

1112.

BUREAU OF AERONAUTICS—POWER OF DIRECTOR TO CREATE SPECIFIC AIR-MARKING DIVISION, DISCUSSED.

SYLLABUS:

Powers and duties of the Director of Aeronautics with reference to creating a Division of Air-Marking within the Bureau of Aeronautics, and the manner of compensating the chief of such division discussed.

COLUMBUS, OHIO, October 28, 1929.

HON. JOHN M. VORYS, *Director of Bureau of Aeronautics, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

"I enclose herewith a proposal for the creation of a Division of Air-Marking within the Bureau of Aeronautics, together with a copy of the Ohio law and regulations with reference to air-marking. Will you please tell me whether I have authority under the law to create such a division in such a way? If I can do so, is the appointment of the chief of division subject to civil service regulations, to competitive bidding, or to any other regulation or limitation? I have but one other employee in the Bureau of Aeronautics.

As to the sixty-day period provided by law after notice to air-mark will elapse on October 7th, I am anxious to have your opinion as early as possible, in order to proceed with the creation of an Air-Marking Division."

The proposal which you enclose is as follows:

"A PROPOSAL for creation of a Division of Air-Marking in the Bureau of Aeronautics:

Under the law, General Code, Section 6310-44, the Director of Aeronautics, in the event of a failure on the part of any municipality to air-mark itself in accordance with the rules and regulations made by the director within sixty days after notice requiring such marking, 'Director of Aeronautics may cause such marking to be effected or maintained, and charge the cost thereof to such municipality, which shall in no case exceed the amount of twenty-five dollars.'

It is proposed to create a Division of Air-Marking within the Bureau, and to appoint a chief of such division upon the following terms:

1. The Bureau of Aeronautics will compile a list of municipalities which are not air-marked, and will use its best efforts, through correspondence, to obtain a suitable location for an air-marker in each municipality with the permission of the owner of such location to use the same.

2. The Bureau of Aeronautics agrees to use its best efforts to collect the cost of such marking from such municipality, and to pay the same, when collected, to the chief of the division of air-marking as his sole compensation.

3. The chief of the Division of Air-Marking agrees to paint air-markers in accordance with the regulations issued by the Bureau of Aeronautics, in the municipalities designated by the Director of Aeronautics, and at the locations indicated by him in such municipality, at a cost not to exceed twenty-five dollars per municipality.

4. The chief of said division agrees to maintain such division out of

said compensation, and to paint such air-markers at the rate of twenty per calendar month, beginning with the date of his appointment.

5. The chief of said division shall provide a bond in the penal amount of five thousand dollars, conditioned upon the faithful performance of his duties, and indemnifying and saving harmless the Bureau of Aeronautics, the Director of Aeronautics, and the State of Ohio from and against all claims, demands, liabilities, costs, and judgments arising out of said work of air-marking or caused by said chief of said division."

Section 6310-38 of the General Code, provides in part as follows:

"There is hereby created a Bureau of Aeronautics which shall be administered by a Director of Aeronautics referred to hereafter in this act as the director. The Director of Aeronautics shall be appointed by the Governor of the State and shall serve at his pleasure. He shall be paid a salary of \$3,600.00 per annum. It shall be the duty of the director to, and he shall, administer and enforce the provisions of this act, and for such purpose he is authorized to make and enforce such regulations as are necessary to execute the functions vested in him, including regulations governing the marking of communities, which regulations shall conform to and coincide with, so far as possible, the provisions of the air commerce act of 1926 and amendments thereto passed by the congress of the United States, and air commerce regulations, issued pursuant thereto.

The director may appoint such number of deputies, inspectors, clerks, stenographers, and other employees as may be necessary for such purpose and fix their compensation. The salaries and the actual and necessary expenses incurred by the director or any of his subordinates, not over an amount of six thousand dollars per annum, when approved by the Governor of the State, shall be paid from the state treasury on the warrant of the Auditor of State. * * * "

The salient points of your proposal appear to me to be as follows: first, the creation of a Division of Air-Marking within the Bureau of Aeronautics, and second, the appointment of a chief for such division whose sole compensation is the money collected from municipalities where markers are effected and maintained by the Director of Aeronautics.

The courts have repeatedly held that officers, boards and commissions created by statutes have only such powers as are expressly conferred by statute together with such implied powers as are necessary to carry into effect the powers expressly granted. The validity of your proposal depends upon whether or not the Director of Aeronautics has authority under the provisions of Sections 6310-38, et seq., of the General Code, to carry out its terms. Under the provisions of Section 6310-38, the Director of the Bureau of Aeronautics has authority to administer and enforce the provisions of the act creating a Bureau of Aeronautics (Sections 6310-38 to 6310-44, inclusive). As chief administrative officer of the Bureau of Aeronautics, the director is authorized to appoint such number of deputies, inspectors, clerks and stenographers as may be necessary to execute the functions of the Bureau.

While the act creating the Bureau of Aeronautics designated the appointees of the Bureau as deputies, inspectors, clerks and stenographers, such designation does not preclude the Director of the Bureau from creating certain divisions within the Bureau of Aeronautics and assigning employees of the Bureau as heads of the divisions so created. However, this can only be done for purely administrative purposes and such employes so designated by the director may only perform such duties

as the act authorizes. In other words, the mere naming of a deputy or other employe as chief of a division within the Bureau is within the scope of the authority of the Director of the Bureau as an administrative officer of the same.

Therefore, as to the first point set forth by me, I believe that the Director of Aeronautics has authority to create a Division of Marking within his Bureau.

As to the second point, Section 6310-44, General Code, is pertinent and reads as follows:

"The legislative authority of each and every municipality in the State of Ohio shall cause said municipality to be marked for aeronautical purposes, and maintain such marking, subject to and in accordance with law and such rules and regulations as may from time to time be made by the Director of Aeronautics in that regard, the costs thereof to be paid from the general fund. In the event of a failure on the part of such legislative authority of any municipality so to act, and sixty days after notice requiring such marking or the maintenance thereof, duly served by the Director of Aeronautics upon the clerk of such municipality, said Director of Aeronautics may cause such marking to be effected or maintained, and charge the cost thereof to such municipality, which shall in no case exceed the amount of \$25.00. It shall then be the duty of the taxing authority of such municipality to include the cost thereof, in accordance with the duly certified statement of costs filed by the Director of Aeronautics with said body, and the auditor of the respective county, in the next succeeding budget of said municipality; and the budget commission of the county shall allow the same without deduction, and insert it in such budget in case it be omitted, and it shall then be the duty of such county auditor to withhold such amount from the first semi-annual tax collection and remit the same to the said Director of Aeronautics."

This section gives the director authority to cause markings to be made and maintained in a municipality for aeronautical purposes where the legislative authority of a municipality fails to provide markings or maintain them. In such case the cost is to be charged to the municipality and when the costs are collected in the manner provided in Section 6310-44, they are to be remitted to the Director of Aeronautics. Apparently by the provisions of Sections 6310-44 and 6310-38 of the General Code, the Director of Aeronautics has authority to incur the expense of effecting and maintaining the markers in such cases where the legislative authority of the municipality fails to do so, and the expense of such work by the director may be paid out of the state treasury when it is approved by the Governor. However, when the money collected from the municipalities is remitted to the Director of Aeronautics, he is required by virtue of the provisions of Section 24 of the General Code, to pay the funds into the state treasury.

Section 24 of the General Code, provides in part as follows:

"On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the Treasurer of State all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the Auditor of State a detailed, verified statement of such receipts.

* * * "

It is apparent from a reading of Section 24, that the Director of Aeronautics has no authority at law to pay the money remitted to him from collections of a municipality in the manner provided in paragraph 2 of your proposal, but is required to pay this money into the state treasury. While the Director of Aeronautics may appoint employes and assign the duties as proposed in the terms of your proposal, there is no authority to compensate such employes in the manner set forth in your proposal. Such compensation must be paid out of the appropriations made by the General Assembly for the Department of Aeronautics.

The Director of Aeronautics has authority to contract with persons to furnish labor and material for painting markers in municipalities where the legislative authority fails to act, at a cost not to exceed twenty-five dollars for the markers of each municipality. The contract price, however, must be paid out of the funds appropriated for the Bureau of Aeronautics by the General Assembly. The Director of Aeronautics must let such contracts by competitive bidding unless the Controlling Board authorizes the same to be done otherwise.

Section 7 of House Bill No. 510 passed by the 88th General Assembly, which is the act commonly known as the general appropriation act, provides in part as follows:

"If the order and invoice drawn against any appropriation herein made is for labor and materials furnished or for commodities purchased it shall show that the same was furnished or purchased pursuant to competitive bidding and that the lowest and/or best bidder was awarded the contract, unless the Controlling Board shall have authorized the furnishing of such labor or material or the purchase of such commodities without competitive bidding. * * * "

Your attention is directed at this point to the fact that the act creating the Bureau of Aeronautics, limits the amount that may be expended for salaries and actual and necessary expenses of the Bureau of Aeronautics to six thousand dollars per year. The salary of the Director is fixed at thirty-six hundred dollars per year, thus leaving only twenty-four hundred dollars for the expenses and other salaries of the Bureau. The 88th General Assembly by House Bill No. 510, appropriated five thousand dollars per year for personal service and one thousand dollars a year for the maintenance of the Division of Aeronautics. I have directed your attention to this fact because of the provisions of Section 2288-2 of the General Code, which are as follows:

"It shall be unlawful for any officer, board or commission of the State to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the Director of Finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

It must therefore be concluded that while the Director of Aeronautics has authority to create a Division of Markers within the Bureau of Aeronautics and appoint a chief for such a division, he does not have authority to carry out the terms of the proposal submitted by you for the following reasons:

1. The Director of Aeronautics is required by virtue of Section 24 of the General Code, to pay all moneys remitted to him into the state treasury.
2. Employes of the Bureau of Aeronautics can only be lawfully paid from funds appropriated by the General Assembly for such purpose.
3. All contracts for material and labor should be let by competitive bidding unless the Board of Control authorizes the same to be done otherwise and the contract

price of such contracts must be paid out of funds appropriated by the General Assembly for the Bureau of Aeronautics.

The General Assembly only appropriated six thousand dollars for salaries and actual and necessary expenses of the Bureau of Aeronautics, and also by the terms of the act creating such Bureau, limited the expenditure of salaries and expenses to six thousand dollars, so that the funds of the Bureau of Aeronautics are nearly exhausted and the Director of Aeronautics cannot enter into any contract or pass any resolution for expenditure of money unless the Director of Finance certifies that there is a balance in the appropriation pursuant to which such obligation is required to be paid not otherwise obligated to pay precedent obligations.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1113.

APPROVAL, LEASE TO ABANDONED MIAMI AND ERIE CANAL LANDS
IN THE CITY OF DEFIANCE, DEFIANCE COUNTY.

COLUMBUS, OHIO, October 28, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have this day submitted for my examination and approval a certain canal land lease in triplicate, by which the State of Ohio, through you as Superintendent of Public Works, is leasing and demising to one John A. Aspacher, Jr., of Defiance, Ohio, a certain tract and parcel of abandoned Miami and Erie canal lands, located in the City of Defiance, Defiance County, Ohio, and more particularly described as follows:

“Beginning at a point in the northerly line of Second Street in said city that is 131.6 feet, as measured along the northerly line of Second Street, westerly from the westerly line of Clinton Street, and running thence westerly with the northerly line of Second Street, eighty (80) feet; thence northerly at right angles to Second Street, one hundred and thirty-four (134) feet, more or less, to a line one foot north of the south end of Lock No. 38; thence easterly parallel with Second Street, eighty (80) feet; thence southerly, one hundred and thirty-four (134) feet, more or less, to the place of beginning and containing ten thousand, six hundred and twenty (10, 620) square feet, more or less.”

It appears that the above described parcel of abandoned Miami and Erie canal lands is a portion of such abandoned canal lands through the City of Defiance, Ohio, which has not been included in any application by said city for the lease of the same and that under the provisions of Section 18 of the Act of April 15, 1925 (111 O. L. 208), you are authorized to lease this property to the lessee above named.

An examination of the provisions of said lease shows that the same as to its terms and conditions is in conformity with the provisions of the special act of the Legislature, above referred to, providing for the abandonment of the canal lands here in question, and with other statutory provisions relating to the lease of canal lands.