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A BOARD OF TOWNSHIP TRUSTEES MAY ADOPT RULES AND REGULATIONS PERTAINING TO THE DIGGING OF GRAVES IN THE TOWNSHIP CEMETERY AND MAY PROVIDE (1) FOR OPENING OF GRAVES BY EMPLOYEES OF THE BOARD AFTER THE CHARGE FOR SERVICE IS PAID, OR (2) FOR THE OPENING OF GRAVES BY A NON-EMPLOYEE (UNDERTAKER), BUT IF SAID TRUSTEE PERFORMS THE DIGGING HIMSELF, HE CANNOT ACCEPT REMUNERATION FOR SUCH SERVICES FROM OUTSIDE SOURCES—§§517.06, R.C., 2919.10, R.C.

SYLLABUS:

Pursuant to the provisions of Section 517.06, Revised Code, a board of township trustees may adopt rules and regulations pertaining to the digging of graves in the township cemetery, and may provide (1) for the opening of graves by employees of the board after the charge for service is paid, or (2) for the opening of graves by non-employees, such as an undertaker, under the supervision of the board; and although the rules may allow a trustee to perform such digging himself, he is precluded by Section 2919.10, Revised Code, from accepting any remuneration for such services from outside sources.

Columbus, Ohio, June 19, 1961

Hon. Robert Webb, Prosecuting Attorney
Ashtabula County, Jefferson, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“In re: Township Cemeteries

“This office has been asked by several township trustees as to whether, under the law:

“First: The township trustees have to collect for the service of opening a grave, and then hire an employee to do this, or

“Second: An undertaker may, after getting a permit from the County Board of Health, hire individuals to open a grave, said grave site being owned by someone other than the township trustees, or whether an individual trustee could then dig the grave, and be paid by the undertaker for this service, which

would amount to more than the \$6.00 per day to which township trustees are entitled.”

Chapter 517., Revised Code, deals with the powers and duties of a board of township trustees in the establishment and control of cemeteries. Section 517.11, Revised Code, gives the board the responsibility for protection and preservation of cemeteries under its jurisdiction. Section 517.06, Revised Code, provides that the board shall make and enforce all needful rules and regulations for the division of the cemetery into lots for the allotment thereof to families or individuals, and for the care, supervision, and improvement thereof. Under Section 517.07, Revised Code, the board is authorized to sell lots at a reasonable price.

I am unable to find any provision of law setting forth the procedure to be followed by a board of township trustees relative to the opening of a grave. That is, the statutes do not state whether the board should open the grave and then charge for the service, or whether the grave may be opened by a private individual. As noted above, however, Section 517.06, Revised Code, does authorize the board to make and enforce all needful rules and regulations for the care and supervision of the cemetery.

Said Section 517.06, then Section 3447, General Code, was considered by one of my predecessors in Opinion No. 5447, Opinions of the Attorney General for 1936, page 530. The question in that instance was somewhat similar to that here concerned, and read :

“Have the trustees a legal right to require, in their rules and regulations concerning Cemeteries over which they have charge, all work such as the digging of graves, to be paid for in advance or before burial is made, excepting, of course, indigent cases wherein the township must provide burial?

“Such a rule has recently been passed by three trustees and as yet no test has come but they feel that your opinion would be appreciated as to its legality.”

In holding that the trustees could adopt such a rule, my predecessor held that the rule was reasonable, and was authorized under the provisions of Section 3447, *supra*, (now Section 517.06, Revised Code).

Former Section 3447, General Code, was also considered in Opinion No. 791, Opinions of the Attorney General for 1929, page 1210, the first paragraph of the syllabus reading :

“Under the provisions of Section 3447, General Code, township trustees may make rules and regulations to the effect that only a sexton or caretaker having a contract with the township trustees for such purposes may participate in digging graves in such a cemetery.”

And at page 1211 of that opinion, it is stated:

“In view of the duties imposed upon the township trustees, by implication, undoubtedly they have the right to employ some person to supervise and care for the cemeteries. While there seems to be no express authority authorizing such employment, under the well known rules of construction to the effect that such a board has sufficient implied power to carry into effect the express powers granted, I have no difficulty in reaching the conclusion that township trustees may employ a sexton or caretaker under a contract in the manner set forth in your communication. Inasmuch as Section 3447, supra, expressly authorizes township trustees to make all the needful rules and regulations for the supervision of such cemetery, I am inclined to the view that they may provide that graves should be dug by the person so employed, or under his supervision. In other words, it would seem to be obvious that the method employed in digging graves is a proper subject for regulation by the management of such a cemetery.”

Answering your questions, I conclude that the board of township trustees may adopt a rule whereby graves are opened by its employees after the charge for the service is paid. Also, a rule allowing the opening of graves by nonemployees, such as an undertaker, would appear to be within the scope of authority of the board. In this regard, however, it would seem necessary that the board still retain some supervision over the procedure in order to carry out its duty of care and preservation of the cemetery.

As to whether an individual township trustee may dig a grave, such is not a duty imposed by law on a trustee. I can not, however, see any bar to a trustee performing such duty if the rules of the board permit such action. In such case, however, the trustee could not receive pay from an outside source for his work, as such would be in violation of Section 2919.10, Revised Code, which reads in part:

“No * * * member of a board of township trustees, shall be interested in the profits of a contract, job, work, or services for such * * * township * * *.

“Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both.”

In conclusion, therefore, it is my opinion and you are advised that pursuant to the provisions of Section 517.06, Revised Code, a board of township trustees may adopt rules and regulations pertaining to the digging of graves in the township cemetery, and may provide (1) for the opening of graves by employees of the board after the charge for service is paid, or (2) for the opening of graves by non-employees, such as an undertaker, under the supervision of the board; and although the rules may allow a trustee to perform such digging himself, he is precluded by Section 2919.10, Revised Code, from accepting any remuneration for such services from outside sources.

Respectfully,
MARK McELROY
Attorney General