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1. MENTAL HYGIENE AND CORRECTION, DEPARTMENT OF—DIRECTOR—CHIEF OF DIVISION OF MENTAL HYGIENE—APPROVAL DIRECTOR OR ASSISTANT DIRECTOR—PROPER OFFICIAL FOR CIVIL SERVICE COMMISSION TO RECOGNIZE IN PERSONNEL ACTIONS—TRANSFER, CLASSIFIED EMPLOYEES FROM ONE MENTAL INSTITUTION TO ANOTHER.
2. CLASSIFIED EMPLOYEE—MAY BE TRANSFERRED FROM POSITION IN ONE MENTAL INSTITUTION TO SIMILAR POSITION IN ANOTHER MENTAL INSTITUTION—WITHOUT CONSENT OF EMPLOYEE—TRANSFER INTRA-DEPARTMENTAL.
3. CLASSIFIED CIVIL SERVICE EMPLOYEE—MAY APPEAL TO CIVIL SERVICE COMMISSION—ORDER OF INTRA-DEPARTMENTAL TRANSFER— ONLY WHEN TRANSFER CONSTITUTES AN ACT OF DISCRIMINATION AGAINST EMPLOYEE FOR RELIGIOUS OR POLITICAL REASONS OR AFFILIATIONS.

SYLLABUS:

1. The director of the Department of Mental Hygiene and Correction, or the chief of the Division of Mental Hygiene with the approval of the director or assistant director, is the proper official to be recognized by the Civil Service Commission in personnel actions relating to the transfer of classified employees from one mental institution to another, both institutions being within the Division of Mental Hygiene of the Department of Mental Hygiene and Correction.

2. A classified employee may be transferred from a position in one mental institution to a similar position in another mental institution within the Division of Mental Hygiene of the Department of Mental Hygiene and Correction without the consent of such employee, since such a transfer is intradepartmental.

3. A classified civil service employee may appeal to the Civil Service Commission from an order of intradepartmental transfer only when such transfer constitutes an act of discrimination against such employee for religious or political reasons or affiliations.

Columbus, Ohio, April 18, 1955

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

Dear Sir:

Your request for my opinion reads as follows:

"This Commission is confronted by a situation in which the consent of the Commission is sought for the transfer of a classified employee from one hospital to another, within the Department of Mental Hygiene and Correction, in two personnel actions:

"1. On a request for such a transfer signed by the superintendent of the releasing hospital and by the superintendent of the requesting hospital in accordance with paragraph 1 (b) Rule XI, Section 143.25 of the Revised Code. However, the written consent of the employee involved was not attached to the transfer form and in fact the employee has objected to the proposed transfer by letter to this Commission.

"2. The other action consists of a letter addressed to the employee by the Commissioner, Division of Mental Hygiene, endorsed by the Director of the Department of Mental Hygiene and Correction, notifying said employee that:

'You are hereby transferred to the Gallipolis State Institute * * * effective February 16, 1955, for the good of the service.'

"Section 143.25 of the Revised Code provides in part:

'With the consent of the commission, a person holding an office or position in the classified service may be transferred to a similar position in another office, department, or institution having the same pay and similar duties; * * *'

"Paragraph 1 of Rule XI applies to the above section of the law and is designed to implement transfers of personnel:

'1. Transfer of a person holding a position in the competitive classified service, who has served the required probationary term, may be made as follows:

'(a) For a period not exceeding thirty days, from one position to a similar position of the same class, grade and character of work, and having the same pay, within a department without notice of the Commission, but this shall not be construed as limiting the power of the head of an institution

in making such assignments of the officers therein as he may deem advisable.

‘(b) With the approval of the Commission, from a position in one department to a position having the same pay and similar duties in another department, upon request of the heads of the two departments concerned, provided the employee to be transferred does not object.

‘(c) Where the good of the service demands, a transfer may be made with the consent of the Commission upon request of the head of a department to which transfer is to be made, without the approval of head of the department from which such transfer is to be made.

‘(d) Persons in the classified service of the state may be transferred to the same or a similar position in the county service, in accordance with Section 143.25 of the law, upon request of the head of the county department to which transfer is desired, and consent of the state department from which the transfer is being made. Transfers from the county service to the state service shall not be permitted.

‘All transfers, except as provided in paragraph (a) above, shall be subject to approval of the Civil Service Commission.’

“Since the above quoted Rule XI contemplates transfers upon the request and consent of appointing authorities concerned, and the consent of the employee concerned is also involved, your opinion is requested to determine:

“1. Which officer or officers in the Department of Mental Hygiene and Correction shall be recognized by this Commission in personnel actions addressed to it?

“2. May an employee in the classified service be transferred from one mental institution to another, both being within the Department of Mental Hygiene and Correction, without the consent of the employee, when such transfer is ordered ‘for the good of the service’ by the Director or the Commissioner of the department?

“3. In the event the answer to Question 2 above is affirmative, does the employee who is transferred, without his consent, from one institution to another within the same department, by an order issued him by the Commissioner, Division of Mental Hygiene and approved by the Director, Department of Mental Hygiene and Correction, in which order substantial reasons justify such transfer as being for the good of the service, have the right to appeal to this Commission on the merits of such order?”

For the purpose of this opinion it will be assumed, since you do not say, that the transfer contemplated in your request is from one position to a similar position of the same class, grade and character of work, and having the same pay. If this were not true, a different conclusion might result in this opinion.

It is well recognized that the fundamental purpose of the 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 fitness, without regard to political consideration, and to safeguard appointees against unjust charges of misconduct and inefficiency, and from being unjustly discriminated against for religious or political reasons or affiliations. It serves a further purpose: that being to secure to the State of Ohio the services of qualified individuals. The Civil Service laws protect the individual as well as the state. Therefore, although a classified Civil Service employee has certain benefits and protection under the Civil Service laws, one must also look to the welfare of the State of Ohio in giving consideration to these laws. The Civil Service laws have almost in detail set out the various procedures to be followed in regard to employing and discharging classified personnel.

Your inquiry concerns the transfer of a classified service employee. The only statute which pertains to such a transfer is Section 143.25, Revised Code, which you have quoted in your letter. However, in addition to that statute, the Civil Service Commission has adopted rules and regulations, one of which is Rule XI, paragraph 1, pertaining to transfers. Although Section 143.25 does not set forth who has the authority to make transfers under this section, paragraph 1 of Rule XI quite clearly indicates that the proper official having the authority to transfer a classified employee is the head of the department.

You have stated in your inquiry that the transfer contemplated is that of an employee from one mental institution to another, both institutions being in the Division of Mental Hygiene, within the Department of Mental Hygiene and Correction. You further advise that you have under consideration two personnel actions in regard to this transfer: one where a request was made by the superintendents of the two hospitals involved, and the other taken by the Commissioner of Mental Hygiene, with the approval of the Director of the Department of Mental Hygiene and Correction.

In giving consideration to the action taken by the superintendents of the mental hospitals, you apparently are assuming that each superintendent is the head of a department, as set forth in your Rule XI, paragraph 1 (b).

Prior to 1911 each state benevolent or correctional institution was a separate principality, controlled by an individual board of trustees, Section 1832, General Code of Ohio for 1910. In 1911, House Bill No. 146, 102 Ohio Laws 211 was enacted, creating the Ohio board of administration. To this board was given the full power to manage and govern certain named institutions, among which were the mental hospitals. Both prior to and after the enactment of House Bill No. 146, as is the case today, each institution had as its executive head a superintendent. However, the institutions were not within any specific department as such, and may well have been looked upon as separate departments. In 1921 a law was enacted (109 Ohio Laws, 105) which created various administrative departments, one being the Department of Public Welfare. In that particular act, all the powers and duties of the Ohio board of administration, with certain exceptions, were given over to the Department of Public Welfare, including the control and government of the mental institutions previously under the board's jurisdiction. Here then, for the first time, the mental institutions ceased to be separate entities or principalities, and became parts of a definite department of the State of Ohio.

The Civil Service law was enacted in 1913, at which time Section 486-16, General Code, now Section 143.25, Revised Code, pertaining to transfers of classified employees, was enacted. It is important to note that this section is the same today as enacted then. I am advised by your office that Rule XI, paragraph 1 of the rules and regulations of the Civil Service Commission was put into force on January 27, 1916, and was substantially the same as the present paragraph 1 of Rule XI.

It therefore follows that in 1913, when former Section 486-16, General Code, was enacted, and in 1916, when paragraph 1 of Rule XI was put into force, the mental institutions may have been considered as separate departments, and each superintendent considered as the head of a department. However, with the change in the law in 1921 in regard to these mental institutions, they ceased to be departments as such and became parts of a department. Today, under Chapter 5119 of the Revised Code, though still headed by superintendents, the mental institutions are but subdivisions of the Division of Mental Hygiene of the Department of

Mental Hygiene and Correction, which department is under the executive control of the director. Under the provisions of Section 5119.48, Revised Code, a superintendent, referred to as the managing officer, has the entire executive charge of the institution for which he is appointed; but he is under the supervision of the director of the department as well as the chief of the division of which such institution is a part. The director of the Department of Mental Hygiene and Correction, on the other hand, under the provisions of Section 5119.01, Revised Code, is the executive head of the entire department, and has control over each mental institution even to the extent of having the authority, with the approval of the Governor, to change the purpose for which any institution under his control is being used. Section 5119.03, Revised Code.

It is therefore my opinion that the director of the Department of Mental Hygiene and Correction, or the chief of the Division of Mental Hygiene, with the approval of the director, is the proper official to be recognized by the State Civil Service Commission in regard to the transfer of a classified employee from one mental institution to another, both institutions being in the Division of Mental Hygiene of the Department of Mental Hygiene and Correction.

I turn now to your second inquiry as to whether a classified employee may be transferred from one mental institution to another within the Division of Mental Hygiene of the Department of Mental Hygiene and Correction without the consent of said employee. Having reached the conclusion that I have in answer to your first question, it follows that the transfer to which you refer is an intradepartmental transfer, and your question resolves itself into a consideration of whether a classified employee's consent is a prerequisite to an intradepartmental transfer.

The section pertaining to the transfer of classified Civil Service employees is Section 143.25, Revised Code, quoted in your letter, which reads in part as follows:

“With the consent of the commission, a person holding an office or position in the classified service may be transferred to a similar position in another office, department, or institution having the same pay, and similar duties; * * *”

It may be noted from an examination of this section that there is no requirement that a classified employee's consent be obtained in regard to any transfer made under this section. From an examination of paragraph

1 of Rule XI of the rules quoted in your letter, I note that subparagraphs (b), (c) and (d), have to do with transfers other than intradepartmental transfers. The pertinent part of paragraph 1 of Rule XI, therefore, is subparagraph (a), which reads as follows:

“1. Transfer of a person holding a position in the competitive classified service, who has served the required probationary term, may be made as follows:

“(a) For a period not exceeding thirty days, from one position to a similar position of the same class, grade and character of work, and having the same pay, within a department without notice of the Commission, but this shall not be construed as limiting the power of the head of an institution in making such assignments of the officers therein as he may deem advisable.”

Under this portion of the rule of the Civil Service Commission there appears no requirement that a classified employee's consent must be obtained in regard to a transfer within the same department. In 1917 the then Attorney General had under consideration former Section 486-16, General Code, now 143.25, Revised Code, and in Opinion No. 795, Opinions of the Attorney General for 1917, Vol. 3, p. 2122, the third branch of the syllabus held as follows:

“An employe appointed from a state-wide eligible list is under the control of the head of the department who, in the proper management of the affairs of such department, may require the services of such employe in different localities from time to time as the exigency of public service requires, so long as the transfer is not from one department to another in violation of Section 16 of the civil service law.”

I recognize that this opinion did not have under consideration the transfer of a classified employee from one institution to another; however, in that opinion, at page 2125, the then Attorney General state:

“* * * As to the transfer of the employes, the opinion expressed by you in your question is correct, that section 16 of the civil service law has reference to transfers from one department to another and not to mere transfers from one position to another in the same department. * * *”

It will be further noted that this opinion came after the adoption of Rule XI of the Civil Service Commission but prior to the change of the status of the mental institutions.

In 1934, Section 486-16 and Section 1 (a) of Rule X, which is nearly identical to the present Rule XI, were under consideration by the then

Attorney General. In that opinion, No. 3128, Opinions of the Attorney General for 1934, Vol. 2, p. 1302, the syllabus reads as follows:

“An employe in the classified civil service, may be transferred for a period of ninety days or for a longer period from one position to a similar position within the same department, regardless of the objections of such employe.”

From an examination of the above statute, rule of the Civil Service Commission, and the above quoted Attorney General's opinion, it is my opinion that a classified employe may be transferred from a position in one mental institution to a similar position in another mental institution within the Division of Mental Hygiene of the Department of Mental Hygiene and Correction, without his consent; since, as I have pointed out above, such a transfer is intradepartmental.

I come now to your third and final question: when the commissioner of the Division of Mental Hygiene, with the approval of the director of Mental Hygiene and Correction, orders the intradepartmental transfer of a classified employe without his consent, does such employe have the right to appeal to the Civil Service Commission on the merits of such order.

The right to appeal from such orders is strictly a statutory one. Section 143.07, Revised Code, reads in part as follows:

“The commission shall: * * *

“(F) Hear appeals from the decisions of appointing officers of persons in the classified service, who have been reduced in pay or position, laid off, suspended, discharged or discriminated against by such appointing authority.”

Bear in mind that the order to which you refer is an order of transfer, and that the right to appeal is a matter of law. From an examination of the above section, as well as the entire Civil Service laws, I cannot find that the legislature has made any provision for an appeal to the Civil Service Commission from an order of transfer as such. At first glance one might assume that where a classified civil service employe is transferred for other reasons than for the efficiency and good of the public service, such employe might have an appeal on a basis of discrimination. However, Section 143.26 of the Revised Code reads in part as follows:

“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 the case of Board of County Commissioners of Huron County, et al v. The State, ex rel. Clarke, 127 Ohio St., 341, the Court had under consideration the above two quoted statutes. In that case the Court, construing these two sections together, held, and the syllabus reads as follows:

“The discrimination referred to in Section 486-17, General Code, connotes discrimination for religious or political reasons or affiliations. Under the provisions of that section, where discrimination is relied on as the sole basis for reduction in pay or position, or lay off, suspension or discharge, it must be charged and proven that the discrimination was made because of such reasons or affiliations.”

In view of the Clarke case, I am obliged to hold that a classified civil service employee may appeal to the Civil Service Commission from an order of intradepartmental transfer only when such transfer constitutes an act of discrimination against such employee for religious or political reasons or affiliations.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The director of the Department of Mental Hygiene and Correction, or the chief of the Division of Mental Hygiene with the approval of the director or assistant director, is the proper official to be recognized by the Civil Service Commission in personnel actions relating to the transfer of classified employees from one mental institution to another, both institutions being within the Division of Mental Hygiene of the Department of Mental Hygiene and Correction.

2. A classified employee may be transferred from a position in one mental institution to a similar position in another mental institution within the Division of Mental Hygiene of the Department of Mental Hygiene and Correction without the consent of such employee, since such a transfer is intradepartmental.

3. A classified civil service employee may appeal to the Civil Service Commission from an order of intradepartmental transfer only when such transfer constitutes an act of discrimination against such employee for religious or political reasons or affiliations.

Respectfully,

C. WILLIAM O'NEILL

Attorney General