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INDUSTRIAL COMMISSION OF OHIO—CREATED BY LEGISLATIVE ENACTMENT, MARCH 12, 1913, 103 O. L. 95 — “BOARD OF BOILER RULES” CREATED MAY 31, 1911, 102 O. L. 494—ABOLISHED—POWERS AND DUTIES REPOSED IN SAID COMMISSION—DEPARTMENT OF INDUSTRIAL RELATIONS —109 O. L. 105 — POWER, JURISDICTION, AUTHORITY, TO EXAMINE AND LICENSE STEAM BOILER INSPECTORS, RENEW OR REVOKE LICENSES — STATUS, CERTIFICATE ISSUED IN FOREIGN STATE—WHERE INSURANCE COMPANY INSURES BOILERS AGAINST EXPLOSION AND BOILER INSPECTOR DOES NOT TAKE EXAMINATION PROVIDED FOR IN SECTION 1058-16 G. C.

SYLLABUS:

1. *The legal existence of what was denominated “the department to be known as the board of boiler rules,” created by the Legislature in the act of May 31, 1911 (102 v. 494), was terminated in the act of March 12, 1913 (103 v. 95) creating the industrial commission of Ohio, to which was transferred all the powers and duties formerly vested in such department or board, the commission being expressly directed to “enter upon the performance of all the duties conferred by law” upon the board of boiler rules so abolished (Sec. 871-11 G. C.). Since the effective date of the act of March 12, 1913, the “board of boiler rules” has had no legal existence as such, and has had no independent or exclusive discretionary or quasi-judicial powers or authority.*

2. *Upon the effective date of the act terminating the legal existence of “the department * * * known as the board of boiler rules (103 v. 95; 2/12/13) the authority, powers and duties formerly vested in such department or board were transferred to and placed in the industrial commission of Ohio, in which commission such authority, powers and duties have reposed since said date, and now repose, excepting only such powers and duties relating to the inspection and regulation of the construction and operation of steam boilers and appliances used in connection therewith as were transferred to the department of industrial relations in the Administrative Code (109 v. 105; 4/19/21).*

3. *Because of the abolishment of “the department * * * known as the*

board of boiler rules" and the transfer to the industrial commission of the powers, authority and duties of such department or board (Sec. 871-11, G. C.), and by reason of the express provisions of paragraph 11 of Section 871-22, General Code, it is the duty of the industrial commission of Ohio, and it has full power, jurisdiction and authority, to examine and license persons who desire to act as inspectors of steam boilers; to provide for the scope, conduct and time of such examinations; to provide for, regulate and enforce the renewal and revocation of such licenses; to make rules and regulations and orders pertaining to the construction, installation, inspection and operation of steam boilers and all appliances connected therewith and to do and require all things necessary to make such examination, inspection and requirement efficient.

4. *In the Administrative Code of 1921, the Legislature transferred to the department of industrial relations those powers and duties relating to the inspection and regulation of the construction and operation of steam boilers, leaving in the industrial commission of Ohio the authority, powers and duties which were of a quasi-judicial or discretionary nature, i. e., those committing to the industrial commission the duty of looking into facts and acting upon them not in a specific way but in accordance with the exercise of its sound discretion, including all powers and duties mentioned in Section 1058-8 to 1058-12, inc. and 1058-16, "and the powers of the commission as successor of the board of boiler rules" under Section 1058-18, General Code (Sec. 154-45 G. C.)*

5. *The industrial commission of Ohio is authorized and empowered by Section 871-14, General Code, to employ the types of employes named in such section and fix their compensation, provided that such employments and compensation be first approved by the Governor; and provided further that there be "a specific appropriation, made by law" from which such employes may be paid. By the express terms of both Sections 871-22 and 154-45, General Code, the industrial commission may appoint advisors to serve without compensation, Section 154-45, General Code, authorizing the industrial commission to pay such advisors their "actual and necessary expenses," provided, of course, there be an appropriation from which they may be paid."*

6. *In performing its duties and exercising its powers and authority with reference to the inspection and regulation of the construction and operation of boilers, the examination and commissioning of regular and special*

boiler inspectors, and all matters pertaining thereto, the industrial commission has such powers and only such powers as are conferred by statute, together with such implied powers as may be necessary to carry the powers expressly granted into effect, and in performing its duties in this respect the commission is limited in the extent and the manner of exercising its authority by legislative enactments, including Sections 1058-8, et seq. of the General Code.

7. An applicant for examination as inspector of steam boilers who has met all the requirements of Section 1058-16, General Code, is, upon a favorable report by the Industrial Commission, entitled to have issued to him by the chief inspector of steam boilers, a certificate to that effect. A person who has passed a written examination approved by the Industrial Commission, which was given in another state, and who holds a certificate of competency approved by the Industrial Commission which was issued by such other state, is, upon being designated by an insurance company authorized to insure boilers against explosion in this state, entitled to a commission issued by the chief inspector of steam boilers, authorizing him to inspect boilers for the state of Ohio, without taking the examination provided for in Section 1058-16, General Code.

Columbus, Ohio, August 6, 1940.

The Industrial Commission of Ohio,
Columbus, Ohio.

Gentlemen:

Your recent request for the opinion of this office received in due course. In your request you quote in whole or in part Sections 154-3, 154-45, 871-11, 871-14, 1058-2, 1058-8, 1058-10, 1058-11, 1058-12, 1058-16, 1058-17 and 1058-23, General Code; excerpts from Opinion No. 3289, Opinions, Attorney General, 1922, Vol. I, p. 605; and parts of certain resolutions adopted by your commission, full copies of some of which are attached to your letter. These sections of the General Code, the quotations from Opinion No. 3289, and most of the resolutions of your commission are deleted from the request and will be quoted or referred to in the body of the opinion as deemed necessary. Your communication reads in part as follows:

“Prior to September 1, 1913, the statute creating the Ohio

Board of Boiler Rules provided that said Board would be appointed by the Governor, with the advice and consent of the Senate.

* * *

Under date of August 30, 1913, The Industrial Commission of Ohio by resolution, a copy of which is hereto attached and marked Exhibit 'A', recognizing that:

'Said, The Industrial Commission of Ohio by the terms of said act, will supersede * * * the Board of Boiler Rules, being authorized and empowered to employ deputies,' appointed the following employes:

(Here follows the names of four persons designated as members of the "Board of Boiler Rules".)

'Each at a per diem compensation of \$10.00 for each day of service in attendance of meetings of the Board, and necessary traveling and other expenses.'

This Board appeared to function until after certain duties which had been performed by The Industrial Commission, were taken over by the then newly created Department of Industrial Relations.

Sometime in 1922, Mr. H. A. Baumhart, one of the original members designated in the Commission's resolution of August 30, 1913, died. The Director of the Department of Industrial Relations proceeded to fill his vacancy. The Industrial Commission in business session under date of May 12, 1922, abolished the Ohio Board of Boiler Rules and proceeded to appoint a new board to act in an advisory capacity to The Industrial Commission, which said action was the subject of a request for an opinion from your office by the Director, Department of Industrial Relations.

* * *

On May 12, 1922, the Commission adopted the following resolution:

'Mr. Duffy moved that since the Director of Industrial Relations has informed the Commission that the present Board of Boiler Rules in his opinion was appointed and has been operating under the authority of Section 871-14 of the General Code, and believing that as a matter of efficiency, fairness and harmony the Board of Boiler Rules should be appointed by and operate under The Industrial Commission of Ohio which is the only legal body now in existence exercising the duties of the Ohio Board of Boiler Rules, that the Board as now constituted be abolished, and that The Industrial Commission of Ohio appoint four advisors who shall serve on an advisory board to be known as The Ohio Board of Boiler Rules under The Industrial Commission of Ohio. This by authority of Section 154-45 of the General Code.

* * *

At this time the members are paid from the Commission's A-2 Wage Account at \$10.00 per day and meet four times a year unless a special meeting is called. The meeting lasts two days and they

are allowed one day for traveling expenses. Traveling expenses are paid on the same basis as other Industrial Commission employes (F-6 Traveling Expense Account.)

After the opinion by the Office of the Attorney General No. 3289, July 3, 1922 (*supra*), it appears that The Department of Industrial Relations suggested to The Industrial Commission of Ohio the persons that were desired on this board and said persons were in each case appointed by the Commission.

From July 1, 1921, to May 15, 1934, said Boards per diem rate and traveling expenses appear to have been paid by the Department of Industrial Relations there being no method apparent by which the Industrial Commission of Ohio could pay their salary and expenses and the need of expert services being absolutely necessary for the administration of these duties. Since the amendment of Ohio General Code Section 154-45, effective May 15, 1934, the daily rate of \$10.00 for each member and traveling expense of this board have been paid by The Industrial Commission from the account designated above.

It will be observed the duties to be performed by The Industrial Commission of Ohio as successor to the Board of Boiler Rules as set forth in Sections 1058-8 to 1058-12, both inclusive, 1058-16 to 1058-18 of the Ohio General Code are of a technical nature and require the service of technical engineers to properly advise the Commission in the performance of said duties.

* * *

On August 10 and 11, 1921, the Board of Boiler Rules passed a resolution which was regularly approved by The Industrial Commission which read in part as follows:

'Whereas, The National Board of Boiler and Pressure Vessel Inspectors, organized for the purpose of standardizing examinations of applicants for certificates of competency as inspectors of steam boilers; for the issuing of commissions to such inspectors; and for the uniform stamping of steam boilers; has completed its work; therefore:

Be it resolved, That the Ohio Board of Boiler Rules hereby approves of and will accept written examinations conducted by any political subdivision of the United States which is a member of The National Board of Boiler and Pressure Vessel Inspectors.'

Contained in the minutes of the meeting of the Board of Boiler Rules of March 4 and 5, 1936, is the following:

'Whereas, The National Board of Boiler and Pressure Vessel Inspectors has put into effect a uniform written examination for qualifying boiler inspectors in all the states and cities that are members of this Board, and,

Whereas, such uniform examinations are conducted in all the states and cities that are members of the National Board, on the first Wednesday in March, June, September, and December, and,

Whereas our responsibility for the testing of the ability of persons to inspect boilers is complied with when such persons are tested by equal standards adopted by the Board, even though such tests are conducted by other competent state boards,

Therefore, be it resolved, That the Ohio Board of Boiler Rules with the authority vested in them by law, Section 1058-17, hereby approves persons holding certificates of competency obtained by passing the uniform National Board examination in the state or city that is a member of the National Board, as a qualified Ohio Boiler Inspector.

After thoroughly discussing this matter it was regularly moved and seconded that this question be submitted to the Attorney General for an opinion as to whether or not this can legally be done.'

The Department of Industrial Relations Division of Boiler Inspection, has a form 'Application for Commission as an Inspector of Steam Boilers' which when executed shows from what state a certificate of competency is held. Copy is hereto attached and marked Exhibit 'D'.

Commissions have been issued by Chief, Division of Boiler Inspection, ostensibly under the provisions of Section 1058-17 Ohio General Code which permit the holders of said Commission in other states to act as an Ohio inspector in all branches of boiler inspection both factory inspections while under construction and other inspections.

1. There being a technical duty to perform in the administration of Sections 1058-18 Ohio General Code by The Industrial Commission of Ohio requiring the services of experienced technically trained experts on steam boilers, please advise this Commission if the present procedure hereinabove outlined including the method of appointment, approving or rejecting their recommendations by action of the Commission, and payment of wages and expense is a legal administration of the above sections of the General Code within the spirit and intent of said sections.

2. Please advise on whom rests the duty of preparing the questions for the written examination mentioned in Section 1058-16 Ohio General Code?

3. It seems to have been the intention of the legislature to vest authority in The Industrial Commission of Ohio, after the filing of a satisfactory application and passing a written examination by the Board, to issue to successful applicants certificates of competency. (1058-16 O. G. C.) Is it lawful for The Industrial Commission of Ohio (Board of Boiler Rules) to issue said certificates of competency to persons who have not met all the requirements set forth in Section 1058-16?

4. Does the chief inspector of steam boilers have authority under the provisions of Section 1058-17 or any other section of the Ohio General Code to issue to persons holding certificates of competency from other states commissions to inspect boilers in and for the State of Ohio? These boilers are required to be inspected while

under construction if manufactured in some other state to be sold, installed and used in Ohio?

5. Does the chief inspector of steam boilers, by virtue of Section 1058-17 Ohio General Code have authority to issue commissions to persons who have not complied with Section 1058-16 Ohio General Code but who have taken an examination approved by the Board of Boiler Rules, passed same, and secured a certificate of competency from another state.

6. Does Section 1058-17, O. G. C. permit The Industrial Commission to issue certificates of competency to persons who have passed a written examination and holding certificates of competency in other states without actually taking the examination set forth in Section 1056-16?"

What was once a state department known as the "board of boiler rules" was created by the 79th General Assembly in the act of May 31, 1911, codified as Sections 1058-6 to 1058-30, inclusive, of the General Code. Section 1 of the act provided in substance that there should be established "in the office of the chief examiner of steam engineers, a department to be known as the board of boiler rules, to consist of the chief examiner of steam engineers, who (should) be chairman of the board, and four members to be appointed by the governor, with the advice and consent of the senate", the section further providing that one of the four persons so appointed should be an employe of the boiler using interests; one an employe of the boiler manufacturing interests; one an employe of the boiler insurance interests; and one an operating engineer; or that the governor, if he deemed it advisable, might "make such appointments from any class of citizens." See 102 v. 494.

On March 12, 1913, in the act entitled "An Act—Creating the industrial commission of Ohio, abolishing the * * * chief examiner of steam engineers, board of boiler rules * * * merging certain powers and duties of said departments in and transferring certain powers and duties of said departments to said industrial commission of Ohio, * * * and repealing sections * * * 1058, 1058-6, 1058-9, 1058-13, 1058-14, 1058-15 (and) 1058-27, * * * of the General Code", the board of boiler rules was abolished and the powers and duties theretofore vested in it were transferred to and placed in the industrial commission where they now repose (103 v. 95).

Section 11 of this act, now Section 871-11, General Code, reads in part as follows:

"On and after the first day of September, 1913, the following

departments of the state of Ohio, to-wit: * * * chief examiner of steam engineers, board of boiler rules, * * * shall have no further legal existence, except that the heads of the said departments, and said boards, shall within ten days after the said date submit to the governor their reports of their respective departments for the portion of the year 1913 during which they were in existence, and on and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred by law upon the said departments."

Section 14 of the Act of 1913 (Section 871-14, G. C.) provides:

"The commission is authorized and empowered to employ, promote and remove a secretary, or secretaries, deputies, clerks, stenographers, and other assistants, as needed; to fix their compensation, and to assign to them their duties. Such employments and compensation to be first approved by the governor."

Section 22, (amended on May 27, 1915, in respects not here material, 106 v. 508, 510), and codified as Section 871-22, General Code, reads in part as follows:

"It shall also be the duty of the industrial commission, and it shall have full power, jurisdiction and authority:

(I) To appoint advisers, who shall without compensation, assist the industrial commission in the execution of its duties; to retain and assign to their duties any or all officers, subordinates and clerks of the commissioner of labor statistics, the chief inspector of mines, the chief inspector of workshops and factories, the chief examiner of steam engineers, the board of boiler rules, chief inspector of steam boilers, the state board of arbitration and conciliation, and the state liability board of awards:

* * *

(II) On and after September 1, 1913, to examine and license persons who desire to act as steam engineers, and persons who desire to operate steam boilers and persons who desire to act as inspectors of steam boilers; to provide for the scope, conduct, and time of such examinations, to provide for, regulate and enforce the renewal and revocation of such licenses, to inspect and examine steam boilers and to make, publish and enforce rules and regulations and orders for the construction, installation, inspection and operation of steam boilers and all appliances connected with steam boilers and to do and require and enforce all things necessary to make such examination, inspection and requirement efficient. * * *"

By the enactment of the Administrative Code (109 v. 105; 4/19/21), the 84th General Assembly, among other things, created the department of industrial relations to be administered by the director of that department, to which certain of the authority and duties of the industrial commission with respect to the inspection of boilers were transferred.

In so far as here pertinent, Section 154-3, General Code, as enacted in the Administrative Code, provides:

“The following administrative departments are created:

* * *

The department of industrial relations, which shall be administered by the director of industrial relations, hereby created:

* * * ”

The first, second and last paragraphs of Section 154-45, General Code, enacted at the same time, read as follows excepting that the words emphasized were added when paragraphs other than those quoted were amended in the act of May 3, 1934 (115 v. Pt. 2, 242):

“The department of industrial relations shall have all powers and perform all duties vested by law in the industrial commission of Ohio, excepting the following:

Those powers and duties of the commission which it exercises as successor of the state liability board of awards, the state board of arbitration, the board of boiler rules, and in the investigation, ascertainment and determination of standards, devices, safeguards, and means of protection, being all powers and duties mentioned in paragraphs 3 to 8, both inclusive, of section 871-22 of the General Code, sections 871-23, 871-26, 871-27, 871-28, 871-30, 871-32, 871-33, 871-34 and 871-35, sections 1058-8 to 1058-12, both inclusive, 1058-16, 1063 to 1077, both inclusive, of the General Code and the powers of the commission as successor of the board of boiler rules under section 1058-18 of the General Code, which shall continue to be exercised and performed by the industrial commission of Ohio in the manner provided by law for the exercise of such powers and the performance of such duties.

* * *

The commission may appoint advisors, who shall without compensation, *except actual and necessary expenses*, assist the commission in the execution of the powers and duties retained by it under this section.”

Sections 1058-8 to 1058-12, both inclusive, 1058-16 and 1058-18, General Code, specifically enumerated in the second paragraph of Section 154-45, *supra*, each and all have to do with the powers and duties originally conferred upon the board of boiler rules as created in the act of May 31, 1911 (102 v. 494), which powers and duties were, as above pointed out, transferred to the industrial commission in the act of March 12, 1913 (103 v. 95), where they were left when the administrative Code was adopted in the act of April 19, 1921 (109 v. 105). Wherever the phrase “the board of boiler rules”

occurs in the sections named in the second paragraph of Section 154-45, therefore, such phrase must be read as though written "the industrial commission of Ohio."

And in this connection it will be observed that the functions once vested in the old board of boiler rules and now reposed in the Industrial Commission are of a quasi-judicial or discretionary character. As said in *Bair v. Struck*, 29 Mon. 45, 74 P. 69, 71, 63 L. R. A. 481 (1903), citing *Mechem*, Pub. Off. §637, and *Bishop Non. Cont. Law* §§785, 786, "Quasi-judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides necessarily indistinct; but, in general terms, *when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial.*"

Section 1058-8, General Code, in addition to making it the duty of the board of boiler rules (industrial commission), to formulate rules regulating the construction, operation, etc., of steam boilers, safety valves, "and such other appliances as the board may deem necessary to safety in operating steam boilers," requires that such authority shall also "make a standard form of certificate of inspection and * * * *examine applicants for certificates as boiler inspectors as hereinafter provided.*"

Section 1058-9, which was repealed in the act of March 12, 1913 (103 v. 95, 109), formerly prescribed that the board should hold examinations and certain public hearings in Columbus on the second Wednesday in February, May, August and November of each year and at such other times as the board might determine.

Section 1058-10, General Code, provides as follows:

"If the board, after any hearings, shall deem it advisable to make changes in its rules, it shall appoint a day for a further hearing, and shall give notice thereof, and of the changes proposed, by advertisement in at least one newspaper in each of the cities of Cleveland, Cincinnati, Columbus, Toledo, Dayton and Youngstown, at least ten days before such hearing. If the board, on its own initiative, contemplates changes in its rules, like notice and a hearing shall be given and held before the adoption thereof."

Section 1058-11, General Code, provides that, except as therein provided, any such changes shall take effect six months after the approval of the same by the Governor.

Section 1058-12 contains provisions authorizing the board (industrial commission), to permit the installation of special types of boilers upon compliance with the provisions of such section.

Section 1058-16, General Code, has to do with the examinations of inspectors and reads as follows:

“Applications for examination as an inspector of steam boilers shall be in writing, accompanied by a fee of ten dollars, upon a blank to be furnished by the chief inspector of steam boilers, stating the school education of the applicant, a list of his employers, his period of employment and the position held with each. He shall also submit a letter from one or more of his previous employers certifying to his character and experience. Applications shall be rejected which contain any wilful falsification, or untruthful statements. Such applicant, *if the board of boiler rules deem his history and experience sufficient, shall be examined by the board at its next regular meeting, by a written examination dealing with the construction, installation, operation, maintenance and repair of steam boilers and their appurtenances, and the applicant shall be accepted or rejected on the merits of his application and examination.* * * *

Upon a favorable report by the board of boiler rules, of the result of an examination, to the chief inspector of steam boilers, he shall immediately issue to the successful applicant a certificate to that effect.” (Emphasis ours.)

Section 1058-17, General Code, as amended on April 29, 1921 (109 v. 255), provides:

“The chief inspector of steam boilers may with the consent of the governor, appoint from the holders of certificates provided for in §11 (Sec. 1058-16, G. C.), not to exceed ten general inspectors.

Any company authorized to insure boilers against explosion in the state may designate from holders of certificates of competency approved by the board of boiler rules persons to inspect boilers covered by such company’s policies, and the chief inspector of steam boilers shall issue to such persons commissions authorizing them to act as special inspectors. Such special inspectors shall be compensated by the company designating them, and the fee provided for in §20 (Sec. 1058-25, G. C.), shall not be collected by such special inspectors.

The chief inspector of steam boilers shall issue to each of such appointees, a commission to the effect that the holder thereof is authorized to inspect steam boilers for the state of Ohio.

No person shall be authorized to act for the state, either as a general inspector or a special inspector, *unless he holds a certifi-*

cate of having passed a written examination approved by the board of boiler rules, and also that he holds a commission from the chief inspector of steam boilers to represent the state in that capacity."
(Emphasis the writer's.)

It will be noted from the two sections last quoted that the only provisions authorizing the issuance of certificates are contained in section 1058-16, General Code, which certificates are issued by the chief inspector of steam boilers upon receipt of a favorable report by the Industrial Commission of the result of an examination held in Ohio.

Section 1058-17, General Code, in which the words "certificate of competency" appear for the first time, contains no provision for the issuance of certificates. It merely provides that the holders of "certificates of competency" shall receive commissions from the chief inspector of steam boilers, when all other requirements of the statute were met.

Prior to the amendment of Section 1058-17, *supra*, the first and third paragraphs thereof read as they now do, the second and fourth paragraphs, prior to their amendment, reading as follows, the words emphasized indicating the changes made in the amendment:

" * * *

Any company authorized to insure boilers against explosion in *this* state may designate from holders of *such* certificates persons to inspect *the* boilers covered by such company's policies, and the chief inspector of steam boilers shall issue to such persons commissions authorizing them to act as special inspectors. Such special inspectors shall be compensated by the company designating them, and the fee provided for in section 20 shall not be collected by such special inspectors.

* * *

No person shall be authorized to act for the state, either as a general inspector or a special inspector, unless he holds a certificate of having passed *the examination as herein provided*, and also that he holds a commission from the chief inspector of steam boilers to represent the state in that capacity."

(Emphasis the writer's.)

It will be observed that, prior to the amendment thereof in 1921, said section referred to holders of certificates issued under the provisions of section 1058-16, General Code, and provided that holders of such certificates might be designated by insurance companies to inspect boilers covered by policies of such insurance companies, and further, that when so designated, the

chief inspector of steam boilers was required upon a favorable report of the Industrial Commission to issue to such holders, commissions authorizing them to act as special inspectors.

In the last paragraph of said section, as it read prior to its amendment, reference is made to the examinations held and the certificates issued under authority of section 1058-16, General Code.

A comparison of these significant facts with the language in the present statute, wherein no reference is made to the certificates issued under section 1058-16, General Code, but on the contrary "certificates of competency" are made the basis for a special inspector's commission, leads to the conclusion that the Legislature clearly intended to provide for a reciprocal method for the issuance of commissions when it amended said section. In this regard, I might state that upon inquiry I am informed that the phrase "certificate of competency" has a well recognized meaning among insurance companies and inspectors of steam boilers. In said circles, such certificate is regarded as evidence of having successfully passed an examination testing the fitness of the holder thereof to inspect steam boilers.

It seems clear, therefore, that the "certificates of competency," referred to in said latter section, are those issued in states other than Ohio and that the Legislature in amending said section in 1921 intended thereby to provide a means for their recognition and the issuance of commissions to holders of such certificates of competency upon approval by the Industrial Commission.

While the Legislature might well have defined such certificates more explicitly, any construction placed upon the language which it did use other than that which leads to the conclusion above expressed would clearly give no force and effect to the amendment.

Additional support for the above conclusion is found by comparing the present provisions of section 1058-23, General Code, with those contained in said section prior to its amendment (109 v. 255, 4/29/1921): This section now reads:

"All boilers installed after January 1, 1912, shall be inspected when installed. A boiler installed in this state prior to July 1, 1912, which does not conform to the rules of construction formulated by the board of boiler rules, may be used after a thorough

internal and external inspection, and if the inspector deems it necessary, a hydrostatic test, and after a certificate has been issued by the chief inspector. The pressure allowed on such boilers is to be ascertained by rules formulated by board of boiler rules. No certificate of inspection shall be granted on any boiler installed after July 1, 1912, which does not conform to the rules formulated by the board of boiler rules.

No certificate of inspection shall be granted on any boiler installed after July 1, 1913, which has not been thoroughly inspected during construction, and upon completion, by either a general or special inspector, and which does not conform in every detail with the rules formulated by the board of boiler rules, and upon completion distinctly stamped, under such rules as may be formulated by the board of boiler rules, by such inspector, who shall not be directly or indirectly interested in the manufacture or sale of steam boilers."

Prior to the amendment in question, the last phrase of the last sentence read:

"* * * and distinctly stamped, under such rules as may be formulated by the board of boiler rules, upon completion, with the words Ohio Standard, abbreviated to read 'Ohio Std.' by such inspector," etc. (103 v. 651.)

A comparison of the language contained in the above section before and after amendment thereof discloses that the Legislature eliminated the absolute statutory requirement of stamping "Ohio Standard" on boilers, regardless of where manufactured, which were inspected and approved, and lodged in the Industrial Commission the power to promulgate rules governing the stamping of approved boilers.

By so doing, that body seemed to have clearly recognized the futility and unimportance of requiring the word "Ohio Standard" to be stamped on every boiler manufactured at the time such boiler was shop inspected and when it was impossible to determine whether or not such boiler would ultimately be installed and used in Ohio. Manifestly, any provision in the statute which required the words "Ohio Standard" to be stamped on every boiler approved by the special inspector commissioned by Ohio would serve no purpose unless the destination of such boiler was in the state of Ohio. It therefore appears that the amendment to the section in question was effected by the Legislature for the sole purpose of providing an efficient and workable method of inspecting and stamping boilers in process of manufacture in other states which might ultimately be installed in Ohio, such method to be in harmony in every respect with the inspections conducted within Ohio and yet at

the same time making it possible to attain a degree of uniformity with other states. In both amendments the discretionary power of regulation was vested in the Industrial Commission.

Section 1058-18, General Code, contains provisions relating to the revocation of commissions of inspectors "for the incompetence or untrustworthiness of the holder thereof." Among other things this section provides that:

" * * * A person whose commission is revoked may appeal from the revocation to the board of boiler rules which shall at its next regular meeting, hear the appeal and either set aside or affirm the revocation, and its decision shall be final. The person whose commission has been revoked shall be entitled to be present in person and by counsel on the hearing of the appeal. * * * "

From the wording of the statutes above quoted, summarized or referred to, and from the legislative history of the enactment and amendments of such statutes as above outlined, and in an effort to determine the intention of the Legislature and the changes, sought to be accomplished, I have come to the following conclusions:

I. In 1911, the Legislature created a new state department which it denominated the "board of boiler rules," many of the duties of which required the exercise of discretionary or quasi-judicial powers and authority.

II. In 1913, when the Industrial Commission Act was passed, the Legislature clearly and expressly provided that after September 1, 1913, the department known as the "board of boiler rules" should "have no further legal existence," and that the Industrial Commission should "have all the powers and enter upon the performance of all duties conferred by law upon" the board of boiler rules, it being expressly provided in Section 871-22, General Code, that it should "be the duty of the Industrial Commission," and that it should "have full power, jurisdiction and authority" *to examine and license persons who desire to act as inspectors of steam boilers; to provide for the scope, conduct, and time of such examination, *** to inspect and examine steam boilers and to make, publish and enforce rules and regulations and orders* regulating the construction and use of steam boilers and all appliances connected therewith, and to "enforce all things necessary to make such examination, inspection and requirement efficient."

III. In the act of 1913, the Industrial Commission was authorized and empowered, as it still is, to employ the types of employees named in Section

871-14, General Code, and fix their compensation, provided that such "employments and compensation (were) first approved by the Governor;" and provided further, of course, that no state money might or may be drawn from the state treasury to compensate employees of the commission, except in pursuance of a specific appropriation, made by law," which may not "be made for a longer period than two years" (Art. II, §22, Const. of Ohio).

IV. Both by the express terms of section 871-22, General Code, last amended in 1915, and Section 154-45, General Code, last amended in 1934, the Industrial Commission is authorized and empowered to appoint "advisers" or "advisors," who are required to serve *without compensation*, except that under the act of May 3, 1934, the advisors may draw and receive, and the commission may pay, "actual and necessary expenses."

V. In so far as the questions before us are concerned, in the Administrative Code of 1921 the Legislature attempted to and did draw a clear line of cleavage between functions discretionary and quasi-judicial on the one hand, and duties and powers purely ministerial or executive on the other, those of the first character being left in the Industrial Commission while the ministerial or executive duties were transferred to the Department of Industrial Relations.

It may be that this line of demarcation was thus made by the Legislature because it determined that the Industrial Commission, being charged with the proper administration of the workmen's compensation fund and the allowance of claims therefrom, should have some if not a large voice in determining what were necessary and proper rules relating to the construction and operation of boilers, to the end that the safety of employees and others might be promoted and the consequent number of claims against the Industrial Commission Fund correspondingly reduced. Certainly this view is sustained by the observations of Judge Johnson in his opinion in the case of *American Woodenware Company v. Schorling*, 96 O. S. 305 (1917), later overruled and modified by constitutional amendment, where it was said at page 319:

"* * * By Section 22 (§871-22, G. C.) it (industrial commission) is given full power to investigate every employment and place of employment and make and enforce every reasonable, general and special order necessary to bring about and maintain safety in accordance with the manner provided in the act.

These provisions were necessary to meet the new and ever-

varying industrial conditions above pointed out. *They are thus enabled to bring about a reduction of the number of accidents and preserve the safety of employees.* If results in a particular instance require, the commission can increase the premiums to be paid by the employer, and can prescribe means and methods of increased safety and caution, for the violation of which the employer is liable to an injured employe * * *." (Emphasis the writer's.)

VI. Since the effective date of the act creating the Industrial Commission of Ohio (103 v. 95), what has been called the "board of boiler rules" has had no legal existence as an independent board or commission or department of the state. That is to say, what has been called the "board of boiler rules for the past several years has had no independent or exclusive discretionary or quasi-judicial powers or authority since 1913, and

VII. In performing its duties and exercising its powers and authority with reference to the inspection and regulation of the construction and operation of boilers, the examination and commissioning of regular and special boiler inspectors, and all matters pertaining thereto, the Industrial Commission has such powers and only such powers as are conferred by the specific statutes discussed herein, together with such implied powers as may be necessary to carry the powers expressly granted into effect, and in performing its duties in this respect the commission is limited in the extent and the manner of exercising its authority by these legislative enactments, including Sections 1058-8, et seq. of the General Code.

These views are not only sustained by the reasoning contained in Opinion No. 3289, Opinions of the Attorney General, 1922, Vol. I, p. 604, quoted in your request, but seem to have been formally recognized by your predecessors in office in at least two of the resolutions quoted in part in, and submitted with, your request.

Pertinent also is the language of the above opinion, commencing on page 607:

"The commission then in 1913 had the power to employ deputies and assistants for such purpose, retaining and assigning to their duties any officers or employes in abolished departments, the functions of which the commission then took over; and the Commission also had the power to appoint advisers to serve without compensation in assisting the industrial commission in the execution of its duties. It could have done either or both in any case requiring action in the organization of the department of the industrial commission; that is, it could have employed deputies or assistants in

any of the divisions which supplanted the former department, and it could have also appointed advisers to serve without compensation. It had the express power to remove those whom it employed, and it had the power necessarily implied to abolish positions of this character by simply removing *the incumbent of such position, and assigning his duties to some other employe or taking them over itself*. The commission could, at the same time, do away with advisers appointed by it by the simple expedient of failing to call upon them for assistance. *In short, both employes and advisers were creatures of the industrial commission, having no independent functions whatever, and no existence independent of the will of the Commission.* Obviously, however, the two kinds of duties were distinct. The same person could not well have been an adviser serving without compensation as such, and an employe serving with compensation at one and the same time.

It appears from your letter that the Board of Boiler Rules about which you are inquiring was created as a group of deputies or assistants of the commission. *It was not and is not, strictly speaking a board.* Some doubt is engendered by your reference to it as such. Yet, on the whole it is believed that it was competent for the commission to effect such a grouping of employes in its service as to require of them united action within the scope of the duties assigned to them. *Certainly the persons appointed on this new board of 'boiler rules' seem to have been regarded as employes, for their compensation was fixed, which could not lawfully have been the case had they been appointed as advisers.* In view of the long continued practice of the industrial commission, this department is disposed at this time to assume the legality of the original designation of these persons as employes, assistants or deputies of the Industrial Commission and the allowance to them of compensation, though this question is not entirely free from doubt. Being employes, they are not originally to be classed as advisers.

* * *

*This section (Sec. 154-45, G. C.) begins by transferring to the department of industrial relations from the industrial commission all the powers and duties of the industrial commission, with the exceptions named in the second paragraph. One of these exceptions is the powers and duties of the Commission which it exercises as the successor of the board of boiler rules. * * **

(Emphasis the writer's.)

That the Industrial Commission recognized the status of the old board of boiler rules after it was abolished and its powers transferred to the Industrial Commission, is shown by the resolution of August 30, 1913, in which members of the board as it was then called were employed as deputies on a per diem basis and the resolution of May 12, 1922, in which "four advisors who (should) serve on an advisory board to be known as The Ohio Board of Boiler Rules under the Industrial Commission of Ohio," were provided for.

It has been suggested that when on April 29, 1921 (109 v. 255), the

General Assembly amended Sections 1058-17 and 1058-23 in the respects above pointed out without changing the words "the board of boiler rules" to "industrial commission of Ohio," it impliedly recognized the existence of the board of boiler rules as an independent department or board and thereby re-invested the board created by the Industrial Commission with the powers and authority conferred in the original board of boiler rules created by the Legislature in the act on 1911. This suggestion is, however, thoroughly untenable for at least two reasons. First, the phrase, "the board of boiler rules" was obviously left in Section 1058-17 and 1058-23, *supra*, so that these sections would be consistent with the other sections pertaining to the inspection and the regulation of the construction and operation of boilers, namely, Sections 1058-7 to 1058-30, both inclusive. Second, the same General Assembly that amended Sections 1058-17 and 1058-23 on April 29, 1921, enacted the Administrative Code on April 5, 1921, transferring certain of the powers in question from the Industrial Commission to the Department of Industrial Relations.

1. Coming now specifically to answer the questions asked by you, it is at once manifest that your first question cannot be answered categorically. If the members of what is called the board of boiler rules have been employed by the Industrial Commission under the provisions of Section 871-14, General Code, and the employment and compensation has been first approved by the Governor, they may, of course, be paid for their services from the state treasury, provided the Legislature has made appropriation for such purpose. If, on the other hand, such members have been appointed "advisors" to assist the Industrial Commission in the execution of its duties with reference to the inspection and regulation of the construction and operation of boilers, such advisors must, under the law, serve without compensation although by virtue of the amendment to Section 154-45 on May 3, 1934, they may be paid their actual and necessary expenses if there be an appropriation from which such payment may be made.

2. In so far as your second question is concerned, it is clearly the duty of the Industrial Commission to prepare the written examinations provided for in Section 1058-16, General Code. This is true because of the express provisions of subparagraph 11 of Section 871-22, *supra*, which makes it the duty of the commission, and confers upon it full power, jurisdiction and authority, to examine and license persons who desire to act as inspectors of steam boilers, and also true by virtue of the provisions of Section 871-11,

General Code, which ended the legal existence of the old board of boiler rules and transferred to and invested in the Industrial Commission all the powers, authority and duties of such board, such powers, authority and duties being still reposed in the Industrial Commission, excepting those which were transferred to the Department of Industrial Relations in the Administrative Code.

3. "Certificates of competency" issued upon the passing of a written examination given in this state may be issued only by the chief inspector of steam boilers who, upon a favorable report to him by the Industrial Commission of the result of such examination, should immediately issue to the successful applicant such certificate.

4. The chief inspector of steam boilers is authorized and required, under the provisions of section 1058-17, General Code, to issue to persons holding certificates of competency from other states, commissions to inspect boilers for the state of Ohio, provided, however, that such persons must have successfully passed an examination approved by the Industrial Commission and that such certificate of competency held by them must have been approved by the Industrial Commission, and provided further, that such persons must have been designated by an insurance company authorized to insure boilers against explosion in this state.

5. A compliance with the provisions of section 1058-16, General Code, is not required in order to issue a commission to a special inspector. As stated above, if a person passes an examination approved by the Industrial Commission and holds a certificate of competency from another state, which certificate has been approved by the Industrial Commission, such person upon being designated by an insurance company authorized to insure boilers against explosion in this state, shall have issued to him by the chief inspector of steam boilers a special inspector's commission which authorizes him to inspect steam boilers for the state of Ohio.

6. By virtue of the provisions of section 1058-17, General Code, a person who has passed a written examination approved by the Industrial Commission which was given in another state, and holds a certificate of competency approved by the Industrial Commission which was issued in such other state, is, upon being designated by an insurance company authorized to insure boilers against explosion in this state, entitled to a commission to

inspect boilers for the state of Ohio, without taking the examination provided for in section 1058-16, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.