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1. ROAD AND BRIDGE MAINTENANCE—REPAIR—COUNTY—FORCE ACCOUNT—COUNTY COMMISSIONERS—NO AUTHORITY TO CARRY ON SUCH WORK—WHERE COMMISSIONERS ELECT TO HAVE SUCH WORK DONE IN SUCH MANNER, THEY HAVE NO DISCRETION BUT TO COMMIT EXECUTION OF WORK TO COUNTY ENGINEER—SECTIONS 6948-1, 7198 ET SEQ., G. C.—O.A.G. 2460, 1921, PAGE 895, APPROVED AND FOLLOWED.
2. WHERE COST ESTIMATES, PLANS AND SPECIFICATIONS FOR COUNTY ROAD AND BRIDGE MAINTENANCE AND REPAIR PROJECTS HAVE BEEN PREPARED AND SUBMITTED BY COUNTY ENGINEER TO COUNTY COMMISSIONERS—COMMISSIONERS FAILED TO TAKE ACTION BUT FUNDS HAVE BEEN APPROPRIATED—RESOLUTION CONSTITUTES IMPLIED AUTHORIZATION FOR COUNTY ENGINEER TO PROCEED WITH PROJECTS UNDER SECTION 7198 ET SEQ., G. C.

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.

Columbus, Ohio, September 25, 1951

Hon. William H. Irwin, Prosecuting Attorney
Belmont County, St. Clairsville, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Considerable difference of opinion exists between the County Commissioners of Belmont County and the County Engineer as to the manner and method that can be used in the maintenance and repair of county roads and bridges.

“The County Engineer is under the impression that the only method or manner in which the maintenance or repair of county roads and bridges can be done is through force account or by contract.

“At the present time the County Commissioners appropriate so much money to the Engineer for the maintenance and repair of roads and bridges. The employees used for such maintenance are hired by the County Engineer. The payroll is then made up and approved by the Engineer and then submitted to the Commissioners for their approval. The payroll is then sent to the County Auditor who makes the distribution of payments to the employees.

“Under date of January 26, 1951, our County Auditor re-

ceived a letter from the Bureau of Inspection and Supervision of Public Offices in which the following information is set forth:

“During our recent telephone conversation we discussed the powers and duties of the County Commissioners with regard to the county maintenance crew when the commissioners had not given the County Engineer authority to proceed by force account in the maintenance, repair, construction, reconstruction and improvement of roads, bridges and culverts.

“Section 7198, General Code, grants authority to the County Commissioners to permit any type of force account work covered by their resolution. This authority may be limited in its scope, or may grant authority to proceed in all of these activities.

“It was our understanding that the Commissioners of your county have granted no force account authority to the Engineer, except on certain specific projects. If this be the case, it will be necessary for the Commissioners to fix the compensation of the several types of labor employed, purchase all material and approve all bills presented for payment in connection with work not specifically covered by force account resolution.’

“In some instances force accounts are authorized by the Board of County Commissioners for construction. However, most of the construction work is done by contract. The Engineer feels that working under the conditions as outlined in the last paragraph of Deputy Supervisor, Noble, of the Bureau of Inspections, he cannot hire the necessary labor, fearing that the Commissioners will not sign the payroll if the employees as hired by the Engineer do not meet with their approval. Likewise, the Engineer feels that the purchasing methods as outlined in the last paragraph of Mr. Noble’s letter is in direct disagreement with an opinion rendered by the Attorney General in 1935, No. 4767.

“The County Engineer maintains that the approval of the County Commissioners should not be needed and that all maintenance and repair work on county roads and bridges should be done through force account, unless done by contract.

“I would appreciate your opinion in this matter at your earliest convenience.”

As to your statement relative to the appropriation of funds for use by the Engineer, I understand that the county commissioners customarily include in their annual appropriation resolution certain funds for the use of the county engineer expressly designated for expenditure on (1)

“labor employed direct” and (2) “materials”, both under the classification of (a) maintenance and repair of roads, and (b) maintenance and repair of bridges.

The provisions of Section 7198, General Code, are as follows :

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

The authority of the county commissioners to choose between the contract method and the force account method in the maintenance and repair of roads is found in Section 6948-1, General Code, which reads as follows:

“Before undertaking the construction, reconstruction, widening, resurfacing, repair or improvement of a road, the county commissioners shall cause to be made by the county surveyor an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment and all other items of cost and expense. If the county commissioners deem it for the best interest of the public they may, in lieu of constructing such work by contract, proceed to construct the same by force account. Where the total estimated cost of the work exceeds three thousand dollars per mile, the commissioners shall be required to invite and receive competitive bids for furnishing all the labor, material and equipment and doing the work, provided in section 6945 of the General Code, and to consider and to reject the same, before ordering the work done by force account. When such bids are received, considered and rejected, and the work done by force account; such work shall be performed in compliance with the plans and specifications upon which the bids were based. The provisions of this section shall apply both to new construction and to repair work.”

Here it is to be observed that while this section authorizes the commissioners to choose one method or the other with respect to particular work, nothing in this section authorizes the *commissioners themselves* to carry on force account projects. On this point we find the following statement in Opinion No. 2460, Opinions of the Attorney General for 1921, pp. 895, 896:

“The whole subject of force account work was dealt with at considerable length in two recent opinions of this department of date September 10, 1921, being opinions Nos. 2411 and 2412,

directed respectively to Hon. John R. King, prosecuting attorney, Columbus, Ohio, and Hon. Walter B. Moore, prosecuting attorney, Woodsfield, Ohio. Copies of these opinions are enclosed. It is believed that you will find that they practically answer the question you have in mind. However, it may be added that, as noted in opinion No. 2411, *section 6948-1 is a statute of limited application, and merely authorizes the county commissioners to adopt the force account method instead of the contract method of completing road projects formally undertaken under sections 6906 et seq. So far then as the actual carrying out of the force account project is concerned, reference must be had to sections 7198 et seq.* Moreover, you will find that sections 7184 and 7192 give the surveyor general charge of the construction, reconstruction, improvement, maintenance and repair of all bridges and highways under the jurisdiction of the county commissioners.

“Under these conditions, it is perfectly plain that your county commissioners are not at liberty to employ a road foreman for force account work, but must follow the procedure outlined in section 7198 G. C.” (Emphasis added.)

In the maintenance and repair of bridges the commissioners are authorized, under the provisions of Section 2343, General Code, to choose, in their discretion, to proceed by the contract method. This section is as follows:

“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 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.

“Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefore.”

In Section 7198, General Code, we have already noted that the com-

missioners may, as to bridge maintenance and repair, choose the alternate method of force account. These two distinct methods of procedure were noted and commented upon in Opinion No. 2411, Opinions of the Attorney General for 1921, p. 822, as follows:

“Said sections 7198, 7200 and 7214 do not repeal by implication sections 2343 to 2361, G. C. providing among other things for the construction and repair of bridges upon the competitive bidding plan. The two groups of sections provide distinct methods of bridge construction and repair; and when one group is resorted to for procedure, it must be followed to the exclusion of the other”.

If, as is said in Opinion No. 2460, *supra*, the commissioners may only proceed under the provisions of Section 7198, General Code, when they have decided upon the force account method, it must follow that when this method has been decided upon the commissioners have no alternative but to vest the county engineer with authority to carry the project forward as contemplated by that section. This view was adopted in Opinion No. 2106, Opinions of the Attorney General for 1930, p. 1136, the syllabus in which is as follows:

“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 commissioners.”

In this opinion, p. 1137, after quoting Section 7198, General Code, in full, the writer says:

“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 more 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.”

To the same effect is Opinion No. 3139, Opinions of the Attorney General for 1931, p. 527, the syllabus in which is as follows:

“When the county commissioners have authorized the sur-

veyor to construct or improve a road by force account, under the provisions of Section 7198 of the General Code, the surveyor has the sole power to contract with laborers with reference to the construction of such improvement, and the approval of the county commissioners is not required as a condition precedent to the payment of such wages."

In this view, I concur and I am the more strongly persuaded that such view is correct because the county engineer (formerly the county surveyor) is specially qualified by professional training and experience to carry on such work while the county commissioners are ordinarily not so qualified. I conclude, therefore, that if the force account method is determined upon by the county commissioners with respect to any road or bridge maintenance or repair work, the county engineer must be authorized, under the provisions of Section 7198, General Code, to employ the labor and to purchase the materials necessary to such work.

Here, one qualification should be noted. It may be observed that under the provisions of Sections 7203 and 7214, General Code, the commissioners are authorized, in particular circumstances to acquire certain road materials; and I see no reason why they may not reserve to themselves the right so to acquire such materials as may be deemed necessary rather than to confer full authority in this respect on the engineer. Thus, in Opinion No. 4139, Opinions of the Attorney General for 1935, pp. 400, 405, it is said:

"Thus, when the county commissioners passed the resolution, set forth above, authorizing the county surveyor to proceed under section 7198, General Code, and only reserving the right to purchase *materials* (as such commissioners possessed the right to do under sections 7203 and 7214, General Code), such commissioners only gave authority for the county surveyor to employ laborers and teams and to *lease* implements and tools necessary in the construction and repair of county roads and bridges. No authority was given the county surveyor to *purchase* implements and tools, as section 7198, General Code, does not authorize the commissioners to grant the county surveyor such a right."

We may now revert to the specific question presented by your inquiry, viz., the authority of the engineer to proceed by force account in road and bridge maintenance and repair work where the commissioners have not, by express resolution, conferred on such officer the authority so to do, but where the commissioners have, in an appropriation resolu-

tion, designated particular funds for his use (a) to hire labor and (b) to purchase materials.

It will be noted from the provisions of Section 6948-1, General Code, that before any road construction or improvement work can be undertaken by the county authorities the engineer is required to make estimates of the cost thereof for the information of the commissioners. The engineer's duty to prepare cost estimates, plans and specifications on proposed bridge construction and repair is stated in Section 2792, General Code. Moreover, Sections 7184 and 7192, General Code, give the engineer general charge of the construction, improvement, maintenance and repair of all bridges and highways under the jurisdiction of the commissioners.

In these circumstances it must often happen that the engineer will submit to the commissioners from time to time his estimates, plans and specifications for needed road and bridge repair work with respect to which estimates, etc., the commissioners take no express action to decide whether such work is to be done by contract or by force account, but do, by specific appropriation to the engineer of funds designated for expenditure for labor and materials, provide the engineer with funds sufficient to cover the expense of carrying on and completing such work by force account, Such is the situation in the instant case and the circumstances quite readily suggest an implied authorization in the resolution of appropriation for the engineer to proceed on force account.

If we bear in mind that the commissioners themselves have no authority to proceed by force account on such work otherwise than by authorizing the engineer so to proceed, and if we observe that the funds appropriated for the engineer's use in the hire of labor and purchase of materials can hardly be used otherwise than in furtherance of a force account project, we are compelled to conclude that such appropriation resolution is an implied blanket authority so to proceed as to any maintenance and repair work for which estimates have been submitted to the commissioners under the provisions of Section 6948-1, General Code, and with respect to which the commissioners have not elected within a reasonable time, to proceed by the contract method.

Respectfully,

C. WILLIAM O'NEILL

Attorney General