

1092.

STATE SCHOOL FOR DEAF—STATE SCHOOL FOR BLIND—
RULES AND REGULATIONS—WHERE EMPLOYEES NOT
IN CLASSIFIED SERVICE, ATTAIN AGE SIXTY-FIVE
YEARS—RETIRED FROM SERVICE—NOT UNLAWFUL—
SUCH RULE NOT APPLICABLE TO CLASSIFIED CIVIL
SERVICE—POSITIONS HELD DURING GOOD BEHAVIOR
AND EFFICIENT SERVICE, SUBJECT TO STATUTORY
RETIREMENT PROVISIONS.

SYLLABUS:

1. *A rule regularly adopted by those in charge of the management and control of the State School for the Deaf and the State School for the Blind, that employes therein who are not in the classified civil service and who have attained the age of sixty-five before or during the school year 1939-1940 shall be retired from service in those schools at the end of said school year and that thereafter each such employe shall be retired at the end of the school year in which age sixty-five is attained is not unlawful, and such a rule may lawfully be made as a declaration of policy by those entrusted by law with the control and management of said schools.*

2. *Such a rule may not be made to apply to those who hold positions in the classified civil service, as they hold their positions under the law during good behavior and efficient service subject to statutory retirement provisions.*

COLUMBUS, OHIO, August 25, 1939.

MR. DICK SMITH, *Assistant Director of Education, Columbus, Ohio.*

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

"The Director of Education, Mr. Scarberry, Superintendent of the State School for the Blind, and Mr. Abernathy, Superintendent of the State School for the Deaf, at a recent meeting agreed that each teacher, superintendent, assistant superintendent, principal, or anyone else who is eligible for retirement under the provisions of the State Teachers Retirement System of Ohio, and who shall have attained age 65 before or during the school year 1939-40, shall be retired from service in the schools for the blind and deaf at the end of said school year and thereafter each such teacher or other such employee above mentioned shall be retired at the end of the school year in which age 65 is attained.

Is it legal for the Director of Education, in conjunctior

with the superintendents of the above named schools, to make such a ruling?"

By Act of the General Assembly in 1911, there was created the Ohio Board of Administration (102 O. L., 211). By the terms of said Act full power to manage and govern a number of state institutions, among which were the State School for the Blind and the State School for the Deaf, was reposed in the said board. Section 11 of the said Act was codified as Section 1842 of the General Code of Ohio, and has never been modified or repealed. It provides as follows:

"Each of said institutions shall be under the executive control and management of a superintendent or other chief officer designated, by the title peculiar to the institution, subject to the rules and regulations of the board and the provisions of this act. Such chief officer shall be appointed by the board to serve for the term of four years unless removed for want of moral character, incompetency, neglect of duty, or malfeasance, after opportunity to be heard.

The chief officer shall have entire executive charge of the institution for which he is appointed, except as otherwise provided herein. He shall select and appoint the necessary employes, but not more than ten per cent of the total number of officers and employes of any institution shall be appointed from the same county. He shall have power to discharge them for cause, which shall be recorded in a book kept for that purpose, and a report of all appointments and resignations and discharges shall be filed with the board at the close of each month.

For reasons set forth in writing the board may order the discharge of any employe of any institution.

This act shall not be construed as affecting the term of any chief officer which shall be unexpired at the organization of the board; but he shall be subject to removal as hereinbefore provided.

The board after conference with the managing officer of each institution shall determine the number of officers and employes to be appointed therein. It shall from time to time fix the salaries and wages to be paid at the various institutions, which shall be uniform, as far as possible, for like service, provided that the salaries of all officers shall be approved in writing by the governor."

In 1921 the so-called Administrative Code for the State of Ohio, was enacted by the Legislature (109 O. L., 105). This Act was codified as Sections 154-1 et seq. of the General Code of Ohio. In Section 154-3,

General Code as then enacted, a number of administrative departments of government of the State of Ohio were created, among which were the Department of Education and the Department of Public Welfare. By the terms of Section 154-57, General Code, then enacted as a part of said Code it was provided that the Department of Public Welfare should have all powers and perform all duties then vested in or imposed upon the Ohio Board of Administration and the fiscal supervisors thereof, with certain exceptions not pertinent to this inquiry.

Said Section 154-57, General Code, was amended in 1927 (112 O. L., 359) so as to relieve the Department of Public Welfare of the control of the State School for the Blind and the State School for the Deaf and transfer the control of these institutions to the Department of Education. At the same time Section 154-46, General Code, which had fixed the powers and duties of the Department of Education, was amended, and as so amended was made to include among the powers vested in the Department of Education the control and management of the State School for the Blind and the State School for the Deaf, in the following language:

“Such powers and duties vested in and imposed upon the Department of Welfare with reference to the state school for the deaf, and the state school for the blind, excepting such powers and duties with reference thereto which may now be vested in the department of finance under Sections 154-28 et seq. of the General Code.”

From the foregoing it follows that the control and management of the State School for the Blind and the State School for the Deaf and the appointment of the officers and employes of these institutions and the fixing of their salaries and wages as provided in Sections 1842 et seq., now lies in the Department of Education to the same extent it had originally been reposed in the Ohio Board of Administration.

There is no statutory or constitutional inhibition upon the exercise by the appointing authority of its discretion as to the length of time for which employes and officers in these institutions may be appointed except as the positions may be subject to the laws relating to civil service. Unless the positions in question are included in the classified civil service, in which event appointees to the positions would hold them during good behavior and efficient service up to statutory retirement the appointing authority may appoint them for a definite term or simply make the appointments without term and in that case they would hold their positions subject to the will of the person or persons who appointed them. In regard thereto, I might state that it is my information that the teaching positions were exempted from the classified civil service by order of the State Civil Service Commission several years ago. Therefore, the incumbents in such positions have no tenure of term except as it may be fixed by the appoint-

ing authority. They may be appointed and removed in the discretion of those in control of the schools. The adoption of the rule mentioned in your inquiry, is merely the pronouncement of a policy thought by those in charge of the institutions to be for the best interest of all parties concerned. The legislature has reposed that power in those with whom it has entrusted the control and management of the institutions and has not restricted or limited it so far as the question before us is concerned, by any statutory limitations. The fact that the teachers in these institutions are members of the State Teachers Retirement System and that Section 7896-34, General Code, fixes the age of compulsory retirement under that system, gives them no right to their pensions or to continued employment, nor do such facts deny to their employers the right to discharge them. They have no vested right in their positions simply because they have been appointed to them, and acquire no vested right therein by service.

A somewhat similar question was involved in the case of *Harrison vs. Board of Education*, decided by the Court of Appeals for Cuyahoga County, June 15, 1938, and reported in 60 Ohio Appellate Reports, page 45. In that case the question of whether or not the Board of Education of the Cleveland City School District might lawfully adopt a rule to the effect that no teachers in the Cleveland schools would be employed who had reached the age of 65 years, was raised. The court held:

“2. It is within the powers of a board of education, under Sections 4749 and 4750, General Code, to pass a rule requiring all school teaching employees to be retired at the age of sixty-five years, and such a rule does not conflict with Sections 7691 and 7696-34, General Code.

3. In the absence of statute that requires a board of education to reemploy teachers over sixty-five years of age, the right to refuse to do so cannot be successfully challenged, nor can its refusal to do so be held to be an abuse of discretion.”

In the course of the opinion, Judge Lieghley speaking for the court, said:

“Also, Section 7896-34, General Code, is claimed to be a limitation upon the power of the board to adopt said resolution and carry out its expressed purpose. This section deals with retirement age and has nothing whatever to do with a contract of employment for future service between a teacher and the board. This section relates to matters personal to the teacher. He may voluntarily retire at sixty years of age and the retirement board shall retire him when over seventy. This resolution does not retire him at sixty-five and in no way conflicts with the retirement act. Even if it did, it should not seem particularly alarming or outrageous to require one to do that which he may vol-

untarily do. It would not be surprising if inquiry disclosed that more than one board in this state refuses to employ a teacher over sixty. It might be the result of an honest judgment based on their peculiar experience in a particular locality. It may be their experience and judgment that younger teachers produce better results. Whether he elects to avail himself of the privileges of this act at once and retire or seeks employment elsewhere is not determined for him. This resolution simply announces a policy in advance to the effect that this board will not approve and confirm any contract of any teacher seeking employment who has attained the age of sixty-five years.

The existence of a teachers' pension fund in the city of Chicago was held not to restrain the board of education in its right to select such persons as teachers as it may choose to employ and that the only right upon which a contributor to the fund can insist in case of no renewal contract is a right to a return of money contributed. *People of Illinois, ex rel. Pursman v. City of Chicago*, 278 Ill. 318, 116 N. E. 158."

I am therefore of the opinion in specific answer to your question that, a rule regularly adopted by those in charge of the management and control of the State School for the Deaf and the State School for the Blind, that employes therein who are not in the classified civil service and who have attained the age of sixty-five before or during the school year 1939-1940 shall be retired from service in those schools at the end of said school year and that thereafter each such employe shall be retired at the end of the school year in which age sixty-five is attained, is not unlawful and such a rule may lawfully be made as a declaration of policy by those entrusted by law with the control and management of said schools.

Such a rule may not be made to apply to those who hold positions in the classified civil service, as they hold their positions under the law during good behavior and efficient service, subject to statutory retirement provisions.

Respectfully,

THOMAS J. HERBERT,
Attorney General.