

1697.

CONTRACT—BOARD OF COUNTY COMMISSIONERS WITH ARCHITECT OR CIVIL ENGINEER — PLANS, SPECIFICATIONS AND ESTIMATES—PUBLIC IMPROVEMENT—VOID AND UNENFORCEABLE UNLESS CERTIFICATE OF COUNTY AUDITOR ATTACHED TO SHOW AMOUNT REQUIRED TO PAY FEES HAS BEEN APPROPRIATED, IS IN TREASURY OR PROCESS OF COLLECTION TO THE CREDIT OF APPROPRIATE FUND, FREE FROM PREVIOUS ENCUMBRANCES—SEE SECTIONS 2343, 5625-33 G. C.—FEDERAL GRANT, ALLOWANCE.

SYLLABUS:

A contract entered into by a board of county commissioners with an architect or civil engineer for the preparation of plans, specifications and estimates of cost for a public improvement, as provided for in Section 2343, General Code, is void and unenforceable, unless there be attached to such contract a certificate of the county auditor to the effect that the amount required to meet the fees of such architect or civil engineer has been lawfully appropriated for such purpose and is in the treasury, or in process of collection to the credit of an appropriate fund, free from any previous encumbrances, as required by Section 5625-33, General Code.

Columbus, Ohio, January 8, 1940.

Honorable Peter Catri, Prosecuting Attorney,
Sandusky, Ohio.

Dear Sir:

Your request for my opinion reads:

“The Board of Erie County Commissioners have asked me to obtain your opinion in a matter in which the facts are as follows:

On August 15, 1938, two of the county commissioners, pursuant to a motion duly made and passed on that day, signed a Standard Form Agreement between the County Board of Commissioners and a local architect. A copy of the minutes of the meeting authorizing said contract is enclosed.

On August 25, 1938, the Board of County Commissioners unanimously passed a resolution, requesting the appointment of

three citizens of the county by the Court of Common Pleas, for the purpose of approving plans, specifications and costs, in accordance with General Code Section 2351. On September 15, 1938, the Board unanimously passed a resolution authorizing the Clerk of the Board to file an application, through the Federal Emergency administration of Public Works. This grant was allowed by the Government on October 4, 1938. On October 20th, the Commissioners unanimously passed a resolution declaring it necessary to make application of the Tax Commission of Ohio to issue bonds without the vote of the people.

The records of the County Commissioners further show that plans and specifications were approved by the three citizens appointed by the Common Pleas Judge; that the Government's grant was accepted; that they advertised for bids, and went so far as to award one contract; and thereafter abandoned this entire project.

There is no certificate of the County Auditor, certifying that the funds are available or in the process of collection, attached to the contract. However, on October 31, 1938, the following was attached to the contract.

'Funds for this Contract are provided for in a P. W. A. Grant to Erie County, and a bond issue by the County on authority of House Bill 850.'

I understand that it was agreed between the Commissioners and the Architect, that in the event the Government refused to make a grant, the Architect was not to make any charge for services rendered. There is, however, no stipulation to this effect in the contract, and the Architect denies it.

The Architect has presented his bill for detailed plans and specifications in regard to this project, and the Commissioners want an opinion as to the legality of his claim.

I am familiar with General Code Sections 5625-33 and 5625-33A, and have read the case of: *Maple Heights vs. Irish*, 128 O. S. 329. I have also noted General Code Section 2343, which provides in part:

'That before the County Commissioners can erect a public building, or any addition for alteration thereof, they shall cause to be made by a competent Architect, full and accurate plans, showing necessary details, etc.'

In view of the above cited statutes and numerous cases decided thereunder, it seems to me that the pertinent questions that should be answered in passing on the legality of this contract, are as follows:

1. Is this a type of contract which requires the fiscal officer's certificate?
2. Does this contract come within the purview of General Code Section 5625-33a?

3. If the contract is one which requires a certificate of the fiscal officer at the time it was entered into, does it become legal after a grant has been allowed by the Federal Government?"

The copy of the minutes of the meeting of the Board of County Commissioners, held on August 15, 1938, mentioned in and enclosed with your letter, is as follows:

"Whereas, it has been contemplated by the Board of County Commissioners of Erie County, Ohio, to make numerous improvements to the present Erie County Childrens' Home in the way of alterations and enlargements; and

Whereas, it is the intention of this Board to file an application with the Public Works administration for a grant only, in the financing of said proposed improvement; and

Whereas, it is necessary that an architect be employed for the purpose of drawing plans, specifications and estimate of cost of said proposed improvements, in accordance with the rules and regulations of the Public Works Administration; and

Whereas, the Public Works Administration has established the deadline for the filing of said application, and in order to expedite filing of said application, it is now necessary that an architect be employed for this purpose;

After discussing the matter at some length, a motion was made by Mr. L. and seconded by Mr. W. that M., Sandusky, Ohio, be and he is hereby appointed Architect in Charge of the proposed Erie County Children's Home Project.

The roll call: Mr. W. aye; Mr. L. Aye; Mr. B. not voting. August 15, 1938."

In so far as they are pertinent to your inquiry, Sections 2343, 5625-33 and 5625-33a, General Code, read in part:

Sec. 2343:

"When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or substructure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style

required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof.

* * * * *

Sec. 5625-33:

“No subdivision or taxing unit shall:

(a) Make any appropriation of money except as provided in this act; provided that the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the same for the purpose for which such bonds were issued, but no expenditure shall be made from any bond fund until first authorized by the taxing authority.

(b) Make any expenditure of money unless it has been appropriated as provided in this act (G. C. §§5625-1 to 5625-39).

* * * * *

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. In case no certificate is furnished as hereinbefore required, upon receipt by the taxing authority of the subdivision or taxing unit, of a certificate of the fiscal officer that there was at the time of the making of such contract or order, and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract; but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided, however, that if the amount involved is less than fifty dollars, the fiscal officer may authorize it to be paid without the affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.

* * * * *

Sec. 5625-33a:

“When the government of the United States has made a grant

of money to any political subdivision of this state to aid in paying the cost of any public works project of such subdivision, or shall have entered into an agreement with the subdivision for the making of any such grant of money, the amount thereof shall be considered as having been duly appropriated for such purpose by the taxing authority of the subdivision as provided by law and deemed to be in process of collection within the meaning of section 5625-33 of the General Code of Ohio."

In your letter you refer to the case of Village of Mayfield Heights v. Irish, 128 O. S. 329, 191 N. E. 129 (1934), the syllabus of which reads:

"Section 5625-33, General Code, requiring the certificate of a fiscal officer that funds are available for a public contract, does not apply to the employment of a village engineer under a contract fixing his compensation for the preparation of plans, specifications, profiles and estimates for proposed special improvements at a specified percentage of the estimated cost of such improvements."

If this syllabus standing alone were to be considered, it would seem that the claim here under consideration might be lawfully allowed and paid by the board of county commissioners. However, while the syllabus of the Supreme Court of Ohio states the law of the case as to establishing principle and doctrine binding alike on all citizens and on courts both inferior or of equal rank, the syllabus must be read in the light of the facts of the case, and in determining the meaning thereof it is proper to look to the reasoning of the opinion.

Rule VI of the Rules and Practice of the Supreme Court provides that in "each cause a syllabus of the points decided by the Court, shall be stated in writing by the Judge assigned to prepare the opinion of the Court. * * * " This rule was adopted in January, 1858, and has been a part of the settled law of Ohio since that time. But it is equally well settled that the principles of law stated in the syllabus must be interpreted with reference to the facts of the case and the questions presented to, considered and determined by the court, and must not be construed as being any broader than the facts of the case warrant. Moreover, while it has been said that the opinion proper is merely the personal opinion of the judge who wrote the opinion, in so far as an opinion applies the law to the facts of the case and states the process of reasoning by which the court arrived at the judgment in its declaration of the law in the syllabus, the opinion may, and should be looked to to determine the principle of law decided and how far such principle should be extended. See 11 O. Jur., 796 to 799, inclusive.

The facts in the Irish case show that Irish was employed by the village of Mayfield Heights pursuant to a duly enacted ordinance for a definite period of over one year and a half in duration. The ordinance provided that he be paid on a per diem basis for certain types of services, four per centum of the actual cost of special improvements which might be completed, and two per centum "of the estimated cost of such special improvements for the preparation of plans, specifications, profiles, etc., and contract therefor" if the special improvements were not made or completed. In holding that the failure of the fiscal officer of the village to give a certificate as required by Section 5625-33, *supra*, did not prevent the right of Irish to recover compensation for the preparation of plans, etc., for certain special improvements which were not completed, the Court pointed out in the opinion that Irish was a public officer and employed for a definite term. At page 333, Zimmerman, J. said as follows:

"Defendant in error sets forth in his amended petition that he was employed for the period between the summer of 1925 and the first of January, 1930, by the plaintiff in error, as its municipal engineer. Such employment was apparently continuous and regular. Under the decision in *Wright v. Clark*, 119 Ohio St., 462, 164 N. E., 512, he was a public officer of the municipality. The employment of a municipal engineer is authorized by Section 4364, General Code, and Section 4366 provides that such engineer 'shall receive for his services such compensation by fees, salary or both as is provided by ordinance.'

* * *

It is clear, therefore, that if the employment of defendant in error had been wholly upon a salary basis of a fixed and definite amount there could be no doubt of his right to maintain an action to recover salary due for services rendered, regardless of Section 5625-33. Should he be denied a right of action because he performed services under a contract which fixed his compensation therefor at two per cent. of the estimated cost of such improvement?

We have reached the conclusion that there is insufficient distinction between the payment for the services of a public officer on a salary basis and on a percentage basis to bring this case within the operation of Section 5625-33, and that such section was not intended or designed to cover a situation of this kind."

That this was the point upon which this case turned is clearly shown by an examination of the case of *State, ex rel. McGraw v. Smith, et al.*, 129 O. S. 246, 2 O. O. 118 (1935). In that case the Court held as stated in the syllabus:

"1. Section 286, General Code, which among other things provides for the employment of legal counsel by the mayor of a village for the collection of money shown due and owing to the village by the report of the Bureau of Inspection and Supervision of Public Offices, is superseded by Section 5625-33, General Code, to the extent the latter is inconsistent and irreconcilable with the former.

2. Where the mayor employed legal counsel under Section 286, General Code, to collect money owing the village under such report, and Section 5625-33, General Code, was not complied with as to the appropriation of money and the attachment of a certificate showing funds available, the contract of employment is void and unenforceable."

At page 249 of the opinion it was said by Williams, J. as follows:

" * * * Under Section 286, General Code, as in force at the period in question, the fees of counsel shall be paid out of the treasury on voucher approved by the mayor, and on warrant of the village clerk, and the failure of council to appropriate or levy funds for such purpose shall not affect rights of legal counsel so employed; on the other hand Section 5625-33, General Code, makes such a contract void, and forbids the issuance of a warrant for the payment thereof unless an appropriation has been made for that purpose and the required certificate attached. In fact, the latter section applies to every contract of the taxing unit except payrolls of regular employes and officers. *Village of Mayfield Heights v. Irish*, 128 Ohio St., 329, 191 N. E., 129. Section 5625-33, General Code, being wholly inconsistent and contradictory of the provisions in Section 286, General Code, must prevail, and the latter, insofar as it is irreconcilable with the former, is superseded and repealed by implication. * * *

* * *

Upon the conceded facts no legal duty rested on the village clerk to issue the warrant, but he was duty bound to observe the statutory provision and refuse to issue it."

See also the case of *Allen v. Commissioners of Auglaize County*, 49 O. A., 249, 3 O. O. 197, 17 Abs. 674 (1934). While this case was decided under old section 5660 of the General Code, historically known as the Burns Law, and later superseded by Section 5625-33, the observations of Guernsey J. are pertinent. Commencing at page 257 the Court said:

"* * * The plaintiff bases his contention on the case of *Village of Mayfield Heights v. Irish*, 128 Ohio St., 329, 191 N. E., 129, decided by the Supreme Court on May 16, 1934, * * *.

* * *

From the statement of facts in the case it appears that the

employment of Irish was based on an ordinance passed by the village council on April 14, 1928, * * *

* * *

The employment was general and was not confined to any specific work to be done by the village. And in the opinion in the case it is held at page 333:

'Under the decision in *Wright v. Clark*, 119 Ohio St., 462, 164 N. E., 512, he was a public officer of the municipality.'

And being a public office and coming within the exception to Section 5625-33 above mentioned, the only question that remained was whether he should be denied a right of action because he performed services under a contract which fixed his compensation therefor at two per cent of the estimated cost of such improvement.

* * *

It would also appear that plaintiff in the case at bar was not in any sense a public officer. One of the characteristics of an office, as named in the definitions, is tenure, that is, duration and continuance. In other words, the person who is to be regarded as a public officer must be clothed, by virtue of law, with authority not incidental or transient, but for such time as denotes duration and continuance. 32 Ohio Jurisprudence, 863, Section 6. Ordinarily, an office requires something more permanent than a single transaction to call it into being. Hence, where persons are appointed for a definite purpose, and that purpose has been carried out, and the duty performed, their rights and duties terminate — there is no tenure or permanency to the position, which is usual or common to public office. 32 Ohio Jurisprudence, 864, Section 6."

From the facts stated in your request it seems clear that the architect employed by the board of county commissioners was not employed for a definite period and was not a public officer, but was only employed to draw plans and specifications for a single project. This being true, it seems to me that he would come within the rule laid down in the *McGraw* case, *supra*, and that, since there was neither an appropriation of funds nor a certificate of the county auditor to the effect that funds were available or in the process of collection, no recovery can be had by him against the county, and any payment for the services of the architect would be illegal.

In view of the foregoing, and upon the authorities above cited, it is my opinion that:

1. The type of contract described in your letter is one which requires a fiscal officer's certificate, as provided in Section 5625-33, General Code.

2. If the other requirements of law, including Section 5625-33, General Code, had been complied with, the contract in question would have come within the purview of Section 5625-33a, General Code.

3. The allowance of a Federal grant does not cure the invalidity of a contract which was void at the time it was entered into, because of the failure of the proper officer to furnish a certificate as required by Section 5625-33, General Code, unless a resolution or ordinance authorizing the issuance of a warrant in payment of the amounts due on such purported contract be passed by the proper taxing authority, within thirty days of the receipt of a certificate from the fiscal officer as provided in said section.

Respectfully,

THOMAS J. HERBERT,
Attorney General.