sions of section 4785-175, of the General Code of Ohio, hereby certify that, in my opinion, the attached summary is a fair and truthful statement of the proposed amendment of the Constitution of Ohio by the adoption of Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of Article XVIII."

Respectfully,
THOMAS J. HERBERT,
Attorney General.

841.

CIVIL SERVICE, STATE — WHERE FOUR CALCULATING MACHINE OPERATORS EMPLOYED—TWO SERVED PROBATIONARY PERIOD—TWO NOT YET COMPLETED PROBATIONARY PERIOD — POSITIONS ABOLISHED — LATER, TWO POSITIONS RECREATED—STATUS OF EMPLOYES ON ELIGIBLE LIST.

SYLLABUS:

Where, within a department of state, there are employed four calculating machine operators, two of whom are serving a probationary period and two of whom have completed the probationary period, and the positions occupied by those who have permanent status are abolished and thereafter, after those two persons serving probationary periods have achieved permanent status, such other two positions are abolished and it subsequently becomes necessary to recreate two of the four abolished positions, it is required that the Civil Service Commission, in the same manner as provided for original appointments, certify to the appointing authority an eligible list bearing the names of all four of the incumbents displaced from employment by such abolishments.

COLUMBUS, OHIO, July 1, 1939.

HON. CARL W. SMITH, *Chairman, Civil Service Commission of Ohio, State Office Building, Columbus, Ohio.*

DEAR SIR: Your request for my opinion reads as follows:

"In a major department of the state service the following unusual situation recently occurred:

There were four Calculating Machine Operators appointed from certification but serving their probationary period of ninety days. Under date of February 1, 1939, the Director of the Department abolished two of the four positions, the incumbents of

which had just completed the ninety day probationary period required by Section 486-13 of the General Code, and Section 21 of Rule VII of the rules and regulations of this Commission. However, the two remaining employees had not completed their ninety day probationary period upon the date of abolishment of the first two, which was February 1, 1939. The ninety day probationary period in the case of the two remaining employees would not be served and completed until February 24, 1939.

It is the opinion of this Commission that the Director acted in error on February 1, 1939, in abolishing two of the four positions occupied by incumbents who had completed their ninety day probationary period and retaining in the service the two who had not yet completed their ninety day probationary period.

However, under date of March 1, 1939, the Director abolished the positions of the remaining two Calculating Machine Operators, and on that date, March 1, 1939, they had completed their ninety day probationary periods.

It now becomes necessary on March 15, 1939, for the good of the service to re-create two of the four positions, and the question presents itself to the Civil Service Commission as to which two of the four former incumbents are entitled to be reinstated.

In accordance with Section 486-16, General Code, the two whose positions were abolished on February 1, 1939, were placed by the Civil Service Commission at the head of an appropriate eligible list. Subsequently on March 1, 1939, when their positions were abolished, the other two were returned at the head of the eligible list and over the two whose positions had been abolished one month prior thereto.

The Director claims to have acted in good faith and states that he was not aware of the fact that the second two who now head the eligible list had not completed their probationary periods on February 1, 1939, when the first two positions were abolished. In the meantime they were permitted to gain their full ninety day probationary periods, although same was accomplished through error on the part of the Director in permitting them to serve. Nevertheless, they now have gained their ninety day probationary periods which the law requires in order to be permanent classified employees and stood at the head of the eligible list on March 15, 1939 when two of the four positions were recreated. All four who were formerly classified employees lay claim to the two positions recently established on March 15, 1939. The Director assigned to the positions the two whose positions were abolished on March 15, 1939, and who on that date headed the eligible list respectively, as is provided by Section 486-16 of the General Code.

Will you kindly inform us relative to the proper legal procedure in this situation."

It is apparent from the words and tone of your letter that you consider the first abolishment mentioned therein improper in that it displaced persons who had achieved permanent status in the classified service by the completion of the ninety day probationary period required under Section 486-13, Ohio General Code and the rules of your Commission and thereby preferred persons who had not achieved permanent status by the serving of their ninety day period of probation. It may well be that the act of the Director, in its incidental effect, created a result not completely in accord with the wishes of your Commission in that it displaced persons of longer service than others and of permanent status, but unless some definite prohibition created by law exists, it does not follow that such act of the Director was improper.

It must be remembered in considering abolishments of positions that the separation of a person from employment caused thereby is incidental to the abolishment as shown by the fact that a person so separated, even though without fault on his part, has no appeal to your Commission nor may such person apply for relief in a court if the abolishment is made in good faith. See 7 O. J. 594 and Vansuch vs. State 112 O. S. 688. Likewise, the courts of this state have stated that unless bad faith appears, it is within the discretion of an appointing authority to determine which position, among several, shall be abolished. See State, ex rel. Riggin vs. Benesch, No. 156,726, Common Pleas Court of Franklin County. Also, by reference to the principles governing lay-offs of employes under classified civil service, we find the same discretion in an appointing authority as to whom, among several persons, may be removed by means of a lay-off.

In an opinion of a former Attorney General, it was held that your Commission was without authority to require lay-offs to be made in the inverse order of appointment and thus make seniority of service the deciding factor in lay-offs in the absence of some statutory provision requiring the same. See 1936 Opinions of the Attorney General, Opinion No. 5809.

The probationary period of a civil service employe is provided by Section 486-13, General Code, which in so far as is material to this inquiry, is as follows:

"All original and promotional appointments shall be for a probationary period of not to exceed three months to be fixed by the rules of the commission, and no appointment or promotion shall be deemed finally made until the appointee has satisfactorily served his probationary period. At the end of the probationary period the appointing officer shall transmit to the commission a record of the employe's service, and if such service is unsatis-

> factory, the employe may, with the approval of the commission, be removed or reduced without restriction; but dismissal or reduction may be made during such period as is provided for in sections 486-17 and 486-17a of the General Code. Any person who is appointed to a position in the classified service under the provisions of this act, except temporary and exceptional appointments, shall be or become forthwith a resident of the state."

You will observe that, except for a contingency, i. e., the disapproval of the appointing officer at the end of ninety days, the right of a probationary employe to hold office is made the same as a regular employe by the provision that removal shall be in accordance with Sections 486-17 and 486-17a, General Code, which sections provide for a removal for cause only of civil service employes. You will further observe that the above section providing for the probationary period of service sets up no distinction between those who have served such approval period and those who have not; all of which leads me to the conclusion that no distinction between the two above classes of employes is created by the Civil Service Act, but that a probationary employe serves with the same right as a regular employe, subject only to the contingency above noted. It, therefore, appears that unless length of service or some standard of status under the law is made a test, the discretion of an appointing authority as to which jobs may be abolished should not be disturbed.

I must, therefore, conclude that in the absence of a prohibition in law forbidding an abolishment as here made, the act of the Director is not in itself unlawful.

There having been nothing contrary to law in the acts of the Director in making these abolishments, the manner and means of filling the re-created positions become the principal inquiries here. Section 486-16, General Code, so far as is pertinent to this inquiry, provides:

> "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."

It will be noted that the Act, after providing generally for the reinstatement of persons otherwise separated from the service, in specific

words provides for the placing of the name of a person whose position has been abolished at the head of an eligible list to be certified to an appointing authority as in the case of original appointments. I also note that under Section 12 of Rule X of your Commission, which is in the following words:

> "Should a position once abolished in accordance with the provisions of Section 486-16 of the General Code be found necessary to be recreated or re-established within one year from the date of abolishment, the last incumbent of this position shall be entitled to same providing he was, at the date of his separation, a regular and permanent employe."

your Commission has made provision for the reinstatement of persons separated from the service by reason of an abolishment by granting to such persons the right to the position if the same be recreated within a certain period of time.

Coming to the actual mechanics of filling the jobs now created, it appears that there would be a variance in the method followed under the statute, supra, and the method prescribed by your rule above set out. To demonstrate the above, under Section 486-16, supra, the incumbents of these abolished positions would be placed upon an eligible list and would appear now in the inverse order of the abolishments and, no other factors entering, would be the first four names on the appropriate eligible list, and there now being two appointments to make, all four names would be certified to the appointing authority, as in the case of an original appointment and such appointing authority would have the right to choose two of the four names to fill the positions. Under your rule above quoted, however, the last incumbents of the positions recreated would, of right, be entitled to the positions and two of the persons displaced by these abolishments would be deprived of the right of consideration for the offices now to be filled.

The authority for your Commission to make rules governing administrative procedure is found in Section 486-7, Ohio General Code, but it is a well settled principle of law that, while administrative or quasi judicial bodies may be granted the authority of prescribing rules for administration, such rule making power grants no right to create rules inconsistent with or giving greater rights than the law itself. Thus in 1936 Opinions of the Attorney General, Opinion No. 5809, it was said that your Commission might not by rule grant greater rights or extend those rights granted to civil service employes, which rights were created by legislative enactment.

Under Section 1 of Article II of the Constitution of Ohio, the legislative power of the state is vested and reserved to the General Assembly. Any administrative rule which purports to be declarative of public policy is an encroachment on the legislative power which is expressly prohibited

by the above mentioned section of the Constitution. In State, ex rel. vs. The Akron Metropolitan Park District, 120 O. S., 464, at page 479, the last principle is stated in the following words:

> "* * * 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."

It having been demonstrated that the rule of the Commission above set out gives additional rights not conferred by the statute concerned, and further leads to a different result, when put into application, from the statute concerned, it must be said that the Legislature being a superior power and a body such as yours being without legislative power, the rule announced in the statute must be applied.

Putting into operation the last conclusion, it will be seen that compliance with the legislative standard as set out in Section 486-16, supra, requires the certification to the Director of the names of all four incumbents of the positions abolished, from which list the Director must choose persons for the offices recreated as in the case of original appointments.

It is, therefore, my opinion that under the circumstances outlined in your request for my opinion, it is required that your Commission must certify to the appointing authority concerned the names of the incumbents displaced by the abolishment of the offices held by such persons in the same manner as on an eligible list for original appointment to such positions within the classified service, from which eligible list the appointing authority involved may make such choice as he might in the case of the original appointment to these positions.

Respectfully,
THOMAS J. HERBERT,
Attorney General.