading of the whole opinion discloses that it was concerned with a situation where the county commissioners by resolution determined to build a bridge by force account, and advertised for bids. All bids submitted, including the one accepted, *included both labor and materials* for the complete erection of the bridge. The county engineer objected to the procedure of the commissioners under force account in accepting a proposal by a bridge corporation to furnish *all labor and material*.

His objection was well taken, as the county commissioners have no authority to hire labor, although they do have discretionary authority to purchase material and lease equipment.

It might well be that good, economical management of county affairs would impel the commissioners to make bulk purchases of materials in common and extensive use, keep them on hand in a materials storage warehouse or yard, and direct their use by the county engineer on any project to be completed by him on force account. This, we believe, would be within their authority under the statutes.

Under authority of the above citations we conclude that a resolution of the board of county commissioners authorizing the county engineer to proceed by force account gives him the power to hire and discharge employees and to make petty purchases in a transaction being done by force account, unless the board specifically reserves to itself the right to purchase materials.

The above cited statutes and opinions and the conclusions thereunder are general in nature; however, a single phase or aspect of this subject matter requires consideration under other statutory authorization for force account operations where only repair projects or necessary repairs are involved.

This discussion thus far relates to Section 7198, General Code, which with substitution of the word "engineer" contained the identical wording of Section 5543.19, Revised Code, now reading, as follows :

"The county engineer may, when authorized by the board of county commissioners, employ such laborers and teams, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads, bridges, and culverts, by force account."

Your inquiry involves the authority of the county engineer as to projects of the kind mentioned in the above quoted section, including repair of roads, bridges and culverts, by force account, conditioned upon authorization by the board of county commissioners, and also involves the question of such authority under other sections of the Code applicable to no projects except "necessary repairs".

Former provisions applicable to your question were those of Section 2792-1, General Code, 110 O.L., p. 133, enacted in April of 1923, as provisions supplemental to those of Section 2792, General Code, and imposing additional duties and responsibilities upon the county surveyor, title changed to county engineer in 1935 by enactment of Section 2782-1, which such additional duties or responsibilities were set forth, as follows :

"Sec. 2792-1. For the purposes of this act, necessary repairs, the total cost of which is not more than two hundred dollars, shall be deemed emergency repairs. The county surveyor shall make all emergency repairs on all roads, bridges and culverts in the county, including state highways, and shall keep on hand at all times a supply of material for the purposes of making such repairs. Upon report to the county surveyor of any road or bridge in the county needing immediate attention, the county surveyor shall, if he deems it an emergency repair, proceed at once to make such repair by force account, without preparing plans, specifications, estimates of cost or forms of contract."

In Opinion No. 540, Opinions of the Attorney General for 1937, page 896, the four paragraphs of the syllabus read, as follows :

“1. Section 2792-1, General Code, authorizing the county engineer to undertake certain road repairs by force account as emergency repairs, total cost of which is not more than \$200.00, is an exception to the general statutes placing control of county highways in the board of county commissioners.

2. Section 2792-1, General Code, authorizes the purchase of materials and the employment of labor by the county engineer for the making of emergency repairs, the total cost of which is not more than \$200.00 in any one instance.

3. It is not necessary when the county engineer determines the same to be an emergency repair and needing immediate attention, in the exercise of his sound discretion, that he prepare plans, specifications, estimates of cost or forms of contract, but he may make such repairs by force account.

4. Payments for emergency repairs by the county engineer are made by authority of the county engineer from the fund appropriated for such purpose by the county commissioners. Salary or wages of a road superintendent are not properly payable from such fund so appropriated.”

From the body of the above Opinion, at pages 900 and 901, we quote as follows:

“You make specific inquiry as to whether or not the county engineer would be justified in dividing up a road several miles long into several units in order to improve said road from the emergency repair fund.

As suggested heretofore, your question contains the answer when you state that such method would be used in performing the improvement, that is to say, a road in that condition and improved throughout could not be classed as an emergency repair. It would be possible for the county engineer to repair certain small portions of the worst part of this highway to make the same passable for traffic and thereby take care of the emergency until such time as an improvement of the entire road would be made, providing he, in the exercise of his sound discretion, determined such expenditure to be necessary and proper.

* * * There may be isolated conditions whereby certain repairs or improvements might be made in accordance with either of the two above mentioned sections. Construction, improvement and repair of roads may be undertaken under more than one provision of law off-times, but when commenced the same must proceed to a final conclusion under the method provided by law, selected to be used at the beginning of the improvement. * * *

* * * the controlling legal principle to be applied is that related sections of the General Code, providing for location, con-

struction, maintenance and repair of roads must be followed through in detail as the same may apply to the particular improvement being made. * * *

Section 2792-1 as the then existing law on repairs was repealed in the year 1947, and re-enacted, 122 O.L. p. 525, with the therein indicated omissions or italicized changes, similarly emphasized, as follows :

“For the purposes of this act, necessary repairs, the total cost of which is not more than * * * *one thousand* dollars, shall be deemed *as necessary* for emergency repairs. The county * * * *engineer* shall make all emergency repairs on all roads, bridges and culverts in the county, including state highways, and shall keep on hand at all times a supply of material for the purposes of making such repairs. Upon report to the county * * * *engineer* of any road or bridge in the county needing immediate attention, the county * * * *engineer* shall, if he deems it an emergency repair, proceed at once to make such repair by force account, without preparing plans, specifications, estimates of cost or forms of contract.

The county commissioners are hereby authorized to appropriate a sum of money each year sufficient to enable the county * * * *engineer* to carry out the purpose of this section. Such sum shall constitute the ‘county * * * *engineer’s* emergency repair fund’. All expenses incurred in employing extra help or in purchasing materials used in such repairs shall be paid from such fund on vouchers signed by the county * * * *engineer*.”

(Emphasis added.)

Effective as of October 1, 1953, the above quoted Section 2792-1 of the General Code, was incorporated in Section 315.13, Revised Code, and reads as follows :

“The county engineer shall make all emergency repairs on all roads, bridges, and culverts in the county, including state highways, and shall keep on hand at all times a supply of material for the purposes of making such repairs. Upon report to the engineer of any road or bridge in the county needing immediate attention, such engineer shall, if he deems it an emergency repair, proceed at once to make such repair by force account, without preparing plans, specifications, estimates of cost, or forms of contract.

The board of county commissioners may appropriate a sum of money each year sufficient to enable the county engineer to carry out this section. Such sum shall constitute the ‘county

engineer's emergency repair fund'. All expenses incurred in employing extra help or in purchasing materials used in such repairs shall be paid from such fund on vouchers signed by the engineer.

Necessary repairs, the total cost of which is not more than one thousand dollars, shall be deemed as necessary for emergency repairs."

To the extent that repair programs may be regarded as separable in nature so as to not come within the concept of the portion of Section 315.19, Revised Code, providing that the board of county commissioners *may* appropriate a sum of money each year sufficient to carry out this section, the portions of Opinion No. 540 of 1937, heretofore quoted, are adopted as pertinent to your inquiry.

It is my opinion and you are advised that under authority of Section 5543.19, Revised Code, a resolution of a board of county commissioners, duly adopted and entered in the minutes, authorizing a county engineer to proceed in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account, grants to him the power to hire and discharge employees and, unless the board specifically reserves to itself the right to purchase materials, to make such purchases without supervision or interference.

You are further advised that under authority of Section 315.13, Revised Code, with or without a resolution authorizing force account methods, if sufficient funds are available in the county engineer's emergency repair fund, the county engineer may proceed at once to make any emergency repair by force account, without preparing plans, specifications, estimates of costs, or forms of contracts. In so doing he may hire and discharge employees and make petty purchases, but the total cost, including labor or materials or both may not exceed one thousand dollars.

Respectfully,
WILLIAM SAXBE
Attorney General