

Note from the Attorney General's Office:

1943 Op. Att'y Gen. No. 43-5798 was overruled in part by 2014 Op. Att'y Gen. No. 2014-006.

5798

1. FIRE DISTRICT OR DISTRICTS—MAY BE CREATED OUT OF PORTION OF DESIGNATED TOWNSHIP—AUTHORITY, BOARD OF TRUSTEES OF TOWNSHIP IN WHICH IS LOCATED ONE OR MORE MUNICIPAL CORPORATIONS—PORTION OF SUCH TOWNSHIP NOT INCLUDED IN CORPORATE LIMITS OF MUNICIPAL CORPORATION—FIRE APPARATUS—WATER SUPPLY—FIGHTING FIRES—CONTRACT—MUNICIPALITY OR ANOTHER TOWNSHIP TO FURNISH FIRE PROTECTION—SECTIONS 3298-54, 3298-60 G. C.
2. TRUSTEES NOT REQUIRED TO COVER ENTIRE TERRITORY OF TOWNSHIP OUTSIDE CORPORATE LIMITS OF ANY MUNICIPALITY—MAY INCLUDE SUCH PORTION DEEMED ADVISABLE.
3. COST—TO ACQUIRE AND MAINTAIN FIRE EQUIPMENT OR OBTAIN PROTECTION—CANNOT BE PAID OUT OF GENERAL FUNDS OF TOWNSHIP—MUST BE PAID BY TAX LEVY, TAXABLE PROPERTY IN DISTRICT OR BY BOND ISSUE—SECTIONS 3298-55, 3298-56 G. C.

SYLLABUS:

1. Under the provisions of Section 3298-54, General Code, the board of trustees of any township in which there is located one or more municipal corporations, may create a fire district or districts out of the portion of such township which is not included within the corporate limits of such municipal corporation or corporations, and may provide for such district or districts fire apparatus and water supply for fighting fires, or may contract with a municipality or with another township for furnishing fire protection in such fire district or districts, as provided in Section 3298-60 of the General Code.

2. In establishing such fire district or districts, the trustees are not required to cover the entire territory of the township which is outside the corporate limits of any municipality, but may include only such portion of such territory as they deem advisable.

3. The cost of acquiring and maintaining such fire equipment or of obtaining such fire protection in any such fire district cannot be paid out of the general funds of the township, but must be obtained by a levy of taxes on the taxable property in the district, pursuant to the provisions of Section 3298-55 of the General Code, or by the issuance of bonds pursuant to the provisions of Section 3298-56 of the General Code.

Columbus Ohio, February 4, 1943.

Hon. Nicholas F. Nolan, Prosecuting Attorney,
Dayton, Ohio.

Dear Sir:

I have your request for my opinion, reading as follows:

"In Clay Township, Montgomery County, Ohio, are located two municipal corporations, the village of B. in the southern end, and the village of P. in the northern end. Surrounding the village of P. the township trustees desire to establish a fire district under authority of Section 3298-54 General Code, which district will include approximately half of the rural territory in the township; the remaining half would probably remain entirely without any fire district.

If and when such district is established, it is planned, if legally possible, to enter into a contract with the village of P. whereby the village fire department will serve the rural territory in the surrounding district.

Question One: Can the trustees legally set up part of a township into a fire district and leave part of the township excluded? This question is inspired by the language in the last paragraph of Section 3298-54, wherein occur these words: '* * * creating a fire district or districts of that portion of such township not included within the corporate limits of such municipal corporation * * *'. In other words, it might seem that *all* the township must be set up into a district or districts.

Question Two: On what basis could the trustees of the township allocate funds, if any, out of the current general fund to pay the contract price between the village and the contiguous fire district, or, are the trustees limited to setting up a levy in their future budgets to be assessed against the property in the contemplated fire district? (See G. C. 3298-55.)

Question Three: If the entire portion of such township outside the municipal corporations should be set up into two fire districts, on what basis could funds be allocated by the trustees to the two districts?"

The questions you raise involve an examination of certain sections of the General Code of Ohio, the pertinent portions of which are as follows: (In each case the emphasis is mine.)

Section 3298-54:

"Township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of citizens against damage and accidents resulting therefrom and may, with the approval of the specifications by the county prosecuting attorney, purchase or otherwise provide such fire apparatus, appliances, materials, fire hydrants and such water supply for fire fighting purposes as may seem to the trustees to be advisable, in which event they shall provide for the care and maintenance thereof, and, for such purposes, may purchase, lease or construct and maintain necessary buildings; and they may establish and maintain lines of fire alarm telegraph within the limits of the township. Such township trustees may employ one or more persons to maintain and operate fire fighting equipment; or they may enter into an agreement with a volunteer fire company for the use and operation of such equipment. The trustees are empowered to compensate the members of a volunteer fire company on such basis and in such amount as the trustees deem fair and equitable.

The trustees of any two or more townships or the councils or other legislative authorities of any two or more political subdivisions or any combination thereof, are authorized through joint action to unite in the joint purchase, maintenance, use and operation of fire fighting equipment, or for any other purpose designated in this act, and to pro-rate the expense on such terms as may be mutually agreed upon.

The board of trustees of any township in which there is located a municipal corporation or corporations, or a part of a municipal corporation, may by resolution whenever in their opinion it is expedient and necessary to guard against the occurrence of fires or to protect the property and lives of the citizens against damages resulting therefrom, *create a fire district or dis-*

tricts of that portion of such township not included within the corporate limits of such municipal corporation or corporations and may purchase or otherwise provide such fire apparatus, appliances, materials, fire hydrants and such water supply for fire fighting purposes; or may contract for such fire protection for such fire district or districts the same as provided in section 3298-60 for other subdivisions. The fire district or districts so created shall be given a separate name by which it shall be known and designated."

Section 3298-54a provides for the appointment by the trustees "in each township, or fire district, or districts, having or hereafter establishing a fire department" of a fire chief and such firemen as the trustees deem necessary.

Section 3298-55:

"The trustees of a township are authorized to levy in any year or years a sufficient tax upon all taxable property in the township or in a fire district, or districts, to provide protection against fire and to provide and maintain fire apparatus and appliances and buildings and sites therefor and sources of water supply and materials therefor, and the establishment and maintenance of lines of fire alarm telegraph and the payment of permanent, part-time or volunteer fire fighting companies to operate same."

Section 3298-56:

"No bonds shall be issued by township trustees for the purpose of providing fire apparatus, appliances, buildings or sites therefor, or sources of water supply and materials therefor, or the establishment and maintenance of lines of fire alarm telegraph or the payment of permanent, part-time or volunteer fire fighting companies to operate the same unless approved by vote of the people *in a township, a fire district or districts* in the manner provided by law; and in no event in an amount exceeding \$20,000.00."

Sections 3298-54, 3298-55 and 3298-56, as enacted or amended in 118 O. L. p. 273, were more limited in their scope than the present provisions. They differ only from the statutes in the form above quoted, in that by the latest amendment found in 119 O. L. p. 315, there was introduced into Section 3298-54 the paragraph relating to the creation of fire districts in that portion of a township not included within the corporate limits of a municipal corporation. Sections 3298-55 and 3298-56 were by the same act amended only by the insertion of the words which I have emphasized, relating to a fire district or districts.

Inasmuch as Section 3298-60 of the General Code is referred to in:

the new portion of Section 3298-54, it becomes important to consider a portion of that section which reads as follows:

Section 3298-60:

"Any township, village or city, in order to obtain fire protection or to obtain additional fire protection in times of emergency, shall have the authority to enter into a contract or contracts for a period not to exceed three years, with one or more townships, villages or cities, upon such terms as may be agreed upon, for services of fire departments or the use of fire apparatus or for the interchange of the service of fire departments or use of fire apparatus, within the several territories of the contracting subdivisions, if such contracts are first authorized by the respective boards of trustees, councils, or other legislative bodies. * * *

Such contracts may provide for a fixed annual charge to be paid at the times agreed upon and stipulated therein, or for compensation based upon a stipulated price for each run, call or emergency, or the number of members or pieces of apparatus employed or the elapsed time of service required, in such run, call or emergency; and may provide for compensation for loss or damage to equipment or apparatus while engaged outside the limits of the subdivision owning and furnishing the same: * * *."

Your first question, as to whether it is necessary for the board of trustees of the township, in order to avail itself of the power given in Section 3298-54 in setting up one or more fire districts, to include all of the area of the township lying outside of the municipality, calls for a particular examination of the provisions of that section. It will be observed that by the language used, the trustees are authorized to "create a fire district or districts of that portion of such township not included within the corporate limits of such municipal corporation or corporations." It is further provided that the township trustees may contract for such fire protection "for such fire district or districts the same as provided in Section 3298-60 for other subdivisions" and that the "fire district or districts" so created shall be given a separate name "by which it shall be known and designated".

It seems to me that there is nothing in the language used in this statute which would make it mandatory that the trustees should organize into one or more districts all of the area of a given township lying outside of a municipality. It is entirely consistent with the language used that they should organize only such portion of the township as in their judgment is in need of fire protection and is so situated as to be capable of maintaining a fire department or contracting with a municipality for such protection. It is obvious that in a township there may be a certain portion

of it, particularly that portion contiguous to a municipality, which is somewhat thickly built up and in which fire protection is needed and practicable, whereas the bulk of the township might be so purely agricultural and buildings so infrequent and widely scattered that fire protection might not be practicable or demanded.

The words used in this statute are not intended to impose a mandate on the township trustees, but are strictly permissive and by way of conferring a power which it is within their discretion to exercise or not to exercise. Therefore, there is no reason why there should be read into the statute any suggestion that the township trustees should be compelled to do a useless and absurd thing in order to avail themselves of the power to do what is obviously reasonable and necessary.

Accordingly, I am clearly of the opinion that the trustees can legally set up part of a township into a fire district and leave part thereof excluded.

Coming to your second question, as to allocation by the trustees of moneys out of the current general fund of the township to pay the cost payable by a fire district arising upon a contract with a village, it is my opinion that they would have no such power. There is no provision in the statute whereby general funds of the township could be used for the cost of fire protection for a fire district constituting a portion of the township. Funds raised by taxation which go to make up the general fund of the township are produced by a levy upon all the property in the township, and it would not be permissible to spend these funds for the purpose of either establishing a fire department in a portion of the township or contracting with a municipality for fire protection for such portion of the township.

Prior to the amendment of Section 3298-54 and the related sections of the General Code, I had presented to me the question of the power of the township trustees to contract with a municipality to furnish fire protection to an outlying portion of the township, and also the question of the power of a municipality to furnish such service, and in an opinion rendered April 3, 1940 (Opinions Attorney General, 1940, p. 325) it was held:

“1. A board of township trustees cannot enter into a contract with a municipal corporation whereby the municipal corporation agrees to give fire protection to a portion or portions only of the township.

2. A municipal corporation may not enter into a contract with an association comprised of citizens living in a certain portion of a township for the furnishing of fire protection to that

portion of the township in which the citizens comprising the association live.”

Commenting on the right of the township trustees to expend general funds of the township for the protection from fire of a portion of the area of the township, I said at page 327 :

“If a board of township trustees enters into a contract with a city for fire protection, the funds which the township would expend thereunder would necessarily be derived from taxation on all the taxable property in the township and the board of township trustees is certainly not authorized to use public funds obtained by taxation on all the property in the township to contract for fire protection for a portion only of the township even though such portion may contain water mains and fire hydrants threaded to fit the fire fighting apparatus of the municipality with which the contract is made.”

The recent amendments have supplied the power which was then lacking to provide fire protection for a portion of the township, but have, in effect, emphasized the opinion I there expressed.

The Legislature has provided a means, and in my opinion the only means, whereby such protection in a fire district can be provided for. This is found in Sections 3298-55 and 3298-56, above quoted, whereby the trustees are authorized to levy a sufficient tax for such purpose upon all taxable property in a fire district or fire districts, and are further authorized to issue bonds which, however, must be first approved by a vote of the people in the township if the service is for the entire township, or in the fire district in case the service is for a district.

What has just been said seems to be a sufficient answer to your third question. It is evident that the general funds of the township could not be allocated to the maintenance of a fire department or fire protection in two fire districts established pursuant to the statute above quoted any more than to the maintenance of such protection in one district, and that if two districts are set up in the outlying territory of the township, each should be financed by the levy of taxes upon the property in that district, and if necessary a separate bond issue for each district.

Respectfully,

THOMAS J. HERBERT,
Attorney General.