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COUNTY COMMISSIONER, *FORMER* — SECTION 2407 G.C. GRANTS NO AUTHORITY TO SIGN HIS NAME, AFTER TERM EXPIRED, TO MINUTES, BOARD OF COUNTY COMMISSIONERS, MEETINGS HELD DURING HIS TERM OF OFFICE — VALIDITY OF RESOLUTIONS ADOPTED, BY BOARD, NOT AFFECTED, WHERE ONE COMMISSIONER FAILED TO SIGN RECORD OF MINUTES OF BOARD MEETING.

SYLLABUS:

1. *Section 2407 of the General Code grants no authority to a former county commissioner to sign his name to the record of minutes of a meeting of the board of county commissioners which was held during his term of office.*

2. *The fact that one of the county commissioners has failed to sign the record of the minutes of a meeting of a board of county commissioners, as directed by Section 2407 of the General Code, does not affect the validity of resolutions adopted by the board at such meeting.*

Columbus, Ohio, March 3, 1941.

Hon. Leo E. Carter, Prosecuting Attorney,
Caldwell, Ohio.

Dear Sir:

I am in receipt of your request for my opinion reading:

> "A County Commissioner's term of office, expiring on January 5th, 1941, at midnight and some 12 to 18 hours after the expiration of his term of office and after his successor takes office, obtains access to the Commissioners Journal and signs several minutes of meetings held during his term of office; thereby, attempting to pass on one of the minutes which only carried one commissioner's signature prior to his signing. What is the status of such a signature of an ex-official?"

The statutory provisions giving rise to your inquiry are contained in Sections 2406 and 2407 of the General Code. The pertinent parts thereof are as follows:

Section 2406.

> "The clerk shall keep a full record of the proceedings of the board, and a general index thereof, in a suitable book pro-

vided for that purpose, entering each motion with the name of the person making it on the record. He shall call and record the yeas and nays on each motion which involves the levying of taxes or the appropriation or payment of money. He shall state fully and clearly in the record any question relating to the power and duties of the board which is raised for its consideration by any person having an interest therein, together with the decision thereon, and shall call and record the yeas and nays by which the decision was made. When requested by a party interested in the proceedings or by his counsel, he shall record any legal proposition decided by the board, the decision thereon and the votes by which the decision was reached. If either party, in person or by counsel, except to such decision, the clerk shall record the exceptions with the record of the decision."

Section 2407.

"Immediately upon the opening of each day's session of the board, the records of the proceedings of the session of the previous day shall be read by the clerk, and, if correct, approved and signed by the commissioners. When the board is not in session, the record book shall be kept in the auditor's office, and open at all proper times to public inspection. * * * "

From your request, I assume that at the meetings held during the term of the county commissioners, the commissioners properly voted by an yea and nay vote, that proper record thereof was made by the clerk and that all those acts required by Section 2406 of the General Code to be done and performed were done, and that no further action was to be done by the commissioners except for the signing of the record.

In the case of State v. Halin Construction Company, 19 O.App., 255, the question was presented as to whether the signing of the minutes by the county commissioners would cure the defect that the members had not voted by a yea and nay vote. The court held that it could have no such effect. See also Board of Education v. Best, 52 O.S., 138; Village of Vinton v. James, 108 O.S., 220. In fact, we might cite many decisions construing the proposition that when a yea and nay vote is required by statute such provision is mandatory and that when the vote is taken in any other manner the vote is a nullity. Such principle is laid down upon the theory that a yea and nay vote requires the legislator to give consideration to the solemnity and effect of his vote and is for the public welfare. However, we do not find any decision of the courts as to whether the signing of the record of minutes is directory or mandatory.

In determining whether the provisions of a statute directing or authorizing the doing of an act are mandatory, in the sense of requiring the act to be done or the proceedings are void, or directory or permissive,

courts have usually held that when the statute invests the public body with power or authority to perform the act which concerns the public or the rights of individuals, then the statute is mandatory, even though it may be permissive in form; but, when the statutory provisions are regulations of official action in matters of form, they are to be regarded as merely directory — as, when they are designed only to promote order and convenience, and when public interests or rights do not depend upon their strict observance, they are to be construed as directory. See Sections 125 and 127, Clark on Interpretation of Laws.

When we bear in mind that the adoption of the resolution by the board of county commissioners by a yea and nay vote constitutes the action of such board, that the minutes prepared by the clerk are only evidence that such action was, in fact, taken, and that the language of Section 2407 of the General Code requires only the examination of the minutes to determine their correctness, we are made to question whether any public interest or private rights could depend upon the strict observance of the legislation that the commissioners shall cause the clerk to read the minutes and, if correct, sign their names thereto as evidence of such approval.

In 15 C.J., 467, we find the following statement of the author:

> "The proceedings of county boards are not rendered void by the fact that the records or minutes thereof are not duly and properly signed and attested, * * * "

In support of such statement in the text, the author cites the cases of People v. Eureka Lake etc. Canal Co., 48 Calif., 143; People v. Lyons, 168 Ill. App., 396; Goddard v. Stockman, 74 Ind., 400; Lacey v. Davis, 4 Mich., 140; Beck v. Allen, 58 Mass., 143. Such cases are decided upon the hypothesis that the record of the action is only evidence of the action of the board and not the action of the board, that, since the clerk is not a public officer but rather an employe, the attestation of the minutes, by the affixation of the signatures, is more a requirement to insure correct records of the official action than a step in the official proceedings.

In view of such reasoning, it would seem to me that a court would scarcely hold that the action taken by the board was void even though the minutes were never signed by all of the commissioners. It would therefore seem to me that even though we admit that the signature of the former commissioner was a nullity, for the reason that the name

which he affixed to the record of minutes was not that of a county commissioner but rather of a former commissioner, the conclusion would follow that such fact would only affect the weight of the evidence as to what transpired at the meetings described in the minutes.

In Section 2407 of the General Code, no authority is granted to any county commissioner to sign minutes except "immediately upon the opening of each day's session of the board," and no authority is granted for any other person to sign such record of minutes.

Specifically answering your inquiry, it is my opinion that:

1. Section 2407 of the General Code grants no authority to a former county commissioner to sign his name to the record of minutes of a meeting of the board of county commissioners which was held during his term of office.

2. The fact that one of the county commissioners has failed to sign the record of the minutes of a meeting of a board of county commissioners, as directed by Section 2407 of the General Code, does not affect the validity of resolutions adopted by the board at such meeting.

Respectfully,

THOMAS J. HERBERT,
Attorney General.