

Coming now to the employment of the village clerk by the board of trustees of public affairs, it should be noted that the board of trustees of public affairs, under section 4357, is established by the village council and consists of three members resident of the village who are elected for a term of two years. There is no doubt but that this board is a branch of the municipal government and that an expenditure by it is an expenditure of the corporation. It therefore follows that compensation paid by a board of trustees of public affairs of a village to a village clerk, for services as superintendent of the water department and assistant superintendent of the light department of the village, would establish an interest on the part of such clerk in an expenditure of the corporation other than his fixed compensation, which would be in violation of section 3808, General Code.

Coming now to the application of section 12910, General Code, to the above facts, said section provides:

“Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”

You will observe that this section makes no reference whatsoever to personal services and accordingly there would be no violation of its terms in the sale of personal services. See Opinions of the Attorney General for 1913, at page 1476.

In view of the foregoing, and in answer to your inquiry, I am of the opinion that the concurrent employment of a village clerk by the village council as caretaker of parks, and by the village board of trustees of public affairs as superintendent of the water department and as assistant superintendent of the light department, is in violation of section 3808 of the General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3836.

ANNEXATION OF TERRITORY TO CITY—PETITIONERS MAY WITHDRAW THEIR NAMES BEFORE OFFICIAL ACTION TAKEN—COUNTY COMMISSIONERS HAVE DISCRETION WHETHER TO GRANT SUCH ANNEXATION.

SYLLABUS:

1. *Where a petition has been filed for the annexation of territory to a city, under and by force of Section 3548, General Code, signers thereto may withdraw their names at any time before official action is taken on said petition.*

2. *It is not mandatory upon a board of county commissioners to grant the prayer of a petition filed by favor of Section 3548, General Code, for the annexation of territory to a municipality. The commissioners, in such case, are vested*

with the discretion to determine whether or not the granting of the prayer of said petition seems right. Section 3549 and 3522, General Code.

COLUMBUS, OHIO, December 10, 1931.

HON. CALVIN CRAWFORD, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion with reference to the following matter, which request was submitted over the signature of E. E. Duncan, Assistant Prosecuting Attorney:

“Immediately adjacent to the City of Dayton, on the south, is the City of Oakwood. Acting under Section 3548 of the General Code, inhabitants residing on territory adjacent to Oakwood, submitted to the County Commissioners a petition, purported to be signed by a majority of the adult freeholders residing on such territory. The other requirements of the statute as to designating an agent and accompanying the petition with a map or plat were duly complied with. On September 24, 1931, after due notice as required by law, the first hearing on the petition was held by the County Commissioners.

At this hearing the following situation developed: The petition itself, carried the signatures of sixty resident freeholders. At the same meeting when the petition was presented to the commissioners, a withdrawal petition was submitted, signed by eleven who had originally signed the petition for annexation. It was further brought out at the meeting and by subsequent investigation, that on the territory proposed to be annexed, were one hundred and two resident freeholders. The petition signed by the remonstrants stated that the remonstrants were withdrawing because of false inducements or representations made to them when they signed the original petition. If the eleven withdrawals are recognized as legal, then there will be forty-nine valid names left on the original petition, which is less than a majority. The question is: Can the eleven who signed the original petition, withdraw from same in the manner and at the time above set forth?

Another question growing out of the above state of facts is this: If the petition contains a majority of the resident freeholders, is it mandatory upon the county commissioners to grant the petition?”

Proceedings for the annexation of territory to a city on application of the inhabitants of the territory sought to be annexed, are controlled by Sections 3548, et seq. of the General Code. Said Section 3548 reads as follows:

“The inhabitants residing on territory adjacent to a municipality may, at their own option, cause such territory to be annexed thereto, in the manner hereinafter provided. Application shall be by petition, addressed to the commissioners of the county in which the territory is located, signed by a majority of the adult freeholders residing on such territory, and shall contain the name of a person authorized to act as the agent of the petitioners in securing such annexation, and a full description of the territory, and be accompanied by an accurate map or plat thereof.”

The pertinent part of Section 3549, General Code, reads as follows:

"The petition shall be presented to the board of commissioners at a regular session thereof, and when so presented the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as required in case of an application to be organized into a village under the provisions of this division. * * *

There is also submitted for my information the conclusions reached by your office with reference to this matter, together with the citation of authorities relied on.

The general rule with reference to the withdrawal of names from petitions is stated by the Supreme Court, in the case of *State ex rel. v. Rupert, Auditor*, 99 O. S., page 17, as follows:

"In the absence of statutory provisions to the contrary an elector signing a petition authorized by the statutes of this state, invoking either official or judicial action, has a right to withdraw his name from such petition, or, if he be the sole petitioner, to dismiss the same at any time before judgment has been pronounced, or before official action has been taken thereon."

The court cited in support of this rule, the case of *Dutton v. Village of Hanover*, 42 O. S., 215; *Hayes et al v. Jones et al.*, 27 O. S., 218, and *McGonagle et al v. Arthur et al.*, 27 O. S., 251, 256.

This general rule is referred to with approval, by the Supreme Court of Ohio, in the cases of *Board of Education v. Board of Education*, 112 O. S., 111, and *Neiswander et al. v. Brickner et al.*, 116 O. S., 249. The case of *City of Norwood v. Deputy Supervisors of Elections*, 8 O. L. R. p. 380, referred to by you in your letter, is also in point. There are a few cases in Ohio in which this general rule is held not to apply. These cases are readily distinguishable from those in which the general rule is applied and are based on the construction of certain statutes wherein it is held that the rule may not be applied. I see no reason why the rule is not applicable with reference to the petitions filed under and by authority of Section 3548, General Code, and I am therefore of the opinion that the withdrawal petition should be given consideration, under the circumstances, and that the eleven persons who signed the withdrawal petition may not be counted as signers of the original petition.

With reference to your second question, it will be observed by the terms of Section 3549, General Code, that after a petition has been filed, such as we have here under consideration, the same proceedings shall be had and the same duties with respect thereto shall be performed by the commissioners and other officers, as are required in case of an application to be organized into a village under the provisions of this division.

The duties of county commissioners when an application, to be organized into a village is presented, are controlled by Sections 3516 et seq., General Code. These statutes provide in substance that a petition may be presented to the commissioners by the residents of territory which it is sought to have incorporated into a village, after which a hearing shall be had thereon. Section 3522, General Code, provides that upon such hearing if the commissioners find that the petition contains all the

matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described and are not unreasonably large or small, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given as required, that there is the requisite population for the proposed corporation, and "if it seems to the commissioners right that the prayer of the petition be granted, they shall cause an order to be entered on their journal to the effect that the corporation may be organized."

It will be observed from the foregoing, that the commissioners, in proceedings of this kind, are granted considerable discretion in that they are to grant the prayer of the petition only if it seems to them to be right that it should be granted, and the same rule would apply to proceedings for annexation instituted by force of Section 3548, General Code, as Section 3549 specifically says that the duties of the county commissioners in the one case shall be the same as in the other.

In the case of *Bring, et al. v. Hollis, et al.*, 4 O. A. 45, it was held by the Court of Appeals with reference to proceedings had under and by force of Sections 3516 et seq., General Code, for the incorporation of a village, that:

"An order of a board of commissioners in such proceedings, dismissing the petition is not, therefore, subject to review upon petition in error."
See also *Shipbaugh v. Kimble*, 7 N. P. (N. S.) 514.

It clearly follows, from the foregoing, that the county commissioners are vested with a certain discretion in granting the prayer of the petition filed for the annexation of territory to a city under and by force of Section 3548, General Code.

In specific answer to your questions, I am of the opinion:

1. Where a petition has been filed for the annexation of territory to a city, under and by force of Section 3548, General Code, signers thereto may withdraw their names at any time before official action is taken on said petition.

2. It is not mandatory upon a board of county commissioners to grant the prayer of a petition filed by favor of Section 3548, General Code, for the annexation of territory to a municipality. The commissioners, in such case, are vested with the discretion to determine whether or not the granting of the prayer of said petition seems right. Section 3549 and 3522, General Code.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3837.

DISTRICT BOARD OF HEALTH—AUTHORITY TO EMPLOY ATTORNEY
WHERE PROSECUTING ATTORNEY REFUSES TO ACT IN LITIGATION
BETWEEN BOARD AND COUNTY COMMISSIONERS—COUNSEL
PAID FROM GENERAL HEALTH DISTRICT FUND.

SYLLABUS:

1. *In the event of litigation between a district board of health of a general health district and a board of county commissioners of the county constituting all or a major part of such district, and the prosecuting attorney of such county elects*