or sister, provided such president or clerk does not vote for such employment or participate in the making of such a contract otherwise than by signing a written contract which may be made between the parties, or performing whatever ministerial duties may devolve upon him as such president or clerk in connection with the making of the said contract.

Under the terms of Section 5762, General Code, the certificate of sale which is given to the purchaser of lands which have been forfeited to the state of Ohio conveys the lien only of the state for taxes and penalties charged on said lands at the time they were sold. The deed given to such purchaser by the county auditor pursuant to the provisions of said section conveys to the purchaser a fee simple title to said lands.

You also request my opinion as to the constitutionality of the laws relating to the sale of forfeited lands. In respect to this matter, this office has consistently taken the position that the power to set aside an act of the legislature upon constitutional grounds is a power solely vested in the judiciary, and one which may not be assumed by the Attorney General. For this reason this office had declined to render opinions upon the constitutionality of laws after they have been passed.

Respectfully,

JOHN W. BRICKER,

Attorney General.

5808.

APPROVAL—BONDS OF COLUMBIANA COUNTY, OHIO, $73,900.00.

COLUMBUS, OHIO, July 6, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5809.

CIVIL SERVICE COMMISSION—MAY NOT REQUIRE APPOINTING AUTHORITY IN MAKING LAY-OFFS OF CLASSIFIED CIVIL SERVICE EMPLOYES TO DO SO IN THE INVERSE ORDER OF ORIGINAL APPOINTMENT.

SYLLABUS:

1. The Civil Service Commission of the State of Ohio does not have the authority to make a regulation which would require the appointing authority in making a lay-off in the classified service of the state to lay off employes in the inverse order of their original appointment.

2. The Civil Service Commission of the State of Ohio cannot extend the rights and privileges created by the legislature in Section 486-17b in favor of firemen and policemen in the classified service of municipalities to employes in the classified service of the state, by a rule and regulation adopted pursuant to Section 486-7, General Code.

COLUMBUS, OHIO, July 6, 1936.

The State Civil Service Commission of Ohio, State Office Building, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your request for my opinion, which reads as follows:

> "This Commission is in receipt of complaints from various permanently appointed employes in the classified service, who have been temporarily laid off for purposes of economy, who protest such abolishment, or lay off, because of very recent additions to the payroll, although made from eligible lists in the manner provided by the Civil Service laws of Ohio.
>
> From the opinions of the Attorney General of 1914, it is clear that in making reductions the appointing authority may choose whom he shall retain, regardless of length of service or time of appointment. He may take into consideration other things in addition to seniority of service. He is not required to consider solely seniority of service. In support of this view, the Attorney General quotes from State ex rel. vs. Searsy, Mayor, 21 Cir., 83:
>
> In other words, the records show the appellant was permanently appointed from certification to his position in most instances many years ago, and that additional appointments were made, for example, in the Highway Department, during the season just completed. At the same time, when retrenchment became necessary due to lack of work or for purposes of economy, such very recent additions to the payroll were not first laid off nor was the employee of considerable length of service shown to be the least efficient, and for that reason the first laid off.
>
> It is the opinion of this Commission that care and judgment on our part, as well as administration of both the purpose and intent of the Civil Service Laws which grant a permanent tenure of office to qualified employes, should require such very recent additions to the payroll to be first laid off; otherwise it will be readily observed that the remedy of removal, under Section 486-17a, and the tenure of office under the same statute,

can be completely defeated by means of temporarily laying off employes or abolishing positions occupied by long service, qualified employes.

We desire to respectfully inquire, therefore, whether under the provisions of Section 486-7, which requires the Commission as one of its powers and duties to prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of the Civil Service Laws of Ohio, such a rule and regulation could be adopted as would require very recent additions to the payroll, as for example during the last year or working season, to be first laid off in case of retrenchment, due to lack of work or for purposes of economy.

In addition, it is also questionable with this Commission whether such a period of time as one year is sufficiently long enough to be reasonable under the circumstances."

It is an elementary principle of civil service law that a classified employe may be laid off without hearing for the lack of work, money or appropriation (Curtis v. State, ex rel. Morgan, 108 O. S., 292), and it has been held by the courts of this country that the provisions of the Civil Service Laws which prohibit the removal of an employe from the classified service except for cause and after a hearing, do not apply where the position of such employe is abolished or the employe is laid off for lack of work or funds. The courts have also held that the Civil Service Laws of the various states were never intended to take away the right to abolish a position which the appointing authority deems unnecessary or to lay off an employe either for lack of funds or work or for the sake of economy.

The rule of law is stated as follows in 45 C. J., 679:

"The statutes requiring a hearing or opportunity to explain apply only where the removal is for incompetency, misconduct, or other reasons personal to the individual removed, and not where the removal is made in good faith from motives of *economy, as where the services are no longer needed, or there is not a sufficient appropriation to pay salaries, or the office or position is in good faith abolished* * * *" (Italics ours.)

To the same effect is 46 C. J., 990, which reads as follows:

"While one who accepts an office under a civil service law submits to its provisions as to removal, such laws commonly provide for charges and a hearing or opportunity for explanation

before a removal. Charges and a hearing have been held not necessary where the removal is for the *purpose of economy, or where the office is abolished,* or in other cases where the removal is not in consequences of any delinquency on the part of the employe, but is for some other and sufficient reason." (Italics ours.)

The rule is stated in Dillon's Municipal Corporation, Vol. II, Section 479:

"The purpose of the civil service statutes and of other laws prohibiting the discharge of employes without cause assigned, notice, and a hearing, is to insure the continuance in public employment of those officers who prove faithful and competent, regardless of their political affiliations. These statutes are not intended to affect or control the power of the city council or the executive officers of the city to abolish offices when they are no longer necessary or for reasons of economy. They are not intended to furnish an assurance to the officer or employee that he will be retained in the service of the city after the time when his services are required. *They do not prevent his discharge in good faith without a trial and without notice, when the office or position is abolished as unnecessary or for reasons of economy.*" (Italics ours.)

The Supreme Court of Ohio, in the case of Curtis v. State, ex rel. Morgan, supra, expressed the same rule of law in the fourth paragraph of the syllabus of that case, which reads as follows:

"The fundamental purpose of civil service laws and rules is to establish a merit system, whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations, and to safeguard appointees against unjust charges of misconduct and inefficiency, and from being unjustly discriminated against for religious or political reasons or affiliations. Those laws and rules may not be invoked by an appointee, where no discrimination is claimed and no charges have been made involving misconduct, inefficiency, or other delinquency."

See also 7 O. Jur., 594; Fitzsimmons v. O'Neill, 73 N. E., 797 (Ill.); Funston v. District School Board, 278 Pac., 1073 (Ore.); Venable v. Commissioners, 67 Pac., 203 (Ore.); Lyon v. Civil Service Commission, 212 N. W., 579 (Iowa); State, ex rel. v. Sewerage and Water

Board, 106 So. 843 (La.); Phillips v. The Mayor, 88 N. Y., 245; Langdon v. The Mayor, 92 N. Y., 427; Heath v. Salt Lake City, 52 Pac., 602 (Utah); State, ex rel. v. City of Seattle, 133 Pac., 11 (Wash.), 63 A. L. R., 1413; People, ex rel. v. The Mayor, 149 N. Y., 215; Moredel v. State, ex rel., 74 N. W., 823 (Nebr.); State, ex rel. Dunbar v. City of Seattle, 208 Pac., 1093 (Wash.); Essinger v. The Mayor, et al., 119 Atl., 479 (Pa.), and O'Neill v. Williams, 199 Pac., 870 (Calif.).

The Civil Service Laws of this state recognize the power of the appointing authority to abolish a position in the classified service when the same is unnecessary or to lay off employes for lack of work or funds or for the purpose of economy. Section 486-16, General Code, reads in part as follows:

"* * * * * * * * *

Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department; and whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, and for a period of not to exceed one year shall be certified to an appointing officer as in the case of original appointments."

Section 486-17, General Code, provides in part:

"No person shall be reduced in pay or position, laid off, suspended, discharged or otherwise discriminated against by an appointing officer for religious or political reasons or affiliations. In all cases of reduction, lay-off or suspension of an employe or subordinate, whether appointed for a definite term or otherwise, the appointing authority shall furnish such employe or subordinate with a copy of the order of lay-off, reduction or suspension and his reasons for the same, and give such employe or subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission * * *."

Section 486-17a, General Code, reads in part:

"The tenure of every officer, 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 or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office. * * *."

The legislature, under the Civil Service Laws of this state, did not intend to affect or control the power of appointing authorities or executive officers to abolish positions or to lay off men when no longer needed or necessary, or for reasons of economy or for lack of work. In other words, the merit system is not intended to furnish an assurance to an employe that he will be retained in service after a time when his services are no longer required or cannot be paid for. As previously stated, the right of an appointing authority to lay off an employe in the classified service for lack of work or funds is firmly settled in this state by the case of Curtis v. State, ex rel. Morgan, supra, and Van Such, Director, et al. v. State, ex rel., 112 O. S., 488. In the latter case, at page 690, the Supreme Court of Ohio said:

"The authority of city officials to reduce the number of employes, even though it affects those appointed under civil service, when such action becomes necessary because of the condition of the finances of the city, cannot be questioned."

There is nothing in the constitutional provision (Section 10 of Article XV of the Constitution of the State of Ohio) relating to civil service which requires that the seniority of an employe shall be taken into consideration when a classified employe is laid off for lack of funds or work, or his position is abolished. Neither is there any statutory provision in the civil service laws which requires that the employe youngest in point of service be laid off first as far as the state service is concerned. It has been held by the Supreme Court of Ohio in the case of Curtis v. State, ex rel. Morgan, supra, that the provisions of Sections 486-17 and 486-17a, General Code, do not apply where an employe in the classified service has been laid off by reason of the lack of sufficient funds. The first, second and third branches of the syllabus read as follows:

"1. Where an employe in the classified service of a municipality is temporarily laid off by the safety director in the interest

of economy and for the sole reason of the lack of sufficient funds with which to pay salaries of the entire working force in such department, the statutory provisions for written notice to such laid-off or suspended employe and for opportunity to make and file an explanation have no application.

2. No appeal lies from the action of the appointing authority, except in cases of removal on the grounds set forth in Section 486-17a, General Code.

3. In all cases of temporary lay-off or suspension of a municipal employe in the classified service, such suspended or laid-off employe retains title to the office or position, and is entitled to be reinstated therein, upon the same again being refiled, in preference to all persons."

The Supreme Court justified its holding on the ground that the provisions of Section 486-17 and 486-17a are only applicable when the removal, suspension, lay-off or reduction is made for reasons personal to the incumbent and not otherwise. The language of Marshall, C. J., at page 299, is pertinant and reads as follows:

"It is apparent from this language (Section 486-17, General Code) that there is no occasion for furnishing a copy of the order to the employe, or for such employe to file an explanation, unless there is something about the transaction which calls for an explanation upon the part of such employe; that is to say, unjust charges of inefficiency, misconduct, dereliction of duty, or other delinquency. The record in this case discloses that there is no suggestion of censure or criticism of the relator, and there was therefore nothing which called for explanation on her part. Section 486-17 contains no provision for an appeal to the Civil Service Commission, and nowhere in the statutes is any appeal provided from an order of 'reduction, lay-off, or suspension'. This fact is given additional emphasis by the further provisions of Section 486-17, giving to appointing officers power wthout limit to suspend for purposes of discipline for a period not exceeding 30 days, and further removing from the jurisdiction of the Civil Service Commission all temporary and exceptional appointments.

Section 486-17a provides that the tenure of officers and employes in the classified service shall be during good behavior and efficient service, and that such officers and employes can only 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 or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.' " (Insertion ours.)

There is no requirement in the Civil Service Laws of this state providing that the youngest employe in service be first laid off when a reduction in the number of employes becomes necessary because of lack of work, funds or for financial reasons except as to firemen and policemen of municipalities. The legislature in Section 486-17b, General Code, as amended in 114 O. L., 224, provided that in the reduction of the police and fire forces of a municipality, the youngest employe in service shall be laid off first. Inasmuch as the legislature has seen fit only to require the appointing authority to consider seniority in cases of reduction of fire and police forces of municipalities, it is therefore evident that the legislature did not intend to restrict the appointing authorities in the lay-off of other employes in the classified civil service of the state, counties, or cities, except those named in that section. In other words, seniority of service has been recognized by the legislature only in the reduction of the police and fire forces of municipalities, and in no other employments of the state, the several counties or the cities.

The only protection given a classified civil service employe is that provided by Sections 486-17 and 486-17a, General Code, which prevent the removal of employes in the classified service without cause or for political or religious affiliations. However, the provisions of Sections 486-17 and 486-17a, General Code, as prevously pointed out, were held by the Supreme Court in the case of Curtis v. State, ex rel. Morgan, supra, to be inapplicable where the removal is not made for cause personal to the employe. Outside of the provisions of Sections 486-17 and 486-17a, General Code, there is no other provision in the Civil Service Laws of this state which compels the appointing authority to take into consideration the length of the service of the employe before he is laid off for lack of work or funds. Inasmuch as the legislature by Section 486-17b expressly regulated lay-offs only in respect to firemen and policemen of municipalities, it must necessarily follow that all other employes in the classified service of either the state, the several counties and the cities, may be laid off regardless of the length of service, and this, by reason of the principle of statutory construction "expressio unius est exclusio alterius."

The Civil Service Commission of the State of Ohio by reason of Section 486-7, General Code, has the right and power to prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of the Civil Service Laws of the State

of Ohio. However, the power to promulgate administrative rules and regulations does not clothe an administrative body such as the Civil Service Commission of the State of Ohio with the authority to adopt rules and regulations which are declarative of public policy. A rule and regulation requiring the appointing authority to lay off the youngest employe in point of service whenever it becomes necessary to reduce the number of employes because of lack of work or funds or for other causes, would be a declaration of public policy which can only be made by the General Assembly as provided in Section 1 of Article II of the Constitution of the State of Ohio, which reads in part:

> "The legislative power of the state shall be vested in a general assembly, consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws. * * *"

The only provision, as previously pointed out, regulating the lay-off of employes in the classified service is that contained in Section 486-17b, General Code, in respect to the lay-off of firemen and policemen in municipalities which reads:

> "Whenever it becomes necessary in a police or fire department, through lack of work or funds or for causes other than those outlined in Section 486-17a of the General Code, to reduce the force in such department, the youngest employe in point of service shall be first laid off. Should a position in the police or fire department once abolished or made unnecessary be found necessary to be recreated or reestablished within two years from the date of abolishment, or should a vacancy occur through death, resignation, or through any other cause within two years from the date of the abolishment of the position or lay-off, the oldest employe in point of service of those laid off shall be entitled to same providing he was at the date of his separation a regular

and permanent employe. When a position above the rank of patrolman in the police department and above the rank of regular fireman in the fire department is abolished and the incumbent has been permanently appointed in accordance with the provisions of this act, he shall be demoted to the next lower rank and the youngest officer in point of service in the next lower rank shall be demoted, and so on down until the youngest person in point of service has been reached, who shall be laid off."

A reading of the first sentence of that section clearly supports the view that a rule and regulation of the Civil Service Commission requiring that seniority in service be taken into consideration when a lay-off is made for lack of work or funds of a person in the classified service of the state, is an expression of public policy which can only be declared by the General Assembly.

The test to determine whether or not a rule or regulation of an administrative body is violative of Article II, Section 1, of the Ohio Constitution has been stated as follows by the Supreme Court of Ohio in the case of State, ex rel. v. The Akron Metropolitan Park District, 120 O. S., 464, at pages 478 and 479:

"In the complexity of our advancing civilization, in the wide differences in conditions in different localities in the same state, and in the ever-changing conditions in a given locality, the legislature has found it necessary to content itself with declaring the principle governing a general public purpose, and to confer upon existing local officials, or upon local boards to be created in a designated manner, the authority to provide, within definite limitations, rules and regulations to execute the general purpose expressed in the law itself. (p. 478.)

"While the legislature may not delegate to any other power the right to declare principles and standards, or general public policy, it may delegate to other competent agencies the power to determine whether or not they will avail themselves of the privileges conferred, and also delegate to certain named executive or administrative agencies authority involving discretion in relation to the execution of the law.

The legislature having declared the governmental policy, and having fixed the legal principles which are to govern, an administrative agency may be given power to ascertain the facts and conditions to which the policies and principles apply." (p. 479.)

To the same effect is the statement of the Supreme Court of the

United States, in the case of Mutual Film Company v. Industrial Commission of Ohio, 236 U. S., 230, at page 245:

> "While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. * * *
>
> Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution."

I am quite cognizant of the fact that the Supreme Court of Ohio in the case of Green v. The Civil Service Commission, 90 O. S., 252, held that a certain rule and regulation of the Civil Service Commission was an administrative rule and not a legislative act in violation of Article II, Section 1, of the Constitution of the State of Ohio. Although it was held in the case of Green v. The Civil Service Commission that the Civil Service Commission had the power to make rules and regulations by virtue of Section 486-7, General Code, nevertheless the Supreme Court in that case did not hold that the commission was authorized by Section 486-7, to make rules and regulations which were legislative in character. The contemplated rule and regulation of the Civil Service Commission would be an attempt by the Civil Service Commission to expressly supplement the provisions of Section 486-17b, an extension which the legislature of the State of Ohio did not see fit to provide when it amended Section 486-17b in 114 O. L., 224. However commendable the proposed regulation of the Civil Service Commission may be the fact remains that the commission does not have the authority to supplement statutory provisions in the Civil Service Laws of the State of Ohio by rules and regulations declaring public policy.

The Supreme Court of Ohio in the case of Davis, et al., v. The State, ex rel. Kennedy, 127 O. S., 261, held:

> "1. Where a certain jurisdiction is duly conferred, duties assigned and powers granted to a board or commission, such board or commission cannot confer upon itself further jurisdiction or add to its powers by the adoption of rules under authority granted to adopt rules of procedure.
>
> 2. Jurisdiction of the Civil Service Commission of the

city of Cleveland is conferred by the city charter, and that commission has only such powers as are thus vested in it. Jurisdiction in appeal from action of dismissal of employes is conferred upon such commission only in cases of dismissal from the departments of fire and police. If additional jurisdiction is to be conferred, it must be accomplished by an appropriate amendment to the city charter."

Whether seniority in service should be recognized when a lay-off is made of an employe in the classified service of the state, and the several counties, is a matter solely for the determination of the General Assembly. It may be contended with much force that the absence of a regulation recognizing seniority in a case of a lay-off affords opportunity for a circumvention of the spirit of the Civil Service Laws, but unless and until the legislature should see fit to remedy the situation, I am compelled to hold that your commission is without power to correct the situation by regulation. The question is solely one of lawful power vested in your commission and presents a situation where there must be invoked the well-established doctrine that the courts will not permit hard cases to make bad law.

Concluding, it is my opinion that:

1. The Civil Service Commission of the State of Ohio does not have the authority to make a regulation which would require the appointing authority in making a lay-off in the classified service of the state to lay off employes in the inverse order of their original appointment.

2. The Civil Service Commission of the State of Ohio cannot extend the rights and privileges created by the legislature in Section 486-17b in favor of firemen and policemen in the classified service of municipalites, to employes in the classified service of the state, by a rule and regulation adopted pursuant to Section 486-7, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.