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1. CEMETERY OWNED IN COMMON BY TWO OR MORE MUNICIPAL CORPORATIONS OR A MUNICIPAL CORPORATION OR CORPORATIONS AND TRUSTEES OF A TOWNSHIP OR TOWNSHIPS—AUTHORITY TO CONTROL AND MANAGE—VESTED IN COUNCIL OR MUNICIPAL CORPORATION OR CORPORATIONS AND TRUSTEES OF TOWNSHIP OR TOWNSHIPS—EXERCISED BY JOINT ACTION OF SUCH BODIES—SUCH AUTHORITY MAY NOT BE DELEGATED TO OTHERS—SECTIONS 4189, 4192, 4193, 4193-1, 4194 G. C.
2. CEMETERY TRUSTEES' BOARD—POWERS AND DUTIES ELECTED PURSUANT TO SECTION 4193-1 G. C.—MAY NOT BE TRANSFERRED OR DELEGATED—CONTRACT ATTEMPTING SUCH ARRANGEMENT WOULD BE ILLEGAL.

## SYLLABUS:

1. The authority to control and manage a cemetery owned in common by two or more municipal corporations or a municipal corporation or corporations and the trustees of a township or townships, is by the provisions of Section 4189, General Code, vested in the council of the municipal corporation or corporations and the trustees of the township or townships, to be exercised by the joint action of such bodies pursuant to the provisions of Sections 4192, 4193, 4193-1 and 4194, General Code, and such authority may not be delegated to others.

2. The powers and duties of a board of cemetery trustees elected pursuant to the provisions of Section 4193-1, General Code, are defined by such section, and may not be transferred or delegated to others. A contract attempting such an arrangement must be considered illegal.

Columbus, Ohio, May 10, 1949

Hon. Vernon Lee, Prosecuting Attorney  
Tuscarawas County, New Philadelphia, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Within the corporate limits of the city of Dover is located a certain cemetery known as Maple Grove Cemetery, owned and operated jointly as a union cemetery by the City of Dover and the

Board of Trustees of Dover Township. Over a period of years endowment funds have been collected, but a situation has now arisen where the annual revenues produced by the operation of the cemetery are insufficient to operate it and to give same the necessary care and attention required by the rules and regulations of the union cemetery trustees. The Board of Township Trustees and the City Council of Dover, along with the union cemetery trustees now desire to place the active operation and administration of the cemetery under the direction of the Director of Public Service of Dover, said Board of Union Cemetery Trustees to remain in existence for the purpose of handling endowment funds now existing or which may hereafter arise, and to pay over the income from said endowment funds to the City of Dover, to be used toward maintenance and operation of said cemetery. The proposed agreement also provides that the Township Trustees and the City Council will pass all necessary legislation including levies or bond issues which may be necessary to pay its proportionate shares of the expense of operation. The agreement further allows the contracting parties to terminate the same upon giving of six month's notice in writing to the other parties.

"Your attention is respectfully directed to an opinion of the Attorney General in 1915 which may be found in Volume II thereof at page 1506, and being known as Opinion No. 717. In the light of this opinion and the above stated facts, all interested parties desire your opinion whether such a contract would be lawful under the provisions of Sections 4183 et seq. of the General Code of Ohio, particular emphasis being placed upon the question of delegation of powers and duties."

After considering your request for my opinion in its entirety I feel that the questions which it poses may be restated as follows :

1. May the council of a municipal corporation and the trustees of a township delegate the authority of management and control, or a part thereof, of a union cemetery organized and operated pursuant to the provisions of Section 4183 et seq. General Code, to the Director of Public Service of the municipal corporation?
2. May the powers granted to and duties imposed upon the board of cemetery trustees elected in accordance with the provisions of Section 4193-1 General Code, be transferred or delegated to the director of public service of the municipal corporation?

The questions are clearly related, even interdependent, and what for our purpose is dispositive of one is dispositive of the other. Both involve the question of whether discretionary powers and duties in the nature of

a public trust granted and defined by statute may be divested from those in whom the statute intended them to repose and thereupon be transferred to another.

Section 4189 General Code, in so far as pertinent to your inquiry reads 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. \* \* \*”

Sections 4190 and 4191 General Code, are not pertinent to your inquiry. Sections 4192 and 4193 General Code provide for joint meetings of council and trustees to make certain rules, which are referred to in the succeeding section.

Section 4193-1 General Code, provides in part as follows :

“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 the custody of the funds derived from the tax levy provided by section 4192, and it shall be the duty of the political subdivision to pay such funds to the cemetery board upon application of the board of cemetery trustees. Such board of 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 inclusive of the General Code, and such board of cemetery trustees shall together with other powers herein granted have the power to create a permanent endowment fund for the express purpose of keeping such cemetery clean and in good order and may add to the price regularly charged for lots therein a sum for said purpose or may receive gifts for said purpose or may enter into separate agreements with the purchasers of such lots whereby an agreed part of the purchase price of said lot or lots shall be and constitute a permanent fund, or may receive individual gifts for said fund, the income thereof to be used for the upkeep and care of such lot or lots and when any such fund or funds shall have been received or created, the same shall be a permanent fund for such use and the income therefrom shall

be used for the said purpose and for no other purpose and the principal sum shall be kept and invested under the same terms and conditions fixed by law for the investment of the funds of a minor or his guardian. \* \* \*

These two sections in the main prescribe and define the powers and duties of both the municipal council, township trustees and cemetery trustees and from a careful reading of them it is apparent that much of the power and authority granted by both of them may not be exercised without some measure of discretion, and that the duties imposed are in the nature of a public trust.

The rule is well settled that discretionary powers and duties which are in the nature of a public trust, are nondelegable. In enunciating this rule as Ohio law 32 O. Jur. at pages 946 and 947, has this to say :

“The rule as to the delegation of discretionary powers by an agent has been held applicable to public offices. In those cases in which the proper execution of the office requires the exercise of judgment or discretion on the part of the officer, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another. This rule is also frequently invoked in the case of municipal boards and officers. Whenever these boards and officers are vested with discretion and judgment, to be exercised in behalf of the public, the board or officer must exercise it in person and cannot, unless expressly or impliedly authorized so to do, delegate it to others.”

See also McQuillin on Municipal Corporations, Vol 1, (2nd Ed. Revised) Sections 393 and 394; idem Vol. 3, Sections 1271 and 1272.

Even though the Board of Union Cemetery Trustees would remain in existence “for the purpose of handling endowment funds now existing or which may hereafter arise” under the arrangement you propose, this does not alter the fact that they would be divesting themselves of practically all of the powers and duties reposed in them by Section 4193-1 General Code, were the plan under consideration adopted. It is my opinion that this would be doing by indirection that which may not be done directly. It is a well settled principle of law that this may not be done.

In Opinion No. 717, Opinions of the Attorney General for 1915, Vol. II, p. 1506, the then Attorney General had under consideration a similiar

question concerning a cemetery owned by the City of Kenton and by Buck, Goshen and Pleasant Townships. His opinion was :

“\* \* \* that the director of public service of Kenton as such is without authority to in any way manage or control a cemetery which is owned in common by that city, and, Buck, Goshen and Pleasant Townships.”

For the above reasons, it is my opinion in specific answer to your questions that :

1. The authority to control and manage a cemetery owned in common by two or more municipal corporations or a municipal corporation or corporations and the trustees of a township or townships is by the provisions of Section 4189 General Code, vested in the council of the municipal corporation or corporations and the trustees of the township or townships, to be exercised by the joint action of such bodies pursuant to the provisions of Sections 4192, 4193, 4193-1 and 4194, General Code, and such authority may not be delegated to others.

2. The powers and duties of a board of cemetery trustees elected pursuant to the provisions of Section 4193-1 General Code, are defined by such section, and may not be transferred or delegated to others. A contract attempting such an arrangement must be considered illegal.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.