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1. CIVIL SERVICE—POWER TO APPOINT ASSISTANTS AND EMPLOYEES—COUNTY WELFARE DEPARTMENT—EXCEPTION, EMPLOYEES OF INSTITUTIONS WITHIN DEPARTMENT—GRANTED JOINTLY TO DIRECTOR OF DEPARTMENT AND BOARD OF COUNTY COMMISSIONERS—SECTION 329.02 RC.
2. POWER TO ABOLISH POSITION IN CLASSIFIED CIVIL SERVICE—COEXISTENT WITH POWER TO CREATE POSITION OR MAKE APPOINTMENT.
3. POSITION IN COUNTY WELFARE DEPARTMENT—MAY BE ABOLISHED BY DIRECTOR OF DEPARTMENT ONLY WITH APPROVAL OF BOARD OF COUNTY COMMISSIONERS.

SYLLABUS:

1. The power to appoint all necessary assistants and employees of a county department of welfare, except employees of institutions within the department, has been granted jointly to the director of the department and the board of county commissioners, by virtue of the provisions of Section 329.02, Revised Code.

2. The power to abolish a position in the classified civil service is coexistent with, and must be exercised in the same manner as, the power to create such position or make an appointment thereto.

3. A position in a county department of welfare may be abolished by the director of the department only with the approval of the board of county commissioners.

Columbus, Ohio, February 29, 1956

Hon. Carl W. Smith, Chairman, Civil Service Commission of Ohio
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"Mrs. F. M. was appointed a clerk-typist, grade II, in the Columbiana County Welfare Department. This position was later *abolished*, on June 30, 1955, by the County Welfare Director.

"Our question is, does the County Welfare Director have the authority to *abolish* this position *without* the approval of the County Commissioners.

"In 1945 the Ohio Attorney General's Opinion No. 130 refers to reduction, dismissal or lay-off of a County Welfare Department employee, but the word *abolish* is not used in this opinion."

The courts of Ohio have consistently held that the power to create a position in the classified civil service, or make an appointment thereto, includes inherently the power to abolish that position. State ex rel. Stoer v. Raschig, 141 Ohio St., 477; State ex rel. Stine v. McCaw, 137 Ohio St., 13. Whether the director of a county department of welfare may abolish a position within the department without first securing the approval of the board of county commissioners, will therefore depend upon whether the power of appointment has been granted exclusively to the director.

Section 329.02, Revised Code, which prescribes the powers and duties of the director of a county welfare department, provides in part as follows:

"* * * The director, *with the approval of the board of county commissioners*, shall appoint all necessary assistants, superintendents of institutions under the jurisdiction of the department, and all other employees of the department, excepting that the superintendent of each such institution shall appoint all employees therein. * * *

(Emphasis added.)

The above quoted language, together with certain other provisions relating to the creation and management of a county welfare department, was considered in Opinion No. 130, Opinions of the Attorney General for 1945, page 92, to which you refer in your inquiry. The specific

question presented was whether the director of a county welfare department could effect the reduction, dismissal or lay-off of an employee of the department without first securing the approval of the board of county commissioners.

The then Attorney General held that the above quoted statutory language conferred upon the director the exclusive authority to appoint all necessary assistants and employees of the department, except employees of institutions within the department who are appointed by the superintendent of each such institution. As the exclusive appointing authority, it was considered that the director could also dismiss, lay off or reduce in pay any such employee without the approval of the board of county commissioners.

In reaching this conclusion, consideration was given to certain other provisions of then Section 2511-1, et seq., General Code, Section 329.01, et seq., Revised Code. The then Attorney General was of the opinion that these sections placed exclusive executive control over a county welfare department in the director of the department, and considered the requirement for approval of appointments as analogous to the requirement for legislative confirmation of certain executive appointments. The approval was therefore considered to be an act legislative in nature, and not the exercise of an executive function.

It was stated at page 95 of the opinion:

“* * * The fact that their approval of his (the director’s) appointments is required does not make the commission in any sense the appointing officers.”

Although no mention was made in this opinion of the authority of the director to *abolish* a position within the department, I would have no hesitancy in saying that this same rationale is equally applicable to the problem which you present, i.e., *if* complete executive control were considered to be vested in the director, including the exclusive power of appointment, then the authority to determine the need for continued existence of some position within the department would also be vested in the director. If, under this view, the director considered a position to be unnecessary, that position could be abolished in the exercise of his discretion as appointing authority without securing the approval of the board of county commissioners.

It is my opinion, however, that by virtue of certain changes brought

about by the enactment of Senate Bill No. 241, by the 97th General Assembly, amending former Sections 2511-2, 2511-3 and 2511-4 of the General Code, Sections 329.02, 329.03 and 329.04, Revised Code, general executive control over a county department of welfare must now be considered to be vested in the board of county commissioners and not in the director of the department.

This position was first advanced by one of my predecessors in Opinion No. 2551, Opinions of the Attorney General for 1947, page 648. The syllabus of that opinion is as follows:

“By reason of the provisions of Senate Bill No. 241, enacted by the 97th General Assembly, amending Sections 2511-2, 2511-3 and 2511-4, General Code, *complete control of the county department of welfare is vested in the county commissioners*, and vouchers for expenditures in said department must be approved by said commissioners, as provided by Section 2572, General Code.”
(Emphasis added.)

This opinion expresses a reversal of the position taken in Opinion No. 797, Opinions of the Attorney General for 1946, page 170, wherein it was held that vouchers for expenditures by a county department of welfare need not be approved by the county commissioners. As in Opinion 130, the result reached in Opinion No. 797 was predicated on the theory that executive control over the department was vested in the director.

A comparison of the pertinent sections before and after the aforementioned amendment is found at page 650 of Opinion No. 2551, wherein it is stated:

“The opening sentence of Section 2511-2 prior to amendment, read as follows:

“‘Under the direction of the board of county commissioners, the county director of welfare shall have full charge and control of the county department of welfare.’

“As amended, this sentence reads:

“‘Under the control and direction of the board of county commissioners, the county director of welfare shall have full charge of the county department of welfare.’

“Section 2511-3, General Code, provided that the salary of the county director was to be fixed by the board of county commissioners, but that the compensation of all his assistants and employees was to be fixed by the *county director*. This latter provision was changed to read as follows:

“The compensation of all assistants and employees within or under the jurisdiction of the county department of welfare shall *likewise be fixed by the board of county commissioners.*”
(Emphasis added.)

“Section 2511-4 in outlining the powers of the department of welfare, provided:

“The county department of welfare shall have the following powers and duties:’ * * *

“The amended section begins as follows:

“The board of county commissioners *may designate* the county department of welfare to have, exercise and perform under its control and direction, all of the following powers and duties.: * * *
(Emphasis added.)

The writer thereafter concluded:

“* * * The change in phraseology, whereby the ‘control’ has in each instance been transferred from the director to the county commissioners, and the fact that the act wherein these changes were made contains no further alteration in the law whatsoever, result in the conclusion that the director has been reduced from the status of an executive officer having broad powers, to that of an employe with administrative powers only.”

These amended sections have since remained intact.

It might be suggested that by virtue of the provisions of Section 329.04, Revised Code, the board of county commissioners is empowered to abdicate its powers and duties, in relation to the county welfare department, in favor of the department. If this were true, a question of fact would be presented as to whether the board in question had delegated this authority to the director of the department.

The first paragraph of Section 329.04, Revised Code, provides as follows:

“The board of county commissioners may designate the county department of welfare to have, exercise, and perform, *under its control and direction*, the following powers and duties:
* * *
(Emphasis added.)

This section thereafter specifically enumerates certain powers and duties which may be performed by the department.

The last sentence of this section provides as follows:

“* * * The board may designate the county department of

welfare to exercise and perform any *additional* welfare powers and duties which the board has.” (Emphasis added.)

I am of the opinion that the latter sentence does not authorize the board of county commissioners to divest itself of all powers relating to the administration of the welfare department, which powers have been conferred upon it by law. It would appear rather that this sentence simply authorizes the board to designate that the department should exercise whatever welfare powers and duties the board might otherwise possess, in *addition* to those specifically enumerated in Section 329.04, Revised Code. These additional powers, however, must also be exercised under the control and direction of the board of county commissioners.

Despite the fact that executive control is now considered to be vested in the county commissioners, and that the power of appointment is the exercise of an executive function, the language of Section 329.02, Revised Code, which authorizes the director to make certain designated appointments within the department, cannot be ignored.

In effect, the question to be resolved is identical with that presented in Opinion No. 130 for 1945, viz., what effect should be given to the language requiring that the board of county commissioners must approve all appointments made by the director. As in that opinion, consideration should again be given to all pertinent provisions of present Chapter 329., Revised Code.

Inasmuch as these provisions manifest an intention to vest the board of county commissioners with executive control over the department, it is my opinion that the approval of these appointments by the board should not now be considered as a legislative act, but should be construed as a partial exercise of the executive power of appointment. It is my further opinion that, by virtue of the provisions of Section 329.02, Revised Code, this power has been granted jointly to the director of the department and the board of county commissioners, and must be exercised accordingly.

Such a construction will not only give effect to the language of Section 329.02, Revised Code, by which the director is expressly authorized to make certain appointments within the department, but it will also give effect to the manifest legislative intent that the county commissioners should exercise executive control over the department.

It necessarily follows that a director of a county department of welfare cannot dismiss, lay off or reduce in pay any employee of the department without the approval of the board of county commissioners; nor may a position within the department be abolished without such approval.

In specific answer to your inquiry, therefore, it is my opinion and you are advised that:

1. The power to appoint all necessary assistants and employees of a county department of welfare, except employees of institutions within the department, has been granted jointly to the director of the department and the board of county commissioners, by virtue of the provisions of Section 329.02, Revised Code.

2. The power to abolish a position in the classified civil service is coexistent with, and must be exercised in the same manner as, the power to create such position or make an appointment thereto.

3. A position in a county department of welfare may be abolished by the director of the department only with the approval of the board of county commissioners.

Respectfully,

C. WILLIAM O'NEILL
Attorney General