362.

AUDITOR OF STATE—MAY LAWFULLY ISSUE SALARY WARRANTS TO EMPLOYES, CLASSIFIED SERVICE OF STATE, IF CERTIFICATE OF STATE CIVIL SERVICE COMMISSION IS ATTACHED TO PAY ROLL—AMENDED HOUSE BILL 3, 93rd GENERAL ASSEMBLY TRANSFERRED APPROPRIATION AMOUNTS TO BUREAU OF UNEMPLOYMENT COMPENSATION WHEN UNEMPLOYMENT COMPENSATION COMMISSION WAS ABOLISHED —AUDITOR REQUIRED TO TRANSFER SUCH AMOUNTS ON BOOKS OF RECORD IN HIS OFFICE.

SYLLABUS:

1. *The auditor of state may lawfully issue warrants for the salary of employees in the classified service of the state of Ohio who are employed in the Bureau of Unemployment Compensation, if a certificate of the state civil service commission is attached to the payroll for such employees.*

2. *Any and all appropriation amounts to the credit of the Unemployment Compensation Commission were, by the provisions of Amended House Bill No. 3, 93rd General Assembly, transferred to the Bureau of Unemployment Compensation when said Unemployment Compensation Commission was abolished, and said Bureau of Unemployment Compensation was created, and the auditor of state is therefore required to transfer such amounts from the credit of such Unemployment Compensation Commission to the credit of the Bureau of Unemployment Compensation, on the books of record in his office.*

COLUMBUS, OHIO, March 27, 1939.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

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

> "Your attention is directed to the provisions of Amended Senate Bill No. 57, enacted by the present general assembly,

providing for the abolition of the Unemployment Compensation Commission of Ohio, and the creation of a Bureau of Unemployment Compensation, as well as an Unemployment Compensation Board of Review and an Advisory Council.

In connection with this, it is our information that certain employees in the classified service of the state, who were previously appointed to positions in the then existing Unemployment Compensation Commission, have been recently discharged by the appointing authority prior to the termination of the probationary period on the ground of incompetence. In several cases the exact status of the discharged employee may be involved, as to his rights under the classified service of the state, but prior to final determination of the same, other persons are appointed to fill the positions of the discharged employees.

On the presentation of payrolls for the new employees, bearing the approval of the civil service commission, would the auditor of state be within his legal rights to issue warrants for the services involved, when the rights of the discharged employee to retain his position have not been determined by appropriate authority, and would the right of the new employee to hold the position be contingent on the final determination of the civil service commission as to the status of the former employee?

In further comment on the new act first above noted, is the auditor of state acting with proper lawful authority to transfer the appropriation amounts on the books of record in his office from the credit of the Unemployment Compensation Commission to the credit of the Bureau of Unemployment Compensation on the basis that the entire functions of the abolished commission have been, in accordance with law, properly transferred to the Bureau of Unemployment Compensation?"

Pertinent to the first question presented for my consideration are the provisions regarding probationary appointees contained in Section 486-13 of the General Code, which read 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 employee's service, and if such service is unsatisfactory, the employee 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."

It will be noted from the above that all appointments in the classified service of the state are for a probationary period of not to exceed three months and that no appointment shall be deemed finally made until the appointee has satisfactorily served his or her probationary period, and if the record of such appointee is unsatisfactory, such appointee may, with the approval of the civil service commission, be removed without restriction.

The rights of a probationary appointee in the classified service are plainly stated in the above quoted section and the final determination of the same is made when such appointee is removed at the end of the probationary period and such removal is approved by the civil service commission. In other words, there is no appeal from the action of the employer in removing such appointee if such removal is approved by the Commission.

This question has likewise been definitely settled in this state by the Supreme Court in the case of State ex rel. *Artman* v. *McConnough,* 132 O. S., 47, in which the court held, as disclosed by the syllabus, that:

> "1. Under the provisions of Section 486-13, General Code, no appointment to a civil service position shall be deemed finally made until the appointee has satisfactorily served the prescribed probationary period.
>
> 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.
>
> 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."

In the opinion, Judge Matthias, at page 49, said:

> "When it is further conceded that the three steps required by provisions of this section 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. The provisions of Section 486-17, General Code, therefore have no application to the situation presented in this case. It is governed and controlled by the specific provisions of Section 486-13, General Code. Pursuant thereto the record of the service of the probationary appointee was certified to the civil service commission as unsatisfactory, and that commission approved the removal of such appointee.

As a safeguard against arbitrary action of the appointing official or even his erroneous judgment as to the unsatisfactory character of the probationary appointee's services, his removal at the termination of the probationary period cannot be made effective without the approval of the civil service commission. But with that approval, such removal or reduction is 'without restriction.' 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 appointees."

From the foregoing, there can be no doubt that if a probationary appointee is removed by the employer at the end of the probationary period and such removal is approved by the civil service commission, the rights of said appointee have been determined by appropriate authority and the matter is entirely closed as far as such appointee is concerned. Your letter states, however, that it is your information that certain employees have been discharged "prior to the termination of the probationary period." Referring back to Section 486-13, supra, it will be noted that dismissals made during the probationary period are governed by the provisions of Sections 486-17 and 486-17a of the General Code. It is my information, however, that no such probationary appointees have been removed except at the end of the probationary period.

Whether or not the removal of the appointee occurs at the end of the probationary period or before the termination thereof is entirely beside the point, as your question is directed to the issuing of warrants on payrolls bearing the names of new employees.

You state that the payrolls of all new employees were approved by the civil service commission. Your attention, therefore, is directed to Section 486-21 of the General Code, which, under the circumstances, is controlling. Said section reads as follows:

"After the taking effect of this act it shall be unlawful for the auditor of state, or for any fiscal officer of any county,

city or city school district thereof, to draw, sign or issue or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state, or of any county, city or city school district thereof, to pay any salary or compensation to any officer, clerk, employe, or other person in the classified service unless an estimate, payroll or account for such salary or compensation containing the name of each person to be paid, shall bear the certificate of the state civil service commission, or, in case of the service of a city, the certificate of the municipal service commission of such city, that the persons named in such estimate, payroll or account have been appointed, promoted, reduced, suspended, or laid off or are being employed in pursuance of this act (G. C. §§ 486-1 to 486-31) and the rules adopted thereunder.

Any sum paid contrary to the provisions of this section may be recovered from any officer or officers making such payment in contravention of the provisions of law and of the rules made in pursuance of law; or from any officer signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on his official bond, in an action in the courts of the state, maintained by a citizen resident therein. All moneys recovered in any action brought under the provisions of this section must, when collected, be paid into the treasury of the state or appropriate civil division thereof, except that the plaintiff in any action shall be entitled to recover his own taxable costs of such action."

From the above language, it will be observed that the duty of the auditor of state to issue his warrant is dependent wholly upon the presence or absence of the certificate from the civil service commission. On this point, it is stated in Ohio Jurisprudence, Vol. 7, at page 612:

"If the payroll is properly certified, he (the auditor) is under no obligation to inquire further as to the actual legality of the appointment or employment of the persons named thereon, and if, on the other hand, the certificate is lacking, he is neither required nor authorized to issue his warrant even though there may be no question whatever as to such legality."

In an opinion rendered by the then Attorney General, Opinions of the Attorney General for 1915, p. 1735, the first branch of the syllabus reads as follows:

"The auditor of state in issuing warrants for salary and compensation of persons in the classified service of the state

should be guided exclusively by the certificate of the state civil service commission attached to the payroll on which such warrant is demanded. If such certificate is attached, the auditor of state may lawfully issue the warrant; if it is not attached, he may refuse to issue a warrant. In neither event does the duty of the auditor of state to issue a warrant depend upon the legality under the civil service law of the appointment of the person demanding its issuance, except as established by the presence or absence of such certificate."

For all the reasons above stated, I answer your first question by advising you that if the civil service commission certified to the payrolls upon which the warrants in question are to be drawn, then the employees in question are entitled to such warrants; but if the civil service commisison does not certify thereto, such employees are not entitled to the warrants.

Coming to your second question, I assume that the appropriation amounts referred to in your letter, are those moneys which were appropriated by the provisions of Amended House Bill 752, 92nd General Assembly, and also Amended House Bill No. 3, 93rd General Assembly, effective January 13, 1939.

In an opinion rendered by me on March 9, 1939, No. 277, it was stated:

"The functions of government which were carried on by the former Unemployment Compensation Commission of Ohio are in their essential details the same as those now carried on under the terms of Amended Senate Bill No. 57, supra, by the administrator of the Bureau of Unemployment Compensation.

The Unemployment Compensation Commission of Ohio has been divested of the power to administer the Unemployment Compensation Act, and that power has been transferred to and is now vested in its successor, the newly created administrator of the Bureau of Unemployment Compensation."

Such being the case, the provisions of Section 4, on page 99 of the partial appropriation act, Amended House Bill No. 3, supra, are clearly dispositive of your question. Said section, in so far as the same applies hereto, reads as follows:

"If a law requires the transfer or abolition in whole or in part of the functions of any department, institution, office, or other agency or body for which appropriation is made, if such appropriation relates solely to functions transferred or abolished, then in case of transfer, the appropriation shall likewise be transferred, and in case of abolition, the authority to incur obligation under authority of such appropriation shall cease."

From the above it is obvious that the appropriation amounts to which you refer would automatically be transferred by reason of the above provisions and the transfer thereof on the books of record in the office of auditor of state is merely a ministerial duty enjoined upon the auditor of state by operation of law.

Without further prolonging this discussion, you are therefore advised, in specific answer to your questions, that in my opinion,

1. The auditor of state may lawfully issue warrants for the salary of employees in the classified service of the state of Ohio who are employed in the Bureau of Unemployment Compensation, if a certificate of the state civil service commission is attached to the payroll for such employees.

2. Any and all appropriation amounts to the credit of the Unemployment Compensation Commission were, by the provisions of Amended House Bill No. 3, 93rd General Assembly, transferred to the Bureau of Unemployment Compensation when said Unemployment Compensation Commission was abolished, and said Bureau of Unemployment Compensation was created, and the auditor of state is therefore required to transfer such amounts from the credit of such Unemployment Compensation Commission to the credit of the Bureau of Unemployment Compensation, on the books of record in his office.

Respectfully,

THOMAS J. HERBERT,

Attorney General.