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BUILDING LOCATED ON COUNTY OWNED PROPERTY AND USED FOR THE PURPOSE OF STORING ROAD EQUIPMENT, THE COUNTY ENGINEER HAS THE AUTHORITY TO EMPLOY MECHANICS AND NIGHT WATCHMEN—§5543.19, R.C.

## SYLLABUS:

Where pursuant to Section 5543.19, Revised Code, a board of county commissioners has authorized the county engineer to maintain and repair county roads by force account and the road equipment is stored in a county garage and in another building, both of which are used for that purpose only, the garage and the building being located on a county-owned property, the county engineer, and the board of county commissioners, has the authority to employ mechanics and night-watchmen at the garage and at the other building.

Columbus, Ohio, January 31, 1961

Hon. Elmer Spencer, Prosecuting Attorney  
Adams County, West Union, Ohio

Dear Sir:

I have your request for my opinion in which you state:

“In the past twenty odd years this county has worked on a force account method under G. C. 7198 and the present R. C. 5543.19. The county has a garage on county property where most of the road equipment is stored but some equipment is stored in a building which is at the stone quarry site which is also owned by the county.

“I have rendered my opinion to the county commissioners that if the county ‘improvement and maintenance of roads, bridges, etc., is done by force account under R.C. 5543.19 then the county engineer has the authority to employ all personnel for such work when authorized by the county commissioners.’

“My opinion has been based upon 1927 O.A.G. #271 which specifically seems to cover ‘mechanics and other persons as may be necessary efficiently to accomplish the road work in question.’ The 1930 O.A.G. #2106 indicates opinion that G.C. 2410 (present R.C. 305.16) not applicable in road work situations. Further, R.C. 5549.01 commits all machinery, tools, etc., to ‘care and custody of the engineer.’ The above citations and code sections would seem to cover mechanics and nightwatchmen. However, the majority of the county commissioners are not satisfied with

my opinion and they are insistent that they have the right to employ the mechanics and nightwatchmen who work at the county garage and stone quarry and they have based their opinion upon R.C. 305.16. The county commissioners concede the authority of the county engineer for other county road employees and no question is raised on this subject.

“I would therefore respectfully request your written opinion on this question : Does the county engineer or the county commissioners have the authority to employ mechanics and nightwatchmen at the county garage and stone quarry buildings, all of which buildings are on county property, if the county road work is done on a force account basis ”

I have examined the two opinions of the Attorney General to which reference is made in your letter. Opinion No. 271, Opinions of the Attorney General for 1927, Volume I, page 466, states in the syllabus :

“1. In the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account, the county surveyor may, when authorized by the county commissioners, employ such laborers and teams as may be necessary.

“2. The word ‘laborers’ as used in Section 7198, General Code, should be liberally construed to effect the purpose intended, and includes such foremen, laborers, engineers, mechanics and other persons as may be necessary efficiently to accomplish the road work in question.”

Section 5543.19, Revised Code, which was formerly Section 7198, General Code, provides :

“The county engineer may, when authorized by the board of county commissioners, employ such laborers and teams, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads, bridges and culverts, by force account.”

It is clear that the county engineer is authorized to do all the things enumerated in Section 5543.19, *supra*, when the work is done by force account, provided the board of county commissioners has granted him such authority. But, should the board of county commissioners refuse to grant the county engineer such authority, the question arises whether or not such board would be empowered to proceed with the work by force account.

Turning now to Opinion No. 2106, Opinions of the Attorney General for 1930, Volume II, page 1136, it is stated in the syllabus :

“In the maintenance and repair of county roads which is authorized by the county commissioners to be done by force account and without contract, the employment of the necessary laborers for the prosecution of the work rests with the county surveyor and not with the county commisisoners.”

It should be noted in this connection that the title of county surveyor was changed to that of county engineer in 1935. See 116 Ohio Laws, 283.

In Opinion No. 2106, *supra*, Section 2410, General Code, is discussed. Such section, which is now Section 303.16, Revised Code, reads :

“The board of county commissioners may employ a superintendent, and such watchmen, janitors, and other employees as are necessary for the care and custody of the court house, jail, and other county buildings, bridges, and other property under its jurisdiction and control.”

In discussing this section, the then Attorney General stated on page 1137 of Opinion No. 2106, *supra*, as follows :

“\* \* \* \* \* \* \* \* \*

“While the general language here employed might, in the absence of other provisions of law, be construed as broad enough to include the employment of persons engaged upon road work, the specific provisions of Section 7198 (now Section 5543.19, *supra*) are controlling with respect to maintenance and repair work. \* \* \*

“\* \* \* \* \* \* \* \* \*

“It is true that this refers to work by force account only, but I am of the view that it contemplates all maintenance and repair work which is carried on except through contract let pursuant to competitive bidding. Since the ordinary maintenance and repair of roads is generally of such character as to be most appropriately done by the employment of labor and the purchase of materials rather than through contract, it follows that this must be under the supervision of the county surveyor who has the authority, when authorized by the county commissioners, to employ the necessary personnel.

“\* \* \* \* \* \* \* \* \*”

Squarely in point as regards such a situation is Opinion No. 768, Opinions of the Attorney General for 1951, page 504, where it is stated in the syllabus :

"1. County commissioners themselves have no authority to carry on county road and bridge maintenance and repair by force account, and where such commissioners elect, under the provisions of Section 6948-1, General Code, that certain such work shall be undertaken by such method, they have no discretion but to commit the execution thereof to the county engineer under the provisions of Section 7198, *et seq.*, General Code. (Opinion No. 2460, Opinions of the Attorney General for 1921, p. 895, approved and followed.)

"2. Where cost estimates, plans and specifications of particular county road and bridge maintenance and repair projects have been prepared by the county engineer and submitted to the county commissioners pursuant to the provisions of Section 6948-1, General Code, and where such commissioners fail, within a reasonable time, to take any express action to decide whether such projects shall be undertaken by contract or by force account, but have, by specific appropriation to the county engineer of funds designated for expenditure for labor and materials, provided the engineer with funds sufficient to carry on and complete such projects by force account, the resolution of appropriation so adopted by the commissioners constitutes an implied authorization for that officer to proceed with such projects under the provisions of Section 7198, *et seq.*, General Code."

In the light of the holding in Opinion No. 768, *supra*, it would appear by almost necessary implication, that the county engineer, and not the board of county commissioners, has the authority to employ mechanics and night-watchmen at the county garage and stone quarry buildings of the county, where the work is done by force account. Such conclusion is strengthened by Section 5549.01, Revised Code, which provides :

"The board of county commissioners may purchase such machinery, tools, or other equipment, including special wearing apparel, for the construction, improvement, maintenance, or repair of the highways, bridges, and culverts under its jurisdiction as it deems necessary. The board may also purchase, hire, or lease automobiles, motorcycles, or other conveyance and maintain them for the use of the county engineer and his assistants when on official business. All such machinery, tools, and equipment, including special wearing apparel, and conveyances belonging to the county shall be under the care and custody of the engineer, and shall be plainly and conspicuously marked as the property of the county.

"The engineer shall annually, on the fifteenth day of November, make a written inventory of all such items, indicating each article, stating the value thereof, and the estimated cost of all

necessary repairs thereto, and deliver such inventory to the board, which shall cause it to be placed on file. At the same time he shall file with the board his written recommendations as to what machinery, tools, and equipment, including special wearing apparel, and conveyances should be purchased for the use of the county during the ensuing year and the probable cost thereof.

“The board shall provide a suitable place for housing and storing machinery, tools, and equipment, including special wearing apparel, materials, and conveyances owned by the county, and may purchase the necessary material and construct, or enter into an agreement with a railroad company to construct, one switch or spur track from the right of way of such railroad company to land or storage house owned by the county . All expenditures authorized by this section shall be paid out of any available road funds of the county.”

It will be noted that under Section 5549.01, *supra*, the board of county commissioners is authorized to purchase the road building machinery and equipment and to either purchase, hire, or lease various vehicles for the use of the county engineer. When such board exercises such authority it is required to provide a suitable place for the housing and storing of both the road building equipment and vehicles needed by the county engineer and his assistants in connection with their official business. The board is further required to maintain the vehicles mentioned in the statute, but no provision is made as to who is responsible for the maintenance of road building equipment. However, the responsibility for the care and custody of all such property is placed on the shoulders of the county engineer in clear, explicit language. The county engineer is also required to make a written inventory of all vehicles in his custody, give an estimate of necessary repairs, and recommend to the board what new equipment and vehicles may be needed. “Custody” is defined in Black’s Law Dictionary as follows :

“The word is defined as the care and possession of a thing, and means the keeping, guarding, care, watch, inspection, preservation or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected; charge; immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody.”

In view of the unequivocal language of Section 5549.01, *supra*, as regards the responsibility of the county engineer for all articles therein

enumerated and the legal meaning attached to "custody," I am impelled to conclude that the instant question requires an answer consonant with such responsibility; and such conclusion appears to be fortified by the provisions of Section 5543.19, *supra*, and by the interpretation given such sections by my predecessors as noted earlier.

It is assumed for the purpose of determining the question in the instant case that only road equipment and vehicles used by the county engineer are stored in the county garage and the other building.

Accordingly, it is my opinion and you are advised that where, pursuant to Section 5543.19, Revised Code, a board of county commissioners has authorized the county engineer to maintain and repair county roads by force account and the road equipment is stored in a county garage and in another building, both of which are used for that purpose only, the garage and the building being located on county-owned property, the county engineer, and not the board of county commissioners, has the authority to employ mechanics and night-watchmen at the garage and at the other building.

Respectfully,

MARK McELROY

Attorney General