

1963

TOWNSHIP—CLERK; BOARD OF TRUSTEES MAY NOT GRANT LEAVE OF ABSENCE OF NINE MONTHS TO CLERK—§§503.24, 503.241, 507.02 RC.

SYLLABUS:

A board of township trustees has no authority to grant a duly elected, qualified and acting township clerk a nine-month leave of absence to enable such clerk to perform a foreign employment contract.

April 16, 1958

Hon. James I. Shaw, Prosecuting Attorney
Auglaize County, Wapakoneta, Ohio.

Dear Sir:

Your request for my opinion reads as follows:

“I have been requested by the Board of Township Trustees of Goshen Township, Auglaize County, Ohio, to obtain from you your opinion on the following matter:

“The duly elected, qualified and acting Township Clerk of Goshen Township, Auglaize County, Ohio, has entered into an employment contract which will take him to South America for a period of nine months. He has requested that the Board of

Township Trustees grant him a leave of absence during such period of time and that the Township Trustees appoint a Deputy Township Clerk under Section 507.02 of the Revised Code of Ohio. During his period of absence from the Township he does not expect to receive any compensation for the office of Township Clerk but upon his return from South America he is desirous of continuing in his duties as Township Clerk.

“Your opinion on whether or not a leave of absence can be granted to the Township Clerk as set forth above, will be greatly appreciated.”

Your attention is invited first to Opinion No. 802, Opinions of the Attorney General for 1951, p. 558, in which it was held:

“Township trustees possess only such powers and privileges as may be delegated to or conferred upon them by statute, or such powers as are necessarily implied from those granted.”

I have examined the statutes relating to the powers of township trustees and I am unable to find any provisions which either directly or impliedly authorize them to grant a township clerk a nine-month leave of absence for the purpose here requested.

It is to be noted that my immediate predecessor, in Opinion No. 6033, Opinions of the Attorney General for 1955, p. 667, held as follows:

“In the absence of a statute granting specific sick leave, and vacation leave to township *employees*, the township trustees have implied authority in the exercise of a sound discretion to grant such *employees reasonable periods of leave* with pay, *for such purposes.*” (Emphasis added)

Clearly, the problem involved in that opinion is distinctly different from the question now at hand. There the question involved the granting of leave to township employees who are employed by and under the control of the township trustees, whereas the question now before me involves a duly *elected*, qualified and acting township clerk, who, as an officer of the township, is neither employed by, nor under the control of, the township trustees. Furthermore, Opinion No. 6033, *supra*, was concerned with the granting of *reasonable periods of vacation* leave. The leave of absence requested here is admittedly not for vacation purposes.

Of decisive importance in resolving this question are Sections 503.241 and 503.24, Revised Code, which read in pertinent part as follows:

Section 503.241 :

“Whenever any township officer ceases to reside in the township, or is absent from the township for ninety consecutive days, except in case of sickness or injury as provided in this section, his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office.

“Such vacancy shall be filled in the manner provided by section 503.24 of the Revised Code. Whenever any township officer is absent from the township because of sickness or injury, he shall cause to be filed with the board of township trustees a physician’s certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of the ninety consecutive days of absence from the township, his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office.

“This section shall not apply to a township officer while in the active military service of the United States.”

Section 503.24, Revised Code, reads in part :

“If, by reason of the nonacceptance, death, or removal of a person chosen to an office in any township at the regular election, or if there is a vacancy from any other cause, the board of township trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term. * * *”

In Opinion No. 243, Opinions of the Attorney General for 1957, p. 68, I had occasion to consider Section 503.241, Revised Code, and held :

“Thus, under this statute if a township clerk absents himself for a period of 90 consecutive days, except in case of sickness or injury as provided, or is in the active military service of the United States, the board of township trustees *must* declare a vacancy in the office. Such a vacancy *shall* be filled in accordance with Section 503.24 of the Revised Code.” (Emphasis added)

It can hardly be contended that a board of township trustees has the implied power to grant a township clerk a nine-month leave of absence such as requested here when the above statutes enjoin upon them a specifically antagonistic duty.

In my Opinion No. 243, *supra*, I discussed the application of Section 507.02, Revised Code, and stated :

“Section 507.02 of the Revised Code sets forth quite clearly the circumstances under which the township trustees may appoint a deputy township clerk. It provides that when a township clerk is unable to carry out the duties of his office as a result of illness,

or because of his entry into the military service of the United States, or is otherwise incapacitated or disqualified, the township trustees shall appoint a deputy clerk who shall have full power to discharge the duties of the office. Section 507.02 reads as follows:

“When a township clerk is unable to carry out the duties of his office because of illness, because he has entered the military service of the United States, or because he is otherwise incapacitated or disqualified, the board of township trustees shall appoint a deputy clerk, who shall have full power to discharge the duties of such office. Such deputy clerk shall serve during the period of time the clerk is absent or incapacitated, or until a successor clerk is elected and qualified. Before entering on the discharge of his duties the deputy clerk shall give bond, for the faithful discharge of his duties, as required under section 507.03 of the Revised Code. The board shall, by resolution, adjust and determine the compensation of the clerk and deputy clerk. The total compensation of both the clerk and any deputy clerk shall not exceed the sums fixed by section 507.09 of the Revised Code in any one year.’

“Therefore, before the township trustees may appoint a deputy clerk to discharge the duties of the office during the clerk’s absence, they must find the clerk’s inability to perform the duties of the office is based on one or more of the reasons as set out in Section 507.02 of the Revised Code. *Mere absence alone would not, in my opinion, permit the invoking of the provisions of this section.*” (Emphasis added)

If the township clerk entered upon the performance of the foreign employment contract, which would absent him from the township for nine months, his inability to carry out the duties of his office would not be the result of illness, or entering the military service of the United States, or incapacity or disqualification. His inability to carry out the duties of his office would stem solely from his absence from the township. I conclude, therefore, that Section 507.02, Revised Code, is not to be applied in this situation.

Specifically answering your question it is my opinion, and you are accordingly advised, that a board of township trustees has no authority to grant a duly elected, qualified and acting township clerk a nine-month leave of absence to enable such clerk to perform a foreign employment contract.

Respectfully,
WILLIAM SAXBE
Attorney General