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TOWNSHIP TRUSTEES—SECTION 3327 G. C.—WHERE DETERMINATION MADE THAT NUMBER OF CONSTABLES TO BE ELECTED BIENNIALY SHALL BE INCREASED OVER NUMBER PREVIOUSLY AUTHORIZED—TRUSTEES WITHOUT AUTHORITY TO NAME APPOINTEE TO SERVE IN INTERIM UNTIL SUCCESSOR HAS BEEN DULY ELECTED AT NEXT BIENNIAL ELECTION.

SYLLABUS:

Where township trustees, pursuant to authority of Section 3327 General Code, determine that the number of constables to be elected biennially shall be increased over the number previously authorized, the trustees are without authority to name an appointee to serve in the interim until a successor has been duly elected at the next biennial election.

Columbus, Ohio, October 16, 1944

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

Dear Sir:

I have your request for my opinion reading as follows:

“We would like to respectfully ask your opinion upon the following:

G. C. 3327 provides that the respective township trustees direct the number of constables to be elected biennially. The board of trustees for Van Buren Township desires to increase the number of its regularly elected constables from two to three in order to properly police a certain area in the township where a large number of low cost housing units have been recently built.

QUESTION: Can the trustees *now* direct that the number of regularly elected constables be increased from two to three, and name an appointee to serve in the interim until a successor has been duly elected at the next biennial election?”

Section 3327 General Code to which you refer, reads as follows:

“Such number of constables as directed by the trustees shall

be elected, biennially, in each township who shall, each, hold his office for a term of two years, commencing on the first day of January next after his election.”

It will be noted from the foregoing that the township trustees are given full authority to determine the number of constables that shall be elected, and there appears to be no limit placed upon the power of the trustees in this respect either as to the number whom they may designate or as to the time when they may make their determination, so that the part of your inquiry which raises the question whether they may *now* increase the number of constables to be elected from two to three would appear plainly to be answered in the affirmative. The only question which appears to call for consideration is whether, having added one to the present number of constables they have the power to appoint a person to serve in the interim until a successor has been duly elected at the next biennial election.

That question could only be answered affirmatively by finding in the statutes authority given to the township trustees to make such appointment. Section 3329 General Code provides in part as follows:

“When, by death, removal, resignation, or non-acceptance of the person elected, a vacancy occurs in the office of constable, or when there is a failure to elect, the township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable, and until a successor is elected and qualified. \* \* \*”

The creation of a new office may create a “vacancy” in the eyes of the law, which might be filled by the officer authorized to fill vacancies generally in that class of position. In 42 Am. Juris. p. 978 it is said:

“A vacancy may arise in an office newly created. The general rule governing the matter seems to be that when a law establishing an office takes effect a vacancy in the office at once exists, unless the language of the law imports futurity of selection, or unless other restrictions are imposed. Hence, the term ‘vacancy’ applies to an existing office without an incumbent, although it has never been filled; for example, when a new county is created, the county offices, before they are filled, are considered as being technically vacant.”

When the office of chief justice of the supreme court was created in 1913, Section 1467 General Code was enacted, providing:

“A chief justice shall be elected every six years, beginning in 1914, to hold his office for a term of six years commencing on the first day of January next after his election. *Until a chief justice is so elected and qualified, the governor shall appoint a chief justice.* Vacancies occurring in the office of chief justice of the supreme court, shall be filled in the manner prescribed for the filling of vacancies in the office of judge of the supreme court”.  
(Emphasis added.)

There, it will be noted the legislature expressly provided for an interim appointment. However, the action of the township trustees in providing for an additional constable pursuant to the authority given them by the law, certainly does not create a vacancy within the provisions of Section 3329 above quoted, and the absence of any provision authorizing an interim appointment of a constable, taken in connection with the limited provisions of Section 3329 as to filling vacancies, leads to the conclusion that the legislature did not intend such new position to be filled except by the electors at the next biennial election.

Section 3331 gives a justice of the peace power to appoint a special constable or constables in certain cases named, but it has been repeatedly held that that power is limited to the appointment of a special constable to act in a particular case pending before the justice. 1927 Opinions, Attorney General p. 32; 1931 id. No. 3574; 1933 id. No. 1937; 1934 id. No. 3265.

Section 1738 General Code authorizes a justice of the peace to appoint one or more special constables on application of the Superintendent of Public Works or of three freeholders, to guard and protect the property of the state or the property of such freeholders.

Section 9912 General Code makes provision for appointment of special constables by a justice of the peace to assist in keeping the peace during the holding of a fair or meeting of citizens for the purpose of promoting social or literary intercourse. I have found no other statutes authorizing the appointment of constables which could by any possibility serve the purpose indicated in your letter.

The proposition that administrative boards such as township trustees which are created by statute have no authority except that specifically granted by law or necessarily implied from the power granted is too familiar to require elaboration, and since I am unable to find any author-

ity whereby township trustees could appoint a constable to fill a newly created position, I am obliged to hold that they have no such power.

Accordingly, and in specific answer to your question I am of the opinion that where township trustees pursuant to authority of Section 3327 General Code determine that the number of constables to be elected biennially shall be increased over the number previously authorized, the trustees are without authority to name an appointee to serve in the interim until a successor has been duly elected at the next biennial election.

Respectfully,

THOMAS J. HERBERT

Attorney General