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1. TOWNSHIP TRUSTEES — TWO OF THREE AT PROPERLY CALLED BOARD MEETING MAY HIRE ALL LABOR, MAINTENANCE WORK, TOWNSHIP ROADS — ONE OF MEMBERS MAY BE AUTHORIZED TO HIRE EITHER FOR ENTIRE TOWNSHIP OR FOR PARTICULAR ROAD DISTRICT ASSIGNED — SECTION 3370 GENERAL CODE, PARAGRAPH 2.
2. RESOLUTION TO PLACE MEMBERS IN CHARGE OF DESIGNATED ROAD DISTRICT NOT AUTHORIZATION TO HIRE LABOR.
3. GENERAL FUND OF TOWNSHIP MAY NOT BE UTILIZED TO EMPLOY LABOR FOR ROAD MAINTENANCE AND REPAIR.
4. LABOR MAY BE PAID OUT OF TOWNSHIP'S SHARE OF GASOLINE EXCISE TAX FUNDS FOR ROAD MAINTENANCE AND REPAIR — SECTIONS 5541, 5541-8 GENERAL CODE.
5. PLANS AND SPECIFICATIONS, APPROVED BY COUNTY ENGINEER MUST BE FILED WITH TOWNSHIP CLERK BEFORE OBLIGATIONS INCURRED TO CONSTRUCT, WIDEN AND RECONSTRUCT TOWNSHIP ROADS.

SYLLABUS:

1. *At a meeting properly called two of the three trustees constituting a board of township trustees may hire all labor in connection with maintenance work on township roads or may authorize one of its members to do such hiring either for the entire township or for the particular road district assigned to such member under the provisions of paragraph 2 of Section 3370, General Code.*

2. *The adoption by a board of township trustees of a resolution which merely places each of the members thereof in charge of a designated road district does not constitute an authorization to each member to hire labor in his assigned district.*

3. *The general fund of a township may not be utilized to employ labor in connection with the maintenance and repair of township roads.*

4. *Under the provisions of Section 5541-8, General Code, the cost of labor incurred by a board of township trustees in connection with the maintenance and repair of township roads may be paid out of the township's share of the gasoline excise tax funds levied pursuant to Section 5541, General Code.*

5. *No obligation for the constructing, widening and reconstructing of township roads may be incurred by a board of township trustees against the township's share of the gasoline excise tax funds levied pursuant to Section 5541, General Code, unless and until plans and specifications therefor, approved by the county engineer, are on file in the office of the township clerk.*

Columbus, Ohio, December 31, 1941.

Hon. J. Donald Kincaid, Prosecuting Attorney,
Zanesville, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

"Your opinion is requested on the following questions involving the powers and duties of members of a Board of Township Trustees.

Shortly after organization of the Township Trustees the Board passed a resolution under authority of Section 3370 G.C. dividing the Township into three road Districts, and assigned a District to each Trustee. The question has arisen between the members of the Board as to whether either of two Trustees, or the both of them, may hire labor to perform maintenance work on the Township roads in the District which has been assigned to the third trustee.

May either or both Trustees who have road Districts of their own lawfully hire labor to perform maintenance work on the Township roads in a district which has been assigned to the third Trustee in the absence of any misfeasance, malfeasance or nonfeasance on the part of the third Trustee? Have two Trustees the lawful authority or right in the absence of any misfeasance, malfeasance or nonfeasance on the part of the third Trustee, to take over or assume control and supervision of Township road maintenance and repair work in the third Trustee's District which was assigned to him by resolution duly passed which divided the Township into three road Districts as authorized under the second method set out in Section 3370 of the G.C.

If such Trustees do proceed to hire labor in the third Trustee's District, may the board lawfully vote to pay for the same out of either the General Fund or the Gasoline Tax Fund of the Township Treasury?

A second proposition has been raised and your ruling is requested on what constitutes maintenance of roads as distinguished from construction, reconstruction or improvement of Township roads as these terms are used in Section 5541-8, G.C. which relates to the use of gasoline tax funds by Township Trustees.

Is the hauling and spreading of stone on the travelled portion of a Township highway, which is only a dirt road, to be considered improvement or construction, or only maintenance of said highway as such terms are used in Section 5541-8 G.C., and if considered an improvement or construction, require plans and specifications to be first drawn and approved by the County Engineer before proceeding with the work?

Is the grading, reconstruction of ditches along the sides, straightening and widening of the travelled portion, the cutting off of small raises and filling dips in the travelled portions, and spreading stone on the reconstructed travelled portion of a township highway, all within the original boundary lines of said highway, to be considered construction, widening or reconstruction of such highway, as such terms are used in Section

5541-8 G.C. or should the same be considered only maintenance of such highway, not requiring approved plans and specifications from the County Engineer?"

Reference to Section 7464, 7567 and 3370, General Code, readily reveals that township trustees have been given complete control of township roads within their township and are charged with the obligation and duty to maintain, repair and keep the same safe for public travel. See Opinion No. 893, Opinions of the Attorney General for 1939, Volume II, page 1208 and Opinion No. 3430, Opinions of the Attorney General for 1941.

This duty is primarily imposed upon the board of trustees as a whole, although Section 3370, General Code, permits a board to adopt certain methods by which to perform such duty. Said section reads in part as follows:

"The township trustees shall have control of the township roads of their township and shall keep the same in good repair. * * *

In the maintenance and repair of roads the township trustees may proceed in any one of the following methods as they may deem for the best interest of the public, to wit:

1. They may designate one of their number to have charge of the maintenance and repair of roads within the township, or
2. They may divide the township into three road districts, in which event each trustee shall have charge of the maintenance and repair of roads within one of such districts, or
3. They may appoint some competent person, not a member of the board of trustees; to have charge of the maintenance and repair of roads within the township which person shall be known as township highway superintendent, and shall serve at the pleasure of the township trustees. The method to be followed in each township shall be determined by the township trustees by resolution duly entered on their records."

As stated in Opinion No. 1101, Opinions of the Attorney General for 1929, Volume II, page 1652, at page 1653:

" * * * it will be noted that the statute provides that the trustees 'may' adopt one of the three methods therein provided for, which of course indicates that the section is not mandatory

with respect to your first inquiry. While under certain circumstances the courts have held that the word 'may' will be construed to mean shall, it is not believed that such circumstances exist in this case. In other words, the statute authorizes the trustees to adopt one of the three methods for their convenience, but they may act as a body if they so desire."

See also Opinion No. 3430, Opinions of the Attorney General for 1941.

Irrespective of the method adopted by a board of trustees, the entire board as such owes a statutory duty to maintain and repair township roads. Failure so to do renders the board liable in its official capacity under the provisions of Section 3298-17, General Code.

My position in this regard is supported by *Guase v. Peeler, et al.*, 41 O.App. 192, as evidenced by the syllabus, which reads as follows:

"1. Township trustees *held* charged with duty of keeping township roads in repair (Section 3370, General Code).

2. Township trustees, in their official capacity, *held* liable for injuries sustained by public in use of township road not kept in proper repair and safe for travel (Sections 3298-17, 3298-18, 3370 and 3375, General Code)."

In your communication you point out that in connection with the maintenance and repair of township roads the board of township trustees in question, by resolution duly spread upon its records, adopted the second method permitted by Section 3370, *supra*, whereby each member of the board was placed in charge of one of three road districts into which the township was divided. You then inquire whether either of two trustees or both of them may hire labor to perform maintenance work on township roads situated in the road district over which the third trustee was given supervision.

In connection therewith, your attention is directed to Section 3373, General Code, wherein are contained provisions authorizing township trustees to maintain, repair, construct and reconstruct township roads by contract or force account as therein outlined. Said section reads in part as follows:

" * * * They shall have the power to purchase such material and to employ such labor and teams as may be necessary for

carrying into effect the provisions of this section, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. * * * ”

It will be noted that power to employ labor is vested in the township trustees. The statute, however, permits the board to authorize one of its members to perform that function. Of course, it is well settled that a public board, such as a board of township trustees, functions by rule of the majority. See State of Ohio, ex rel. Cline v. The Trustees of Wilkesville Township, 20 O.S. 288; Opinion No. 2292, Opinions of the Attorney General for 1934, Volume I, page 164.

It follows, therefore, that at a meeting properly called two of the three trustees constituting a board of township trustees may hire all labor in connection with maintenance work on township roads or may authorize one of its members to do such hiring either for the entire township or for the particular road district assigned to such member under the provisions of paragraph 2 of section 3370, supra. I might add that in the absence of express language to the contrary, the adoption by the board of township trustees of a resolution which merely places each of the members thereof in charge of a designated road district does not constitute an authorization to each member to hire labor in his assigned district. Such a resolution does not relieve the board as a whole of its duty with respect to the maintenance and repair of township roads. Neither does it divest the board of the power to employ labor specifically granted by Section 3373, supra. Dividing the township into road districts and placing one trustee in charge of each is merely a method by which the board's determinations may be carried through; supervision and control of township roads still remain with the board of trustees.

In order to answer your inquiry relative to payment of labor employed by a majority of the board in connection with the maintenance and repair of township roads, I must assume such employment was effected at a proper meeting of the board and pursuant to the authority granted in Section 3373, supra.

First let us consider whether such payments may be made from the general fund. The general fund of a township, established pursuant to Section 5625-9, General Code, consists of those revenues referred to in

Section 5625-10, General Code, as follows:

“All revenue derived from the general levy for current expense within the ten mill limitation; from any general levy for current expense authorized by vote outside of the ten mill limitation; and from sources other than the general property tax, unless the law prescribes its use for a particular purpose, shall be paid into the general fund. * * * ”

The purpose and intent of the general levy above mentioned is contained in Section 5625-5, General Code, which reads in part as follows:

“The purpose and intent of the general levy for current expenses is to provide one general operating fund derived from taxation from which any expenditures for current expenses of any kind may be made, and the taxing authority of a subdivision may include in such levy the amounts required for the carrying into effect of any of the general or special powers granted by law to such subdivision, including the acquisition or construction of permanent improvements and the payment of judgments, but *except the construction, reconstruction, re-surfacing or repair of roads* and bridges in counties and townships and the payment of debt charges. * * * ” (Emphasis mine.)

Your particular attention is called to the language above emphasized excluding from the expenditures of the general levy monies necessary for the repair of roads. Certainly, payments to labor for maintenance and repair are included within such prohibition. Moreover, Section 3373, General Code, specifically provides that “All payments on account of * * * labor * * * shall be made from the township road fund as provided by law”.

The township road fund is a special fund established under authority of Section 5625-9, General Code, consisting of monies realized from special levies authorized by Section 5625-6, General Code, which reads in part:

“The following special levies are hereby authorized without vote of the people. * * *

f. In the case of a township, for the construction, reconstruction, resurfacing and repair of roads and bridges (except state roads and bridges on such roads), including the township's proportion of the cost and expense of the construction, improvement, maintenance and repair of county roads and bridges.”

Without further discussion, I feel an examination of the above

statutes clearly indicates that it was the intention of the Legislature that the general fund of a township may not be utilized to employ labor in connection with the maintenance and repair of township roads. See Opinion No. 1949, Opinions of the Attorney General for 1940, Volume I, page 235.

We must next consider whether such labor may be paid out of the township's share of the gasoline excise tax (Section 5541, General Code), pursuant to the provisions of Section 5541-8, General Code. This proposition was considered by a former Attorney General in Opinion No. 3299, Opinions of the Attorney General for 1931, Volume II, page 767, wherein he held as evidenced by the syllabus as follows:

“Under the provisions of Section 5541-8, General Code, as amended by the 89th General Assembly, in House Bill No. 7, the funds distributed thereunder, to townships, may be used for the purpose of maintaining, as well as constructing, widening, and reconstructing the public roads and highways within such township, irrespective of whether said work is done by force account or by contract.”

The 1931 opinion was cited with approval in Opinion No. 2141, Opinions of the Attorney General for 1933, Volume III, page 2033.

It might be pointed out that since the rendition of the 1931 and 1933 opinions, Section 5541-8, General Code, was amended by our General Assembly (118 O.L. 162). The amendments, however, do not change that portion of the section with which your inquiry and the two opinions above cited are concerned. Hence, I feel there is no need at this time to reconsider those opinions of my predecessors.

We turn now to your final proposition relative to the approval by the county engineer of plans and specifications required by Section 5541-8, General Code. The pertinent portions of said section in this regard read as follows:

“Provided, however, that no part of said funds shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract or to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the cost of materials forming a part of *said improvement*; * * * and provided further that no obligation against such funds shall be incurred unless and until plans and

specifications for *such improvement*, approved by the county engineer, shall be on file in the office of the township clerk; * * *.” (Emphasis mine.)

As is already evident, this statute is not as clear as it might be made. However, applying the rules of grammar it appears to me that “said improvement” and “such improvement” above emphasized refer to “constructing, widening and reconstructing” and, therefore, by the express terms of the section no obligation against the funds referred to may be incurred for construction, widening and reconstruction unless and until plans and specifications therefor, approved by the county engineer, are on file in the office of the township clerk.

Wherein lies the distinction between “maintaining” and “constructing, widening and reconstructing” is difficult to demonstrate. Each project must be considered by itself. See Opinion No. 1130, Opinions of the Attorney General for 1929, Volume III, page 1691; Opinion No. 2141, Opinions of the Attorney General for 1933, Volume III, pages 1873, 2033, 2035.

Both examples presented by you appear to me not to fall within the common acceptance of “maintaining”. In the first case a dirt road is transposed into one of stone — clearly an “improvement”. The work performed on the second road, grading, widening, cutting and filling also appear to go somewhat beyond what we ordinarily consider to constitute “maintenance”.

It is my view that such work constitutes “improvement” rather than “maintenance” within the purview of Section 5541-8, supra. As pointed out above, no obligations for “improvement” may be incurred against gasoline excise tax funds under the provisions of Section 5541-8, supra, unless and until plans and specifications for such improvement, approved by the county engineer, are on file in the office of township clerk.

Based on the foregoing, it is my opinion:

1. At a meeting properly called two of the three trustees constituting a board of township trustees may hire all labor in connection with maintenance work on township roads or may authorize one of its members to do such hiring either for the entire township or for the particular road district assigned to such member under the provisions of paragraph 2 of Section 3370, supra.

2. The adoption by a board of township trustees of a resolution which merely places each of the members thereof in charge of a designated road district does not constitute an authorization to each member to hire labor in his assigned district.

3. The general fund of a township may not be utilized to employ labor in connection with the maintenance and repair of township roads.

4. Under the provisions of Section 5541-8, supra, the cost of labor incurred by a board of township trustees in connection with the maintenance and repair of township roads may be paid out of the township's share of the gasoline excise tax funds levied pursuant to Section 5541, General Code.

5. No obligation for the constructing, widening and reconstructing of township roads may be incurred by a board of township trustees against the township's share of the gasoline excise tax funds levied pursuant to Section 5541, General Code, unless and until plans and specifications therefor, approved by the county engineer, are on file in the office of the township clerk.

Respectfully,

THOMAS J. HERBERT,

Attorney General.