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CIVIL SERVICE COMMISSION — PERSON IN CLASSIFIED SERVICE—CANDIDATE FOR NOMINATION FOR OFFICE AT PRIMARY ELECTION—COMMISSION MAY NOT WITHHOLD APPROVAL OF PAYROLL FOR SALARY OR COMPENSATION EXCEPT SUCH PERSON BE REMOVED BY APPOINTING AUTHORITY IN SPECIFIC MANNER PROVIDED BY LAW—SECTION 486-30 G. C.

SYLLABUS:

1. *The Civil Service Commission may not withhold its approval of the payroll for salary or compensation of a person in the classified civil service who has become a candidate for nomination for office at a primary election, except where such person has been removed by the appointing authority in the specific manner provided by law.*

2. *Section 486-30, General Code, discussed.*

Columbus, Ohio, May 1, 1940.

Miss Gertrude Jones,
Chairman, Civil Service Commission of Ohio,
State Office Building,
Columbus, Ohio.

Dear Miss Jones:

This will acknowledge your recent request for my opinion which presents for answer the two following questions: (1) May the Civil Service Commission refuse to approve the payroll of persons in the classified civil service whom the Commission believes "qualified candidates for election in the May primary"? (2) What is the proper procedure to be followed by the Civil Service Commission under the terms of Section 486-30, General Code, which provides for prosecution in case of violation of the civil service laws and the rules of your Commission?

Pertinent to your first inquiry is Section 486-23, General Code, which prohibits a classified civil service employe from taking part in politics. Said section reads as follows:

"No officer, employe or subordinate in the classified service of

the state, the several counties, cities and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution or payment from any officer, employe or subordinate in the classified service of the state, the several counties, cities or city school districts thereof; nor shall any officer or employe in the classified service of the state, the several counties, cities and city school districts thereof be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions."

For the purposes of this opinion, it is assumed that the acts of the persons mentioned in your letter are acts in violation of the last quoted section.

Section 486-21, General Code, provides in part as follows:

"After the taking effect of this act it shall be unlawful for the auditor of state, or for any fiscal officer of any county, city or city school district thereof, to draw, sign or issue or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state, or of any county, city or city school district thereof, to pay any salary or compensation to any officer, clerk, employe, or other person in the classified civil service unless an estimate, payroll or account for such salary or compensation containing the name of each person to be paid, shall bear the certificate of the state civil service commission, or, in case of the service of a city, the certificate of the municipal service commission of such city, that the persons named in such estimate, payroll or account have been appointed, promoted, reduced, suspended, or laid off or are being employed in pursuance of this act and the rules adopted thereunder."

It is only under the latter section that your Commission might, if authorized by that section refuse to approve the payroll of a classified civil service employe who violates some provision of the civil service act.

I find a direct answer to your first inquiry in Opinion No. 2803, Opinions of the Attorney General for 1928, Volume IV, page 2485. That opinion is based upon and construes the sections just quoted. The second branch of the syllabus of that opinion, which is dispositive of the question here presented, reads as follows:

"The civil service commission may not withhold its approval of that part of the payroll or account for the salary or compensation of a person in the classified civil service, who has become a candidate for nomination for office, or for member of a party con-

trolling committee, at a primary election, except where such person has been removed or suspended by the appointing authority in the manner provided by law."

The conclusion of that opinion is based upon two controlling principles. They are: (1) The language and wording of Section 486-21, General Code, fail to give the Civil Service Commission authority to refuse approval of a payroll of a person violating a provision of the civil service act. (2) A specific means of removal of civil service employes is provided by Section 486-17a, General Code, which provides to the employe an appeal and a hearing and such specific means of removal precludes the Civil Service Commission from, in effect, removing an employe by refusal to approve a payroll.

The reasoning of that opinion is largely contained in the two following quotations. It is stated at page 2488:

"It will be noted that this provision provides that no salary shall be paid to an officer or employe in the classified service of the state until the proper civil service commission has certified 'that the persons named in such estimate, payroll or account have been appointed, promoted, reduced, suspended, or laid off or are being employed in pursuance of this act and the rules adopted thereunder'. Therefore, the civil service commission when inspecting a payroll to determine whether or not it shall be certified, is required to give consideration only to the things enumerated, viz., whether the persons whose names appear thereon, have been appointed, promoted, reduced, suspended, or laid off, or are being employed in pursuance to the provisions of the civil service law. All these matters relate to the manner of employing the appointee. If such employe has been legally employed, the status of the employe continues to exist until changed or terminated as provided in Section 486-17a, General Code, hereinafter quoted. There is no authority found in said section or any other section which authorizes the civil service commission to refrain from approving a payroll because such commission may be of the opinion that some employe had violated the provisions of the act.

It is no more a violation of the civil service law for an appointee in the classified civil service to be active in politics than it is for such person to be dishonest, immoral, discourteous to the public or incompetent.

In case an employe in the classified civil service violates the provisions of the act he may be removed as provided in Section 486-17a of the General Code, which is as follows:

'The tenure of every officer, employ (employe) or subordinate in the classified service of the state, the counties, cities

and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act (G. C., Secs. 486-1 to 486-31) or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office.

In all cases of removal the appointing authority shall furnish such employe or subordinate with a copy of the order of removal and his reasons for the same, and give such officer, employe or subordinate a reasonable time in which to make and file an explanation. Such order with the explanation, if any, of the employe or subordinate shall be filed with the commission. Any such employe or subordinate so removed may appeal from the decision or order of such appointing authority to the state or municipal commission, as the case may be, within ten days from and after the date of such removal, in which event the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm or modify the judgement of the appointing authority, and the commission's decision shall be final; provided, however, that in the case of the removal of a chief of police or chief of the fire department of a municipality an appeal may be had from the decision of the municipal commission to the court of common pleas of the county in which such municipality is situated to determine the sufficiency of the cause of removal. Such appeal shall be taken within ten days from the finding of the commission.'

It will be noted that the above section provides that any such employe may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or 'violation of the provisions of this act'. As pointed out above, becoming a candidate for public office, or for member of a party controlling committee, would be a violation of the civil service act and therefore be grounds for removal. The statute further provides that in all cases of removal the appointing authority shall furnish such removed employe with a copy of the order of removal and the reasons therefor, and give such employe reasonable time in which to make and file an explanation, and that such explanation, if made, shall be filed with the civil service commission. Thereafter such employe may appeal from the removal by the appointing authority to the civil service commission, which commission shall hear such appeal and may affirm or disaffirm or modify the judgment of the appointing officer."

And at page 2491:

“So long as a person is in the employ of the county or city he is entitled to receive compensation therefor and the civil service commission cannot refuse to certify the payroll containing his salary or compensation unless he has been removed from the service as provided by law. To do so would be to give the commission authority to separate him from the payroll, or in other words, substantially to accomplish his removal from office, without giving such employe the benefit of the provisions of Section 486-17a. If the employes referred to have violated the provisions of the civil service law, the appointing authority may and should proceed as provided in said section and remove said persons and notify such employes of the reasons therefor, and the employes may then file an explanation and appeal to the civil service commission for final determination. As pointed out by the Supreme Court in the Brittain case, supra, no other provision is made for the removal of an employe within the classified civil service; and it would seem clearly to follow that the civil service commission has no authority to refuse to honor a payroll containing the names of those employed in the classified civil service of the county or municipality unless such employe has been removed from the service, or suspended, or laid off, as provided by law.”

It is my opinion that the reasoning as here quoted and the conclusion of that opinion is correct and I concur therein and find it applicable as an answer to your first inquiry.

A similar question was considered in the New York case of *The People, ex rel. Bedford vs. McWilliams, et al.*, as the Civil Service Commission, 56 Misc. N. Y. 296. The plaintiff in that action sought a writ of mandamus to force the Civil Service Commission to approve the payroll bearing his name. The Commission refused approval because the plaintiff was, in violation of the civil service act, performing duties for which he was not properly classified. The court in the course of the opinion said at page 297:

“The law requires upon the payroll ‘The certificate of the municipal civil service commission of such city that the persons named in such estimate, payroll or account have been appointed or employed or promoted in pursuance of law and of the rules made in pursuance of law’.”

And at page 298 the court said:

“I am of the opinion that, if a payroll is presented to the municipal commission by the head of a department, bearing the name of a person who it appears from the official roster of the municipal commission has been duly appointed to the position assigned him on said payroll, it is the duty of the municipal commission to attach its certificate; and that the full scope and effect

of such certificate is that the commission certifies that such person is qualified for appointment to the position assigned him on the payroll, and that he was duly appointed thereto, and no more."

On page 299 of the opinion, the court concluded as follows:

"There being no dispute as to the fact that Bedford was duly appointed to the position of foreman of laborers, and his name appearing in such capacity on the payroll certified by the head of the department, it becomes the duty of the municipal commission to affix its certificate; and a peremptory writ of mandamus may issue accordingly."

In the same manner in the case of *The People, ex rel. Doyle vs. Knox, et al.*, 73 N. Y. Sup. 650, a writ of mandamus was sought to compel certification of a payroll, the Civil Service Commission having withheld its approval for the reason that the plaintiff in that action, in violation of law, had hired others to do his work and paid such others from his salary. In granting the writ, the court said at page 651:

"If the civil service commission could refuse the certificate to the person appointed or employed in pursuance of law, and thus prevent payment of his salary or compensation, the result would be that janitors, as well as all other employes and officers, would hold their positions purely at the will of the commission. A janitor once appointed in pursuance of law can only be removed by the action of the school board as provided by Section 1075 * * *."

And on page 652 of the same opinion it is stated:

"All the civil service commissioners have to ascertain before certifying the payroll is whether or not the persons named therein have been appointed, or employed, or promoted in pursuance of law."

In a concurring opinion in the same case, it is said by Bartlett, J.:

"The duty to certify grows out of the fact, * * * that the relator has been appointed janitor * * * pursuant to law and of the rules made in pursuance of law. The charge that a janitor thus appointed is acting in disregard of the law, or of rules made pursuant to law, * * * can only be investigated and determined in a proceeding appropriate for that purpose; and this is not such a proceeding."

It should be noted that the Ohio civil service laws are an adoption of and in most instances use the exact wording of the New York civil service laws, 7 O. J. 510.

I, therefore, feel that the above cases are directly pertinent to the

question at issue and are an indication of the correctness of the opinion here relied upon. My conclusion is not changed by reference to the case of State, ex rel. Hein vs. Cull, et al., 135 O. S. 602. That case rested upon the refusal of the Civil Service Commission of Cleveland to certify a payroll, the Commission in that case acting under the charter of that city pursuant to its rule which provided in part:

“Each name on any such payroll which is there in violation of charter or civil service rules shall be stamped V, meaning void * * *.”

It is obvious that such language is broader in scope and not analogous to the wording of Section 486-21, General Code, under which your Commission must act. Secondly, that case turned solely upon whether or not the relator was within the classified civil service. The precise question, i. e., the right of the Civil Service Commission to approve a payroll under the circumstances here considered, was not presented by the pleadings or briefs and not remarked upon by the court and, therefore, was not adjudicated by the court. Thirdly, in that case, which was an application for a writ of mandamus, the court evidently, by denying the writ, recognized the discretionary powers of the Civil Service Commission involved and hesitated to disturb that discretion by the issuance of a writ of mandamus.

The answer to your second inquiry is found in the wording of Section 486-30, General Code, which in so far as your Commission is concerned, is as follows:

“Prosecutions for the violation of the provisions of this act, or the rules and regulations of the state commission established in conformity thereto, shall be instituted by the attorney-general or by the state commission acting through special counsel, or by the county prosecutor for the county in which the offense is alleged to have been committed; * * *.”

That section means no more than that prosecutions for violations of the civil service laws may be instituted in either of the alternative ways there included, by your Commission acting through special counsel, by the Attorney General or by the prosecutor of the county in which violations may have occurred.

If there be violations of the civil service laws as you are informed, prosecutions might be commenced in any of the manners as provided by that section. The alleged offenses to which you refer, if your Commission has

reasonable grounds to believe in their existence, being minor and local in nature are susceptible of local correction. Upon an affidavit being filed, it would become the duty of the proper local official of the county involved to prosecute the alleged offenders in the proper local court.

Based upon the above and in specific answer to your question, it is my opinion that the Civil Service Commission may not withhold its approval of the payroll for salary or compensation of a person in the classified civil service who has become a candidate for nomination for office at a primary election, except where such person has been removed by the appointing authority in the specific manner provided by law.

Respectfully,

THOMAS J. HERBERT,
Attorney General.