

3595.

CONSERVATION COMMISSIONER—AUTHORITY OF—APPOINTED BY  
DIRECTOR OF AGRICULTURE WITHOUT RECOMMENDATION OF  
CONSERVATION COUNCIL—EXCEPTION NOTED.

SYLLABUS:

1. *The Director of Agriculture is vested by law with the power to appoint, remove or accept the resignation of the Conservation Commissioner. The appointment of such officer can be made without any recommendation from the Conservation Council. The provision in section 1438-3, which provides that the Conservation Council may recommend a Conservation Commissioner to the Director of Agriculture applied only when the Conservation Council was first organized and the first appointment of the head of the Division of Conservation was made.*

2. *The Conservation Commissioner has the sole authority to employ clerks, stenographers, fish and game protectors, both special and otherwise, a Lake Eric supervisor, police patrolmen and such other employes as he may deem necessary. Fish and game protectors and special fish and game protectors can not be appointed by the Conservation Commissioner until directed to do so by the Conservation Council.*

COLUMBUS, OHIO, September 23, 1931.

HON. I. S. GUTHERY, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date and that of J. W. Thompson, Conservation Commissioner, requesting my opinion on the following questions:

1. Who has the authority to appoint, remove or accept the resignation of the Conservation Commissioner?

2. Who is empowered to employ and dismiss the employes in the Division of Conservation?

The following sections and parts thereof of the General Code are pertinent to the first question: Section 1438-3 reads in part as follows:

“As soon as possible after the taking effect of this act the conservation council shall organize and shall recommend to the director of agriculture a conservation commissioner who shall be appointed by such director if acceptable to him. Upon the delivery to the office of the governor of a written notice by said council that it has organized, that the director of agriculture has appointed the conservation commissioner and that he has accepted and qualified as such, and that it is ready to assume its duties and exercise its powers, all the powers and duties now vested by law in the fish and game division of the department of agriculture, or in the chief of said division or any officer thereof, and all powers and duties in regard to fish and game now vested in the director of agriculture or the department of agriculture, shall be transferred to and vest in the division of conservation; and the division of fish and game of the department of agriculture and the offices of chief and assistant chief and all other offices of said division shall be abolished and cease to exist from and after the time of said delivery of said notice. At said time

all records and papers of the division of fish and game, all supplies, offices, leases, rights and property, real and personal, belonging to or in the custody of said division, and pending business of said division and such records, leases, papers, supplies, rights and property belonging to or in the custody of the department of public works for the supervision, maintenance and improvement of the state reservoir parks, pertaining to and necessary for the administration of the powers and duties herein transferred to the division of conservation shall be transferred to and shall be in custody of and under the control of the division of conservation."

Section 1439 provides in part as follows:

"For the purpose of carrying into effect the provisions of this chapter there shall be appointed by the director of agriculture a commissioner as heretofore provided for. The conservation commissioner shall act as secretary to the conservation council."

Section 154-6 reads in part as follows:

"Offices are created within the several departments as follows:

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In the department of agriculture:

Conservation commissioner.

Chiefs of divisions as follows:

Animal industry.

Foods and dairies.

Plant industry.

State fair.

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Sections 154-6 and 1439 were amended in the same bill in which section 1438-3 was enacted. See Amended Senate Bill No. 131, 113 O. L. 551.

The sections just quoted are subject to the rule of statutory construction laid down by the court in the case of *United States v. Baltimore & O. S. W. Ry.*, 16 O. Fed. Dec., page 1, the first branch of the syllabus reading as follows:

"In construing a clause of a statute, regard must be first had to the language of the clause itself, and then to other clauses in the same act, and that construction should be adopted which permits the whole act to stand consistently together, or reduces the inconsistency to the smallest possible limits."

Applying that rule of statutory construction to sections 154-6, 1438-3 and 1439, it would appear that the power to appoint a Conservation Commissioner was vested entirely in the Director of Agriculture by the legislature, except as to the first appointment to that position.

A careful reading of section 1438-3 clearly indicates that the provision contained therein relative to the appointment of the Conservation Commissioner was to apply only when the Conservation Council was first organized. Such a con-

struction results upon the application of the rule of statutory interpretation stated in the case of *State, ex rel. Spira, v. the Board of County Commissioners*, 32 O. App. 382, wherein the court said:

“Purpose of construction of statute is to ascertain and give effect to legislative intent, and in doing so court should seek intent, in language employed in statute, giving full effect to every word used.”

The very language of section 1438-3 indicates that the legislature was only concerned about the first meeting and organization of the Conservation Council in that section. There is nothing in that section which would imply that the procedure outlined in the first sentence thereof, relating to the appointment of a Conservation Commissioner, was to apply whenever a vacancy occurred in that position. This viewpoint is further supported by the fact that the legislature in section 1439 specifically provided that the Director of Agriculture should appoint the Conservation Commissioner. If the provision in section 1438-3, relating to the appointment of the Conservation Commissioner, were to control subsequent appointments as well as the first appointment, it would have been needless for the legislature to have amended section 1439. If the legislature intended to give the Conservation Council the power and right to recommend at all times a Conservation Commissioner to the Director of Agriculture, it would not have amended section 154-6 without amending section 154-7, which reads as follows:

“The officers mentioned in sections 154-5 and 154-6 of the General Code shall be appointed by the director of the department in which their offices are respectively created, and shall hold office during the pleasure of such director.”

Section 154-7 empowers the directors of the various departments in the state of Ohio to appoint the heads of the various offices created by the legislature in section 154-6. The legislature, in order to effectuate the claims of the Conservation Council that the provision of section 1438-3 applied to subsequent appointments as well as to the first appointment, would have limited the grant of the appointing power contained in section 154-7 to all offices except that of the Conservation Commissioner in the Department of Agriculture. This the legislature did not see fit to do and it must be assumed that the legislature, knowing of the provisions contained in section 154-7, contemplated and intended that the Director of Agriculture was to have the sole right to appoint the Conservation Commissioner without recommendation or suggestion from the Conservation Council, except in making his first appointment to that office. My interpretation would harmonize the various provisions contained in Amended Senate Bill No. 131, in 113 O. L. 551, especially sections 154-6, 1438-3 and 1439.

It may be urged that such was not the intention of the author or supporters of the Conservation Act. If that is the case, then their remedy lies with the legislature, since the Attorney General can only construe a statute in view of the plain meaning of the language used therein. It is to be understood, however, that there is no inhibition or prohibition in the Conservation Act which would prevent the Director of Agriculture from seeking or accepting the recommendations made by the Conservation Council in the selection of a Conservation Commissioner. The Director of Agriculture is free to seek their advice and counsel in making his appointment of a Conservation Commissioner but there is no statutory provision requiring him to do so.

Since, under my interpretation, the Director of Agriculture has the sole authority to appoint the Conservation Commissioner, it follows that he is the only one who has the authority to remove him or accept his resignation. Section 154-7 provides that the persons appointed by the directors of the various departments to fill the offices created by the legislature in section 154-6 shall hold such offices only during the pleasure of the directors. It follows that if the Director of Agriculture has the power to remove such an official he also can accept his resignation, inasmuch as a resignation is a voluntary surrender of a position and differs from a removal only in that the latter is an action which is not dependent upon the consent of the person removed.

The second question submitted to me for my opinion is answered by the following sections of the General Code: Section 479, Rule 2, reads:

"All appointments to the position of reservoir police patrolman shall be made on probation, by the conservation commissioner subject to the rules and regulations of the civil service commission, and if at any time, in the opinion of such commissioner a person appointed to such position proves himself unfit for, or neglects to properly perform his official duties, he shall be dropped from the service."

Section 479, Rule 3, reads:

"The conservation commissioner is hereby authorized to employ one police patrolman at each reservoir park, at a salary of not to exceed twelve hundred dollars per year, two assistant police patrolmen at each state reservoir for three and one-half months prior to and including Labor Day, at the rate of not exceeding ninety dollars per month, and may expend for special patrolmen at each state reservoir during the summer months, a sum not exceeding ninety dollars, at the rate of \$3.00 per day for each patrolman employed, all of which expenses shall be paid from the receipts from leases, boat permits and sale of special privileges to be derived from each of the state reservoirs, parks or funds appropriated for such purposes, but no funds shall be expended for this purpose upon any reservoir in excess of its own earnings, except from funds especially appropriated for such purposes."

Section 479, Rule 7, reads:

"Each patrolman, unless otherwise directed by the conservation commissioner shall be at the reservoir to which he is assigned by 9 o'clock a. m. of each day including Sundays, and remain on duty until 9 o'clock p. m., with an intermission of one hour at noon and one hour immediately after 5:30 p. m. and shall be subject to call to make arrests, at all hours during the day or night and be subject to any special instructions which the conservation commissioner deems it necessary to give to such patrolman."

Section 479, Rule 8, reads:

"Each patrolman, both on and off duty, in his conduct and deportment, must be quiet, orderly and respectful towards all persons with whom he may come in contact; violent, coarse, profane and insolent lan-

guage while on duty, and any conduct subversive of good order and gentlemanly bearing, will be cause for dismissal by the conservation commissioner."

Section 479, Rule 23, reads:

"The conservation commissioner shall furnish each patrolman with a copy of this act, which is intended to govern the actions of the police patrolmen when on duty and the conservation commissioner may, whenever he deems it proper, examine any patrolman as to his knowledge of the laws prescribed in this act, and a failure of any patrolman to become fairly familiar with his duties as prescribed in this act, shall be a proper cause for his removal by such commissioner."

Section 479, Rule 24, reads:

"Each patrolman, on the termination of his term of service by limitation or otherwise, shall surrender his badge, records and all property that has come into his hands by reason of his office, to the conservation commissioner or in his absence to any person designated by the conservation commissioner to receive the same."

That part of section 482 which reads as follows:

"Every police patrolman appointed by the conservation commissioner to preserve order and protect the public," etc.

Section 1438-3 reads in part as follows:

"Every officer and employe of the fish and game division of the department of agriculture and every officer and employe of the department of public works whose duty is herein transferred to the division of conservation and are under the state civil service laws at the time this act goes into effect shall be assigned to a position in the division of conservation of the same standing, classification, grade and privileges, as the position each had in the division of fish and game or department of public works under the civil service laws and so far as possible to duties equivalent to those of his former office or employment. Nothing in this section shall be construed, however, to require the retention of more employes than are necessary to the proper performance of the functions of the division of conservation."

Section 1439 reads in part as follows:

" \* \* \* The conservation commissioner shall appoint a Lake Erie supervising protector and such number of fish and game protectors and special fish and game protectors as the conservation council may prescribe. The Lake Erie supervising protector and each fish and game protector shall hold his office for a term of two years, unless sooner removed by the conservation commissioner. Each special fish and game protector shall have the same powers and perform the same duties as a fish and game protector."

Section 1443 provides in part as follows:

"The conservation commissioner is empowered to employ, subject to the civil service law, necessary clerks, stenographers and other employes as he may deem necessary. The compensation of the fish and game protectors, special fish and game protectors, and all other employes of the division of conservation shall be fixed by the conservation commissioner, unless such compensation is otherwise fixed by law. They may also be allowed and paid all actual and necessary expenses incurred by them in the performance of their duties, but only when itemized statements of the same are certified to by the person incurring the expenses and are allowed by the conservation commissioner."

It is apparent from a reading of the sections of the General Code just quoted that the Conservation Commissioner is authorized and empowered by law to employ, subject to the civil service laws, necessary clerks, stenographers, police patrolmen, a Lake Erie supervising protector, fish and game protectors and special fish and game protectors and such other employes as he may deem necessary. The only authority granted to the Conservation Council, in reference to employes, is that contained in section 1439, which provides that the Conservation Council may prescribe the number of fish and game protectors and special fish and game protectors to be appointed by the Conservation Commissioner. In other words, the Conservation Council must first determine the number of fish and game protectors and special fish and game protectors to be appointed before the appointment of such officers can be made by the Conservation Commissioner. There is no section in the Conservation Act which would indicate that the Conservation Council has authority to employ the necessary clerks and stenographers and other employes required to administer the law or to appoint a Lake Erie supervisor or other law enforcing officers.

It is therefore my opinion, in specific answer to your question, that:

1. The Director of Agriculture is vested by law with the power to appoint, remove or accept the resignation of the Conservation Commissioner. The appointment of such officer can be made without any recommendation from the Conservation Council. The provision in section 1438-3 which provides that the Conservation Council may recommend a Conservation Commissioner to the Director of Agriculture applied only when the Conservation Council was first organized and the first appointment of the head of the Division of Conservation was made.

2. The Conservation Commissioner has the sole authority to employ clerks, stenographers, fish and game protectors, both special and otherwise, a Lake Erie supervisor, police patrolmen and such other employes as he may deem necessary. Fish and game protectors and special fish and game protectors can not be appointed by the Conservation Commissioner until directed to do so by the Conservation Council.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*