

In the body of the opinion the court indicated that the presumption is that the supervisors in awarding the contract have exercised a sound discretion and the burden of proof rests upon one attacking their action to establish a state of facts which would constitute an abuse of such discretion. The court in its opinion further pointed out that such discretion can be attacked only when there are present some "equitable grounds of fraud or mistake, or find the discretion or award to be wrongful, fraudulent, collusive or arbitrary." The following is quoted from the opinion:

"The remotest and slightest increase of chances of anything interfering with the franchises of ninety thousand electors on the day of election as against an increased cost of two hundred dollars presents a ponderable question which might well honestly be resolved one way or the other."

It will be noted that in the above case, the contract was awarded to one whose bid was two hundred dollars higher than the lowest bid. In the case you present there is only a difference of fifty dollars and fifty cents. In view of the foregoing decision the conclusion must be reached that a board of deputy state supervisors of elections is not required to award the contract to the lowest bidder but may award it to the high bidder, if, in its sound discretion, the facts and circumstances justify such an award. Undoubtedly, the ability of the bidder successfully to furnish ballots, to the end that a proper election can be held, is one of the factors that may properly be taken into consideration. The discretion of the board in making an award will not be disturbed unless a showing is made which will justify a court in holding there has been an abuse of discretion. What constitutes an abuse of discretion in a given case is a question of fact which is not within the authority of the Attorney General to determine. In other words, your inquiry presents a question wherein the Attorney General can only advise you as to the rule of law which may be applied to all of the facts surrounding the transaction.

You are therefore advised that the board of deputy state supervisors of elections may, in its sound discretion, award a contract for the printing of the ballots to the lowest responsible bidder, even though such bidder is not the lowest bidder. Such action of the board will not be disturbed unless a clear showing is made to the courts that its action constitutes an abuse of discretion. Whether or not such action constitutes an abuse of discretion in a given case is a question of fact, which must be determined from all of the circumstances.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2636.

CEMETERY—EXPENDITURES BY UNION CEMETERY TRUSTEES—  
AUTHORIZATION BY JOINT RESOLUTION OF MUNICIPAL COUN-  
CIL AND TOWNSHIP TRUSTEES WHEN AMOUNT EXCEEDS \$500—  
EXCEPTIONS NOTED—PROCEDURE AFTER RESOLUTION.

**SYLLABUS:**

*When an expenditure in excess of \$500.00 is made by union cemetery trustees elected by authority of Section 4193-1, General Code, other than for the compensation of persons employed by such trustees, such expenditure must first be authorized by resolution of the joint board consisting of the council or councils of the municipal corporation or corporations and trustees of the township, which own the cemetery in common. When so author-*

*ized and directed, the cemetery trustees are required to make a written contract with the lowest and best bidder after advertisement for not less than two or more than four consecutive weeks in a newspaper of general circulation in the subdivisions owning the cemetery.*

COLUMBUS, OHIO, September 28, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—I am in receipt of your inquiry which reads as follows:

“Section 4193-1, G. C., provides in part that union cemetery trustees shall have all the powers and perform all the duties exercised and performed by Directors of Public Service of municipalities under Sections 4161 and 4168, G. C., inclusive.

Section 4326, G. C., provides that the Director of Public Service shall manage cemeteries, etc.

Section 4328, G. C., provides in part that when an expenditure within the Department of Public Service, other than the compensation of persons employed therein, exceeds \$500.00 such expenditure shall first be authorized and directed by ordinance of Council, bids must be advertised for and a contract entered into with the lowest and best bidder.

When a village has joined with a township, established a cemetery, and elected a Board of Trustees, as provided in Section 4193-1, G. C., must such Board advertise for bids when an expenditure will exceed \$500.00?

Must the authorization and direction of Council and the Board of Township Trustees be obtained before such expenditure may be made?”

By authority of Sections 4183, et seq., General Code, two or more municipal corporations, or one or more of such corporations and a township conveniently located, may unite in establishing and maintaining a cemetery. These sections, insofar as pertinent to your inquiry, provide in part as follows:

Section 4183. “The councils of two or more municipal corporations, or of such corporation or corporations, and the trustees of a township or townships, when conveniently located for that purpose, may unite in the establishment and management of a cemetery, by the purchase or appropriation of land therefor, not exceeding in extent one hundred acres, to be paid for as hereinafter provided.”

Section 4188. “The expense of the purchase, or of the proceedings in case of appropriation, and the damages awarded, or both, shall be borne by the corporations and townships in proportion to the property of each on the duplicate for taxation. \* \* \*”

Section 4189. “The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation.”

Section 4192. “In case of a union for cemetery purposes between a municipal corporation and a township, the council of the corporation and the trustees of the township shall have a joint meeting at the council-chamber

of the corporation, on the day of the first regular meeting of the council in the month of May of each year, for the purpose of determining the rate of tax to be levied upon the taxable property of the corporation and the township for the purposes herein required. Upon the passage of a joint resolution by a majority of the members of the council and the trustees, fixing the rate of taxation, the clerk of the corporation shall certify such rate to the auditor of the county for assessment and collection. If there is more than one municipal corporation or township united for such purposes, the councils and trustees of the townships shall become such joint body with the same powers as if there had been one such corporation and township, and the clerk of the corporation containing the greatest number of inhabitants shall certify to the auditor as above provided, the rate of taxation."

Section 4193. "The trustees of such township or townships, or the council or councils of such municipal corporation or corporations may at any time call a joint meeting of the council or councils and the trustees of the township or townships, on a reasonable notice given by either, for the purpose of making joint rules and regulations for the government of the cemetery, or changing them, and making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise."

Section 4193-1. "At any such joint meeting or at the joint meeting provided for by Section 4192 of the General Code, by a majority vote of all present counting council members and trustees, such meeting may elect a board of cemetery trustees consisting of three members, of which one or more must be a member of each of the separate boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting. Such board of cemetery trustees so elected, shall have all the powers and perform all the duties exercised and performed by directors of public service of municipalities under Sections 4161 and 4168, inclusive, of the General Code. \* \* \*"

Section 4194. "In joint meetings, each member of the councils and each of the trustees shall have one vote in determining all questions. The proceedings of joint meetings shall be recorded by the clerk of the corporation having the greatest number of inhabitants."

Sections 4326 and 4328, General Code, read in part as follows:

Section 4326. "The director of public service shall manage municipal water, lighting, \* \* \* cemeteries \* \* \*".

Section 4328. "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditures shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two or more than four consecutive weeks in a newspaper of general circulation within the city."

Authority to establish union cemeteries by the council of an incorporated village and the trustees of the township in which the village is situated, was granted by an

act of the General Assembly passed in 1860 (57 O. L. 44). This authority was later extended to a city, as well as a village (66 O. L. 212, Section 377), and still later to one or more cities or incorporated villages, when conveniently located (68 O. L. 73). Section 2532, Revised Statutes, as it appears in the Revised Statutes of 1880, reads practically the same, except as to immaterial changes in phraseology made in the codification of 1910, as does Section 4183, General Code, in its present form. Succeeding sections of the Revised Statutes at that time (1880), and until the codification of 1910, provided for the control and management of such joint cemeteries by a board of trustees elected by the council or councils of a municipal corporation or corporations and trustees of the township interested. Sections 2532 et seq., Revised Statutes, were codified in 1910 as Sections 4183 et seq. of the General Code. As codified, Sections 4184 and 4185, General Code (formerly Sections 2533 and 2533a of the Revised Statutes), provided for the appointment of a joint board of trustees for union cemeteries, and Section 4189, General Code (formerly Section 2537 of the Revised Statutes), read as follows:

“The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation.”

In 1913, Sections 4184 and 4185, General Code, were repealed, and Section 4189 was amended to read as it now does. From 1913 until the enactment of Section 4193-1, General Code, in 1915 (106 O. L. 345), there was no provision made for the management of union cemeteries of this character by the appointment of a joint board of trustees. Section 4193-1, General Code was somewhat changed by amendment in 1920 (108 O. L. part 2, 1179), but so far as concerns our present inquiry the changes then made were immaterial.

By the terms of Section 4193-1, General Code, the powers conferred and duties imposed on a joint board of cemetery trustees, elected by authority of said section, are the same as those exercised and performed by directors of public service of municipalities, under Sections 4161 to 4168, inclusive of the General Code of Ohio.

Section 4161, General Code, reads as follows:

“The director of public service shall take possession and charge, and have the entire management, control, and regulation of public graveyards, burial grounds, and cemeteries located in or belonging to the corporation, subject to its ordinances. When he deems it necessary, he shall direct the laying them out into lots, avenues, walks, and paths, or other subdivisions, which lots shall be numbered and the avenues named. A plat thereof shall be made so as to exhibit a fair and distinct outline of the grounds, and kept in the office of the auditor of the corporation for the use of the public.”

Succeeding sections, viz. Sections 4162 et seq. of the General Code, set forth a part of the details to be observed in the management, control and regulation of public cemeteries located in cities.

The statutes pertaining to cemeteries for cities, Sections 4160 et seq. of the General Code, as well as those pertaining to union cemeteries, Sections 4183 et seq. of the General Code, were enacted as chapter 26 of the Municipal Code of 1868 (66 O. L. 210, Sections 361 et seq.). Those pertaining to cemeteries for cities and villages later became Sections 2517 et seq. of the Revised Statutes. Section 2517, Revised Statutes, contained provisions with reference to the title to cemeteries similar to those now contained in Section 4160, General Code, and applied to both cities and villages.

Sections 2518, 2519 and 2520, provided for the appointment of a board of trustees for the management of such cemeteries. Sections 2521 to 2531, inclusive of the Revised Statutes, set forth the duties and powers of the trustees. These sections remained practically in the same form as when enacted in 1868 until 1902, when, upon the adoption of the municipal code (96 O. L. 20), Sections 2518, 2518a, 2519 and 2520, Revised Statutes, were specifically repealed (96 O. L. 101), thereby abolishing boards of trustees for cemeteries in both cities and villages. Sections 2521 to 2531, inclusive of the Revised Statutes, were, however, specifically retained in force by Section 8 of the Municipal Code of 1902 (96 O. L. page 26), although the boards of trustees had been abolished. Section 2518, Revised Statutes, was reenacted in 1904 (97 O. L. 538), although by its terms as enacted in 1904, it applied only to villages.

The Municipal Code of 1902, provided that the directors of public service as administrators of the department of public service should have the management of cemeteries in cities (96 O. L. 66); and the same provision was made in the Code of 1908 (99 O. L. 563) with reference to the director of public service in cities. In the fourth, fifth and sixth edition of Bates Revised Statutes, published in 1903, 1905 and 1906, respectively, Sections 2521 to 2531, inclusive of the Revised Statutes were published in the exact phraseology as they had formerly read; that is, they contained provisions relating to the duties of trustees of cemeteries in municipalities although such trustees in both cities and villages had been abolished in 1902 and were revived, as to villages only, in 1904.

Upon the codification of 1910, the codifying commission divided Section 2517 of the Revised Statutes, which applied to both cities and villages, and carried it into the Code as Section 4160, General Code, applying to cities and Section 4174, General Code, applying to villages, which sections have not since been changed. Section 2518, Revised Statutes, as enacted in 1904 (97 O. L. 538), was codified as Sections 4175, 4176, 4177 and 4178, General Code. These sections also have remained until the present time as codified. Sections 2521 to 2531, inclusive of the Revised Statutes, were codified as Sections 4161 to 4173, inclusive of the General Code. The phraseology of these sections was changed by the codifying commission so as to make them apply to the director of public service instead of cemetery trustees as before, apparently for the purpose of making them conform to the manifest intention of the Legislature in abolishing boards of trustees for cemeteries in cities and reposing the duty of managing such cemeteries in the director of public service.

Although the Legislature in enacting Section 4193-1, General Code, in 1915, did not refer to Section 4326, General Code, which was the specific section of the Municipal Code of 1902, directing that the director of public service should manage cemeteries, it did refer to Sections 4161 to 4168, inclusive of the General Code, which then read as they now do. These sections, together with Section 4736, General Code, when read in the light of their legislative history clearly place the management of cemeteries in cities in the director of public service as the administrator of the department of public service. This being true, all expenditures and contracts made for material and supplies, or work done in furtherance of the management of such cemeteries, would be expenditures within the department of public service, and must first be authorized by council and contracts must be let upon competitive bidding, when such expenditures exceed \$500.00, as provided by Section 4328, *supra*, and it would seem to follow that this same procedure must be followed by trustees of union cemeteries.

Some misapprehension has arisen with reference to this question here involved by reason of the fact that there appears in one of the standard publications of the General Code, in general use, an annotation to Section 4162, General Code, which reads:

"It is not necessary to advertise for or receive bids for the work or materials provided for under this section."

citing the case of *Walsh vs. Columbus*, 36 O. S. 169. The case of *Walsh vs. Columbus* was decided by the Supreme Court of Ohio in 1880. It went no further than to hold that cemetery trustees acting under Section 367 of the Municipal Code then in force, were not required to advertise for, or receive bids for the work or materials that go into an improvement, for the reason that the requirements of law then in force with reference to letting public contracts upon competitive bidding did not apply to cemetery trustees. Section 367 of the Municipal Code was Section 2522, Revised Statutes, which was codified with the changes noted above, as Section 4162, General Code. Since the codification and the several changes in the statutes to which I have heretofore referred, the provisions of Section 4528, General Code, with respect to public bidding, now apply to directors of public service in their management of cemeteries in cities, and the Walsh case has no application whatever under the present law.

Since the statute provides that when an expenditure within the department other than for the compensation of employes, exceeds \$500.00 in cost, it must first be authorized by council, and since in my opinion, this provision applies to joint cemetery trustees, it becomes pertinent to inquire which council or which board must first make an authorization before the expenditure may be incurred.

The council or councils of any municipal corporation or corporations and the trustees of a township, which own a cemetery in common, are constituted by law a joint board for the control and management of the affairs of the cemetery (Sections 4189 to 4192, General Code). By the terms of Section 4193, General Code, a joint meeting of the boards may be held at any time for the transaction of any business which may legally come before it, and especially for the making of such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise.

It seems clear that this joint board bears the same relation to the board of cemetery trustees that a city council does to the director of public service in cities, and therefore the authorization to expend more than \$500.00 should be made by this joint board of councils and township trustees.

It is therefore my opinion that when an expenditure in excess of \$500.00 is made by union cemetery trustees elected by authority of Section 4193-1, General Code, other than for the compensation of persons employed by such trustees, such expenditure must first be authorized by resolution of the joint board consisting of the council or councils of the municipal corporation or corporations and trustees of the township which own the cemetery in common. When so authorized and directed, the cemetery trustees are required to make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation in the subdivisions owning the cemetery.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2637.

APPROVAL, BONDS OF THE VILLAGE OF MONTPELIER, WILLIAMS  
COUNTY, OHIO—\$29,000.00

COLUMBUS, OHIO, September 28, 1928.

*Industrial Commission of Ohio, Columbus, Ohio.*