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TOWNSHIP TRUSTEES, BOARD OF — CHARGED WITH DUTY TO MAINTAIN AND REPAIR TOWNSHIP ROADS WITHIN TOWNSHIP — DUTY TO ACT PERSONALLY OR THROUGH DULY APPOINTED AND QUALIFIED TOWNSHIP HIGHWAY SUPERINTENDENT — MAY NOT DELEGATE SUCH DUTY TO INDIVIDUAL BY CONTRACT, FOR STIPULATED SUM, FIXED PERIOD OF TIME, TO MAINTAIN AND REPAIR SUCH ROADS.

## SYLLABUS:

1. *A board of township trustees, either personally or through a duly appointed and qualified township highway superintendent, is charged with the duty of maintaining and repairing the township roads within its township.*

2. *This duty may not be delegated to some individual by means of a contract under the terms of which such individual, for a stipulated sum, agrees to maintain and repair the township roads for a fixed period of time.*

Columbus, Ohio, February 19, 1941.

Hon. John M. Kiracofe, Prosecuting Attorney,  
Eaton, Ohio.

Dear Sir:

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

"The Board of Trustees of Jefferson Township, Preble County, Ohio, are desirous of knowing whether or not they can legally enter into a contract with an individual to furnish maintenance and maintain the Township roads for a period of five years.

Will it be necessary to advertise for bids or can they employ this individual for a stipulated yearly salary for five years?"

It is well settled that township trustees have control of all township roads within their township. See Opinion No. 893, Opinions of the Attorney General for 1939, Vol. II, page 1208. At page 1210 of that opinion, after quoting Sections 7464, 7467 and a portion of Section 3370, General Code, it is stated:

"A cursory examination of the above quoted statutes readily reveals that the Legislature has given township trustees control of the township roads within their township and has charged them with the positive duty of maintaining, repairing and keeping same safe for public travel."

Relative to the methods by which the trustees may proceed with respect to the maintenance and repair of roads under their jurisdiction, Section 3370, General Code, provides in part as follows:

" \* \* \* 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."

It is my view that the three methods suggested above are directory only and the township trustees may adopt other methods within certain limitations which will be pointed out later in this opinion. In support of my position in this regard, your attention is directed to Opinion No. 1101, Opinions of the Attorney General for 1929, Vol. II, page 1652, wherein the then Attorney General held as evidenced by the first branch of the syllabus, as follows:

"Under Section 3370, General Code, it is not mandatory that the trustees employ one of the methods of procedure in connection with roads set out in the section, but they may proceed to act as a board in such matters."

In the event the township trustees appoint a township highway superintendent, Section 3371, General Code, sets forth certain requirements in connection therewith. Said section reads as follows:

"When the trustees of any township determine to proceed in the third method hereinbefore provided and appoint a township highway superintendent such superintendent shall before entering upon the discharge of his duty give bond to the state of Ohio for the use of the township in the sum of two hundred dollars, conditioned upon the faithful performance of his duty. Such bond shall be approved by the trustees of the township and filed with the clerk thereof. The township trustees shall fix the compensation of the township highway superintendent for time actually employed in the discharge of his duties, which compensation shall be paid from the township road fund. The compensation and all proper and necessary expenses, when approved by the trustees, shall be paid by the township treasurer upon warrant of the township clerk."

Irrespective of the method of maintenance and repair adopted by the trustees, certain limitations are placed upon their mode of operation by Sections 3371-1 and 3373, General Code. These sections were the subject of an opinion of a former Attorney General in Opinion No. 784, Opinions of the Attorney General for 1923, Vol. I, page 636. The second branch of the syllabus of the 1923 opinion succinctly states the limitations above referred to and will, therefore, be quoted in place of the statutes themselves. Said syllabus reads as follows:

“In connection with township roads, such authority is subject to the conditions and limitations as are contained in Section 3371-1 of the General Code, as follows: (1) Such maintenance and repair shall be subject to the general supervision and direction of the county surveyor; (2) All expenditures made by them for such maintenance and repair purposes shall, where the amount involved exceeds fifty dollars, receive the approval of the county surveyor before payment is made; and also as are contained in Section 3373 of the General Code, as follows: When they proceed by contract they shall, in case the amount involved exceeds two hundred dollars, (3) Let the contract to the lowest responsible bidder after advertisement as is in said section provided, (4) The contract shall be performed under the supervision of a member of the board of township trustees or the township highway superintendent; if they proceed by force account, (5) The work shall be done under the direction of the board of township trustees or the township highway superintendent, and, (6) All purchases of materials, machinery and tools, shall, where the amount involved exceeds five hundred dollars, be made from the lowest responsible bidder after advertisement made in the manner provided in said section.”

In addition to the above limitations, Section 3374, General Code, imposes a duty upon the township trustees to file annually with the county surveyor, now designated as county engineer (Section 2782-1, General Code), a report concerning the highways, bridges and culverts within their township.

From the foregoing, it is apparent that the Legislature has placed the maintenance and repair of township roads in the hands of the township trustees who may take personal charge thereof or appoint a township highway superintendent to act in their stead, but under their supervision and control. It must be borne in mind that the primary power and duty is lodged in the board of township trustees and all limitations and conditions above outlined refer to the board itself or its duly appointed superintendent.

In Opinion No. 893, Opinions of the Attorney General for 1939, Vol. II, page 1208, it is held as follows:

“1. Township trustees have control of the township roads within their township.

2. In connection therewith, a board of township trustees may in the exercise of its sound discretion take whatever action it deems proper to keep such township roads in repair and safe for public travel.”

It will be noted that this opinion refers to the sound discretion of the township trustees in connection with their powers relative to the maintenance and repair of township roads. It is well settled that such discretionary powers may not be delegated unless specific authority in law exists therefor. The general rule is contained in 32 O.J. 946, paragraph 86, in the following language:

“The rule as to the delegation of discretionary powers by an agent has been held applicable to public offices. In those cases in which the proper execution of the office requires the exercise of judgment or discretion on the part of the officer, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another. This rule is also frequently invoked in the case of municipal boards and officers. Whenever these boards and officers are vested with discretion and judgment, to be exercised in behalf of the public, the board or officer must exercise it in person and cannot, unless expressly or impliedly authorized so to do, delegate it to others.”

In placing the maintenance and repair of township roads under the township trustees, it appears the Legislature intended that the supervision of the work in connection therewith should be in the board of township trustees, irrespective of the general method of procedure adopted by the board. In Rockel's Guide for Township Officers, 24th Edition, page 456, paragraph 836, the following is said in this connection:

“It seems to be the intention to keep within the jurisdiction of the trustees, the maintenance of all roads heretofore given them.”

The only person other than the trustees themselves whom the statutes contemplate may take charge of the maintenance and repair of township roads is the township highway superintendent appointed by the trustees and compensated from the township road fund for the time actually employed in the discharge of his duties. In none of the statutes dealing with the subject about which you inquire do we find any authority, either express or implied, which would permit the township trustees completely to divorce themselves from the powers and duties with respect to the

maintenance and repair of roads, imposed upon them by law, by entering into a contract with some individual who, under the terms thereof, would act for the trustees. In the absence of such authority, it is my opinion the township trustees are without power so to contract. The obligations and limitations of the statutes concerned earlier in this opinion are personal to the township trustees; they may not be avoided by contract.

By reason of what I have already concluded, it is unnecessary to consider the second question propounded in your request.

In view of the foregoing and in specific answer to your inquiry, it is my opinion: (1) A board of township trustees, either personally or through a duly appointed and qualified township highway superintendent, is charged with the duty of maintaining and repairing the township roads within its township; (2) This duty may not be delegated to some individual by means of a contract under the terms of which such individual, for a stipulated sum, agrees to maintain and repair the township roads for a fixed period of time.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.