

3114.

TOWNSHIP TRUSTEES—NO AUTHORITY, EXPRESS OR IMPLIED, TO HIRE INDEPENDENT AUDITOR TO CORRECT TOWNSHIP BOOKS — MAY NOT PAY OUT TOWNSHIP FUNDS FOR SUCH SERVICE.

SYLLABUS:

Township trustees are without authority, either express or implied, to hire and pay out of township funds an independent auditor to correct the township books.

Columbus, Ohio, December 14, 1940.

Hon. Kenneth Kreider, Prosecuting Attorney,
Newark, Ohio.

Dear Sir:

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

“The Newark Township Trustees have presented the following proposition:

The Clerk of the Board, who had held the position over a period of years, recently died, and the Board hired a successor. At the time the new Clerk took office, the Board went over the books with the new Clerk and were unable to arrive at any definite conclusion as to the finances of the Township. The books were then sent to the State Auditor, with the request that they be audited. However, the books were returned, according to their information, and the Township Trustees advised that inasmuch as they had been audited several months prior to the death of the old Clerk, the books were possibly correct and would not be audited until the following year when the regular audit was made.

As we have pointed out, the Trustees and the Clerk could not make the books balance and in conferring with the County Auditor, of this County, it was suggested that they secure the services of an auditor so that the new Clerk would be able to start out with a balanced set of books. Thereupon, and with the approval of the County Auditor, the Township Trustees secured an auditor who has corrected the books and found several discrepancies of major importance.

The question now presented is whether or not the Township trustees have authority to pay this independent auditor for correcting the books of the Township.”

It is well settled that public officers and boards possess only those powers expressly granted by the Legislature and such additional implied powers necessary to carry into effect the express grants. The powers of township trustees are governed by this familiar rule. To answer your inquiry, therefore, it becomes necessary to examine the statutes relating to township trustees in order to ascertain whether or not they permit said officers to hire and pay out of township funds an auditor to examine and audit the township books.

The duty to keep the township books rests with the township clerk as provided by Section 3301, General Code, as follows:

“The clerk shall keep an accurate record of the proceedings of the trustees at all their meetings, and of all their accounts and transactions including their acceptance of the bonds of township officers. He shall record the earmarks of cattle, sheep and hogs, used by the owners, and such other marks and brands as any person may wish to have recorded, but he shall not record the same mark or brand to two persons.”

For this work the clerk is allowed compensation out of township funds by the township trustees in accord with the provisions of Section 3308, General Code, which reads in part as follows:

“The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: * * * for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. * * *”

From your communication it appears the duly elected clerk of Newark Township died, thereby creating a vacancy in the office of township clerk. It further appears that pursuant to Section 3261, General Code, the township trustees appointed a new clerk to fill the vacancy so created. Upon acceptance of such appointment by the new clerk it then became his duty to keep the township books and records as required by statute.

A search of the statutes containing the powers of township trustees fails to reveal any express provision to appoint or employ any person to audit the township books or to compensate any such person out of township funds for services of this nature. Moreover, it is my opinion that no such implied power exists in the township trustees by reason of the fact the power and duty to examine and audit township books rests with the Bureau of In-

spection and Supervision of Public Offices under authority of Section 274, et seq., General Code.

It would, therefore, appear there would be no need on the part of the township trustees to employ a so-called independent auditor to examine the very same books and records with which the Bureau is concerned. Any public moneys spent for such purpose would constitute an unnecessary expenditure.

Supporting this view is the case of *State, ex rel. Locher vs. Menning, et al.*, 95 O. S. 97, wherein at page 99 the court said:

“The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.”

This pronouncement by our Supreme Court with respect to financial transactions of county commissioners may be applied with equal force to like transactions of township trustees.

To the same effect is the case of *State, ex rel. The A. Bentley & Sons Co. vs. Pierce*, 96 O. S. 44, as evidenced by the third branch of the syllabus as follows:

“In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power.”

The Bentley case was cited with approval by Allen, J. in the case of *Schwing vs. McClure, et al.*, 120 O. S. 335, at page 340 as follows:

“The strictness with which the powers of public officers are to be exercised is evidenced by a great variety of cases, ending in this state with the decision in *State, ex rel. A Bentley & Sons Co., vs. Pierce, Auditor*, 96 Ohio St., 44, 117 N. E., 6, which holds that the contractual power of an officer or board is fixed by the statutory limitations upon his power, and that any doubt as to the power of a public officer, as between himself and the public, must be resolved in favor of the public and against the officer. Public officers have no power except such as expressly given. *Ireton v. State, ex rel. Hunt*, 12 C. C. (N. S.), 202, 21 C. D., 412, affirmed without opinion, 81 Ohio St., 562, 91 N. E., 1131; *Peter v.*

Parkinson, Treas. 83 Ohio St., 36, 93 N. E., 197, Ann. Cas., 1912A, 751."

In line with the foregoing, and in specific answer to your inquiry, it is my opinion that township trustees are without authority, either express or implied, to hire and pay out of township funds an independent auditor to correct the township books.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

3131.

WAGES PAYABLE TO EMPLOYE UNDER EMPLOYMENT DURING CALENDAR YEAR, 1939, TAXABLE, 1939—WHERE PART PAID AS BONUS, AMOUNT OF WHICH IS DETERMINED AND PAID IN 1940, SUCH PART NOT "WAGES" UNDER EMPLOYMENT, 1940—SECTIONS 1345-1 (e), 1345-4 G. C.

SYLLABUS:

Under Sections 1345-1 (e) and 1345-4, General Code, wages payable to an employe with respect to employment during the calendar year 1939, are taxable as of 1939, even though a part thereof is paid as a bonus the amount of which is determined and paid in 1940. The part paid in 1940 is not "wages," with respect to employment during 1940.

Columbus, Ohio, December 18, 1940.

Hon. H. C. Atkinson, Administrator,
Bureau of Unemployment Compensation,
427 Cleveland Avenue, Columbus, Ohio.

Dear Sir:

Your recent request for my opinion reads as follows:

"Your attention is directed to Ohio General Code 1345-1(e), which reads:

'Wages' means remuneration *payable* to an employee by each