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CIVIL SERVICE COMMISSION OF OHIO—APPOINTING OFFICER OF CLASSIFIED EMPLOYE ON PROBATION FOR NINETY DAY PERIOD MUST DETERMINE AS TO SATISFACTORY OR UNSATISFACTORY SERVICE—SECTION 486-13 G. C. — HOW RECORD TRANSMITTED—WHERE REPORT UNSATISFACTORY, COMMISSION WITHOUT AUTHORITY TO INVESTIGATE CHARACTER OF SERVICE — DUTY OF COMMISSION TO INVESTIGATE WHERE IT BELIEVES OF-

FICER WITH POWER OF APPOINTMENT, LAY-OFF, SUSPENSION OR REMOVAL HAS ABUSED POWER — IF ABUSE DISCLOSED, DUTY OF COMMISSION TO MAKE REPORT TO GOVERNOR.

SYLLABUS:

1. *The determination as to whether or not the service of a probationary employe in the classified civil service of the state is satisfactory during the ninety-day probationary period, provided for by section* 486-13 *of the General Code, must in all cases be made by the appointing officer of such employe.*

2. *A record of such service must, at the end of the probationary period, be transmitted by such appointing officer to the Civil Service Commission, and if such service is unsatisfactory the employe may with the approval of the Commission be removed or reduced without restriction.*

3. *In determining whether or not the removal of a probationary employe, on the ground of unsatisfactory service, is to be approved by it, the Civil Service Commission is limited to an inspection of the service record submitted to it by the appointing officer and is without authority to investigate the character of the service rendered by such employe.*

4. *Whenever the Civil Service Commission shall have reason to believe that any officer having the power of appointment, lay-off, suspension or removal, has abused such power with respect to the removal of a probationary employe, it is the duty of the Civil Service Commission to make an investigation in connection therewith and if such investigation discloses such abuse of power, it is the further duty of the Civil Service Commission to make a report thereof to the Governor.*

Columbus, Ohio, January 19, 1940.

Hon. Gertrude Jones, Chairman, The State Civil Service Commission of Ohio,
Columbus, Ohio.

Dear Miss Jones:

This will acknowledge receipt of your recent communication, which reads as follows:

"Section 486-13 provides in part that:

'All original and promotional appointments shall be made 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 unsatisfactory, the employe may, with the approval of the commission, be removed or reduced without restriction.'

Section 21 of Rule VII of Rules and Regulations of this Commission provides as follows:

'The probationary period provided by Section 486-13 of the Civil Service Law is hereby fixed at ninety days dating from effective date of permanent appointment and including the day of permanent appointment. At the close of the probationary period, any appointee whose services have not been satisfactory may be removed or reduced by the appointing officer without restriction, upon filing a statement of reasons for such removal or reduction satisfactory to the Civil Service Commission.'

Under the powers and duties of this Commission prescribed in Section 486-7 of the General Code, the fourth paragraph reads in part as follows:

'The Commission shall make investigation, either sitting in banc or through a single commissioner or the chief examiner, concerning all matters touching the enforcement and effect of the provisions of this set and the administrative rules of the commission prescribed thereunder.'

The question upon which this Commission requests your opinion is whether this Commission has the authority to investigate the character of service rendered by a probationary appointee who has been removed when a service record filed with this Commission by the appointing officer if true would be sufficient to warrant the dismissal of a probationary employe, or is this Commission required to accept the service record at its face value?

In several hundred such removals the employe recognizing that he has no right of appeal to the Commission for a hearing requests an investigation, which is merely another method of accomplishing the same result as would be accomplished by means of a hearing.

In this connection, allow us to respectfully invite your attention to the Supreme Court case, known as 132, O. S. 50, decided December 2, 1936, which states in part that:

'No right is granted by this statute to probationary appointees to appeal to the civil service commission or to have a hearing upon the question of the character of the service rendered by him, as is granted by Sections 486-17 and 486-17a, General Code, to permanent employes. Such distinction specifically made by the legislation relative to such appointments cannot be disregarded.

To do so would be tantamount to an amendment of the statute—a legislative and not a judicial function."

The statutes pertinent to your inquiry are in their material parts set forth in your letter and it is therefore unnecessary to restate them herein.

The members of the Civil Service Commission are, of course, public officers, and as such they have only such powers as are expressly delegated them by statute and such as are necessarily implied from those delegated.

The powers conferred upon the Civil Service Commission with respect to conducting investigations are contained in section 486-7, General Code. In order to determine whether or not the Civil Service Commission may in the exercise of such powers investigate the character of service rendered by a probationary employe, it is essential not only to give consideration to section 486-13, General Code, which provides for a probationary period, but to ascertain the object and purpose of said section.

Helpful in this respect are the provisions of Article XV, section 10 of the Constitution of Ohio, which section reads as follows:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

It is significant to note that the above section provides that merit and fitness be ascertained, *as far as practicable,* by competitive examination. It is entirely conceivable that in many instances an examination might not be practicable as the sole test of merit and fitness and, no doubt, in realization of this fact the General Assembly provided for a probationary service as an added measure to determine merit and fitness. Consistent with this position is an observation contained in Field's Civil Service Law, page 108, wherein it is stated:

> "The civil service laws and regulations quite commonly provide for a probationary period that must be served before the person appointed to the position becomes a regular or permanent appointee. The existence of the constitutional provision such as that in New York, which requires appointments to be made on the basis of merit and fitness does not operate in and of itself to prevent the requirement by statute of a probationary period. The constitutional requirement that merit and fitness be ascertained by examination so far as practicable was said to leave room for

> the possibility that an examination might not be practicable as the sole test of merit and fitness, and for that reason a probationary service to determine fitness might be imposed."

On this point, it is stated in the case of People, ex rel. Sweet, v. Lyman, 157 N. Y. 368:

> "It is manifest that the purpose of the statute and rule relating to probationary appointments is to enable the appointing officer to ascertain and correct any error or mistake of himself or of the Civil Service Commission arising from the inefficiency of a candidate certified as eligible, where he might prove incompetent to discharge the duties of the place to which he was appointed."

The obvious purpose therefore being to ascertain the efficiency of the appointee before placing him in permanent employment, it becomes necessary to determine who should decide whether or not an appointee has satisfactorily served his probationary period. There can be no doubt that such decision must be reached by consideration of facts, which in all cases are peculiarly within the knowledge of the superiors of such appointee. In this connection it is stated in Field's Civil Service Law, at page 110:

> "The power to appoint belongs not to the civil service commission but to the appointing officer. It is his decision which permits probationary appointment to ripen into permanent appointment, not the decision of the commission; unless specifically restricted, the appointing officer determines whether probationary service is satisfactory."

To the same effect is a statement contained in the concurring opinion of Landon, J., in the case of People, ex rel. v. Lyman, supra, wherein it is declared:

> "I think it was for the appointing power to pass upon his (the relator's) conduct and capacity during the probationary period, for the reason that if the defendant (the appointing power) has found them satisfactory, it was his duty for the purpose of absolute appointment implies the power to find either way."

I might state at this point that nowhere in the Civil Service Act can any language be found which might in any way be construed as a restriction upon the appointing officer to determine whether probationary service is satisfactory.

The practicability of lodging the power to make such determination in the appointing officer was clearly recognized by the Gen-

eral Assembly in the enactment of section 486-13, General Code. It will be observed that under the provisions of said section the appointing officer must at the end of the probationary period transmit to the commission *a record of the employe's service.* If it were the intention of the General Assembly to enjoin upon the Civil Service Commission the duty of ascertaining whether or not the service of a probationary appointee was satisfactory or unsatisfactory, clearly there would be no purpose in requiring the appointing officer to furnish the Commission with a record of such appointee's service. By providing for such a record to be made by the appointing officer and transmitted to the Civil Service Commission, the General Assembly clearly manifested its intention to limit the Commission to an inspection of the record transmitted to it, in order to determine whether or not an employe's removal should be approved by it.

To say that the statute in question requires, or even permits, the Civil Service Commission or one of its members to make an independent investigation in order to determine whether or not the Commission should approve a removal, would be to give no effect to that part of the statute which requires a record of service to be transmitted.

It is a fundamental rule of statutory construction that a statute under consideration should be construed in its entirety and that effect should be given to every word, phrase and provision contained therein. No provision or part thereof can properly be disregarded in the construction of a statute. As stated above, the Civil Service Commission is by the terms of section 486-7, General Code, empowered to make certain investigations. In order to properly interpret said section and thus determine the scope of such investigation, the manifest purpose of the statute relating to probationary appointments, as set out above, should be considered.

With respect to the rule that all statutes in an act are to be construed together, it is stated in 37 O. Jur. 603:

> "***** in interpreting an ambiguous statute, the entire legislation on the subject at the time is a matter competent for consideration. Indeed, if on the face of a statute there is doubt as to its meaning, and the doubt can be removed and the intent gathered by reference to cognate provisions, it is the duty of the courts to use them in aid of construction to learn and carry out the legislative intent. That is, a particular statute or section should be construed in the light of, with reference to, or in connection with other statutes and sections,—especially where the provisions, though separated in the Code, were formerly part of but one section of an act, or of

> the same act. It follows that all such sections and statutes are to be considered and compared with reference to the entire system of which all are parts."

It is also a familiar rule that statutes are to be given a reasonable construction in conformity with the general object and purpose of the entire legislation covering the subject matter, in order to effectuate such object and purpose.

Having pointed out that the purpose of section 486-13, supra, in so far as said section pertains to probationary appointments, is to repose in the appointing officer the power to determine whether probationary service is satisfactory, it would consequently appear that in order to be in consonance with the well established rules of statutory construction, the provisions of section 486-7, supra, may not be construed so as to contemplate powers to conduct investigations relative to the character of service rendered by probationary employes.

A further reason which leads to the conclusion that the General Assembly intended the employe's record of service be accepted at its face value by the Civil Service Commission, is the presumption of law that the duties enjoined upon public officers are performed in good faith. The law imposes upon a person who assumes a public office the obligation to act in good faith in the discharge of his duties and to exercise ordinary care and prudence in the trust committed to him.

Pertinent hereto is the statement contained in 32 O. Jur., page 951:

> "An officer is under a duty to exercise his judgment, concerning the official act which he is called upon to perform, to a degree commensurate with the responsibility. And it is his duty to act in good faith and with the prudence and integrity which an honest man of ordinary prudence would exercise under like circumstances"

With respect to the presumption as to officers' acts, it is stated in 32 O. Jur., page 953:

> "No doctrine is better established than that the acts of an officer, within the scope of his powers and authority, are presumed to be rightly and legally performed until the contrary appears; that is, the action of a public officer or board, within the limits of the jurisdiction conferred by law, is presumed to be not only valid but also in good faith and in the exercise of sound judgment. Acts done which presuppose the existence of other acts to

> make them legally operative are presumptive proofs of the latter. The foundation of this rule is that one who is invested with authority by the sovereign, commissioned and sworn to faithfully perform the duties pertaining to such commission, must necessarily be supposed to be acting in conformity thereto; and anyone who claims that the officer was not so acting must show affirmatively that such was the case."

See also Ward v. Barrows, 2 O. S. 241; Mitchell v. Franklin Co. Treas., 25 O. S. 143; Steubenville v. Culp, 38 O. S. 18.

If such presumption abides with the appointing officer, it would certainly appear that the Civil Service Commission would be bound to accept the facts contained in the service record of the employe and if such facts, in the judgment of the Commission, justify the removal of the employe, to approve such removal.

Your communication sets out still another cogent reason why the Civil Service Commission should not look behind the service record transmitted to it. You quote from the opinion in the case of State, ex rel. v. McDonough, 132 O. S. 47, and point out that an investigation into the character of service rendered by the removed probationary employe would in effect grant to such employe an appeal to the Commission, which, under the statutes and the above decision, is denied him.

Your position in regard thereto is clearly supported by said case, the second and third branches of the syllabus reading as follows:

> "2. If, at the end of the probationary period, the service of a probationary appointee is unsatisfactory, the appointing officer may, with the approval of the civil service commission, remove or reduce such appointee without restriction.
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> 3. The removal of such appointee is governed by the specific provisions of Section 486-13, General Code, and not by the general provisions of Sections 486-17 and 486-17a, General Code, relating to removal and appeal."

Clearly, if section 486-17a, General Code, which not only gives a removed employe the right to have the Civil Service Commission inquire into the facts surrounding his tenure of employment and his removal therefrom, but likewise contains the authority for the Commission to hear appeals and inquire into such facts, has no application in the case of a probationary removal, it would logically follow that an attempt on the part of the Commission to make an investigation in such case would amount to a usurpation of powers granted to it.

An examination of the record in the above case discloses further that in deciding the issues presented therein the court had before it the question of whether it was the duty of the municipal civil service commission of the city of Steubenville to inquire into the facts set out in the service record of the relator.

The action was one in mandamus and the petition filed therein read in part as follows:

> "Relator further says that said commission, refused to grant him an appeal to said commission or allow him a hearing before it whereby he might explain or refute the so-called charges made against his service, although requested by said relator so to do within ten days after such attempted removal; that on March 2, 1936, without any knowledge on the part of your relator to any meeting of the commission or any intention to act upon the matter of so-called charges against him, and in his absence, said commission held a special secret night meeting at which meeting said commission, *without having before it any record of relator's service and without any testimony or evidence being adduced before it, attempted to act in the matter of removal of relator under the so-called charges against him.*
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> Relator further says that at all times his behavior has been good and his service efficient and satisfactory; that he has not been guilty of incompetency, dishonesty, inefficiency, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of the civil service laws, or of the rules of the civil service commission, or of any other failure of good behavior, or of any acts or conduct mentioned or referred to as 'specific causes' or included in any so called charges submitted against him, or of any acts of misfeasance, malfeasance, or nonfeasance in office, and that there existed no statutory ground for his dismissal.
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> Relator avers that the causes mentioned or assigned by the said director for his removal, were not the true reasons prompting him in his desire to remove said relator, and that they were not the reasons actuating the said commission in its action in approving said dismissal; but that they were a mere pretense and sham for the purpose of evading and avoiding a statement or disclosure of the real reasons for the attempted discharge of this relator, and that the real reasons were solely for political purposes, such as are prohibited by law as a ground for his removal." (Emphasis the writer's.)

To the petition the respondents demurred on the ground that the facts stated therein did not constitute a cause of action. The demurrer was sus-

tained by the court of common pleas which judgment was reversed by the court of appeals. Upon a hearing thereof by the Supreme Court, said court, in a unanimous opinion, reversed the judgment of the court of appeals and affirmed that of the court of common pleas. Pertinent hereto is the further observation of the Supreme Court in said case:

> "When it is further conceded that the three steps required by provisions of this section (section 486-13, General Code) which are specifically applicable to the situation here presented have been taken and the essential requirements of the statute thereby met, the averments of the petition challenging the good faith and impugning the motive of the appointing officer and the civil service commission become immaterial. The removal was made at the end of the probationary period by the process prescribed by the section above quoted. Such appointment could not be deemed finally made until the appointee had satisfactorily served his probationary period." (Parenthetical matter the writer's.)

It should be pointed out in connection herewith that authority to conduct investigations is also granted to the Civil Service Commission by the terms of section 486-22 of the General Code, which section reads as follows:

> "Whenever a civil service commission shall have reason to believe that any officer, board, commission, head of a department, or person having the power of appointment, lay-off, suspension or removal, has abused such power by making an appointment, lay-off, reduction, suspension, or removal in violation of the provisions of this act, it shall be the duty of the commission to make an investigation, and if it shall find that such violation of the provisions or the intent and spirit of this act has occurred, it shall make a report thereof to the governor, or in the case of a municipal officer, or employe to the mayor or other chief appointing authority, who shall have the power to remove forthwith such guilty officer, board, commission, head of department, or person; an opportunity first having been given to such officer, employe or subordinate of being publicly heard in person or by counsel in his own defense, and such action of removal by the governor, mayor or other chief appointing authority shall be final except as otherwise provided herein."

It will be observed, however, that the above section requires the Civil Service Commission to make an investigation whenever it shall have reason to believe that the power of appointment, lay-off, suspension or removal has been abused by an appointing officer, and if it shall find that the provisions of the act relative thereto have been violated, to report the same to the governor. Under these powers it would appear that if the Commission

has reason to believe that an appointing officer has abused his power of removal with respect to probationary appointees, the Commission could then make an investigation in connection therewith and, if such were the case, report to the Governor. In other words, the above section confers upon the Civil Service Commission special authority to conduct an investigation with a view to and for the sole purpose of effecting the removal of an appointing officer who has abused his power of appointment. Obviously, such authority could not be extended to permit the investigation about which you inquire.

In light of the foregoing, and in specific answer to your question, it is therefore my opinion that:

1. The determination as to whether or not the service of a probationary employe in the classified civil service of the state is satisfactory during the ninety-day probationary period, provided for by section 486-13 of the General Code, must in all cases be made by the appointing officer of such employe.

2. A record of such service must, at the end of the probationary period, be transmitted by such appointing officer to the Civil Service Commission, and if such service is unsatisfactory the employe may with the approval of the Commission be removed or reduced without restriction.

3. In determining whether or not the removal of a probationary employe, on the ground of unsatisfactory service, is to be approved by it, the Civil Service Commission is limited to an inspection of the service record submitted to it by the appointing officer and is without authority to investigate the character of the service rendered by such employe.

4. Whenever the Civil Service Commission shall have reason to believe that any officer having the power of appointment, lay-off, suspension or removal, has abused such power with respect to the removal of a probationary employe, it is the duty of the Civil Service Commission to make an investigation in connection therewith and if such investigation discloses such abuse of power, it is the further duty of the Civil Service Commission to make a report thereof to the Governor.

Respectfully,

THOMAS J. HERBERT,
Attorney General.