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CAPITAL PLANNING AND IMPROVEMENT, CHIEF OF THE DIVISION—LEGAL AUTHORITY TO CONTINUE EXISTENCE OF OFFICE—WITHIN STATE DEPARTMENT OF FINANCE—OFFICE MAY BE FILLED BY APPOINTMENT BY DEPARTMENT OF FINANCE—SECTIONS 121.04, 121.14 RC—AM. SUB. H.B. 490, 101 GA—SECTIONS 125.81, 125.82, 127.21, 127.26, 153.04 RC—AM. H.B. 212, 101 GA, SECTION 121.04 RC.

The provisions of Sections 125.81, 125.82, 127.21 and 127.26, Revised Code, as enacted in Amended Substitute House Bill No. 490, 101st General Assembly, and of Section 153.04, Revised Code, as amended in such enactment, are sufficient to continue in existence the office of "Chief of the division of capital planning and improvement" within the state department of finance, notwithstanding the deletion of the listing of such office in Section 121.04, Revised Code, by the amendment of such section in Amended House Bill No. 212, 101st General Assembly. Such office may be filled by appointment by the department of finance, prior to January 3, 1956, the effective date of Section 121.04, Revised Code, as amended, under authority of Section 121.06, Revised Code; and following such date such office may be filled by like appointment under authority of Section 121.14, Revised Code.

Columbus, Ohio, November 15, 1955

Hon. John M. Wilcoxon, Director, Department of Finance
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In Anderson's supplement to the Revised Code, Section 121.04 R.C. is shown twice, once on page 6 and again on page 7.

"The section on page 7 shows a position in the Department of Finance known as 'Chief of the division of capital planning and improvement.' This law came about through the passage of House Bill 490 and is effective October 5, 1955.

"The section on page 6 omits the position mentioned above and became a law through the passage of H. B. 212, and is effective January 3, 1956, by section 3 of the act.

"The Department of Finance desires to employ a person as 'chief of the division of capital planning and improvements' and the legislation in the General Appropriation Act, known as House Bill 929, provided appropriations in a separate division of the Department of Finance to carry out the provisions of House Bill 490.

"The questions are:

"1. Will the position of 'Chief of the division of capital planning and improvement' become a part of the permanent law?

"2. Will such position be automatically eliminated from the law upon the effective date of H. B. 212?

"3. Will both sections prevail and be a part of the permanent law?"

In State ex rel. Guilbert v. Halliday, 63 Ohio St., 165 (1900), the syllabus is as follows:

"1. In so far as two statutes are irreconcilable, effect must be given to the one which is the later.

"2. A bill cannot become a law until it has been signed by the presiding officer of each house; and when one bill was so signed after another bill so signed on the same day, the former is the later enactment."

Since that decision, Article II, Section 16, Ohio Constitution, has been amended to confer the veto power on the Governor, and the date of the Governor's approval of a bill, or the date of expiration of the ten day period within which he is authorized to act, as the case may be, must be regarded as the date of "enactment," regardless of whether, by operation of a constitutional provision or by the terms of the act itself, it does not become *operative* as law until some later date. See Sutherland on Statutory Construction, 3rd Edition, Volume I, Section 1604, pp. 267, 268. Applying this rule in the instant case it follows that Amended House Bill No. 212, 101st General Assembly, must be deemed to have been "enacted" on July 12, 1955, and so with respect to Amended Substitute House Bill No. 490, is the later enactment, the latter bill having been approved by the Governor on July 6, 1955. Accordingly, under the rule in the Halliday case, *supra*, such later enactment will prevail to the extent that an irreconcilable conflict exists between the two.

The provisions of Section 121.04, Revised Code, as enacted in Amended House Bill No. 490, providing for the office of "chief of the division of Capital planning and improvement," was expressly repealed by the later enactment of such section; and it is clear that we are thus presented with a situation essentially analogous in every respect to that which I had for study in Opinion No. 3045, Opinions of the Attorney General for 1953, p. 431. The syllabus in that opinion is as follows:

"1. The sections of Amended House Bill No. 243, 100th General Assembly, which will remain in force after July 1, 1954, adequately provide for continuation of the Department of Highway Safety which is to be established October 2, 1953.

"2. The sections of Amended House Bill No. 243 which will remain in force after July 1, 1954, together with Section 141.03(O), Revised Code, adequately provide for the position of Director of Highway Safety after that date.

"3. Should a vacancy occur in the position of Director of Highway Safety after July 1, 1954, the power to appoint to fill such vacancy is in the Governor, the appointee to serve at the pleasure of the Governor."

In this opinion it was pointed out, p. 433, *et seq.*, that some twenty-one sections in the earlier act, all dealing with the powers of the department of highway safety, remained unaffected by the seemingly inadvertent amendment of Section 121.02, Revised Code, and it was concluded that these sections were legally sufficient to provide for the continued existence of the department. On this point I said, pp. 436, 437:

“The force and effect of the remaining sections of Amended House Bill No. 243 can be destroyed only if we were to hold that these sections suffered an implied repeal when the legislature mistakenly effected an express repeal of those portions of Section 121.02 and 121.03, Revised Code, which relate to the Department of Highway Safety. It must be remembered that repeal by implication is never favored. *Ohio v. Dudley*, 1 Ohio St., 437. Upon considering the chaotic consequences therefore it cannot be said that the legislature intended an implied repeal of the remaining part of Amended House Bill No. 243. Added support for this conclusion is found in the established rule of construction that absurd or unreasonable results are to be avoided where an alternative exists. *Sawyer v. State*, 45 Ohio St., 343.”

In the instant case it will be observed that in House Bill No. 490, four new sections were enacted, and Section 153.04, Revised Code, was amended, and that none of the provisions of these sections were affected by the seemingly inadvertent amendment of Section 121.04, *supra*, in House Bill No. 212. Among the new sections thus enacted is Section 125.81, Revised Code, which reads as follows:

“There shall be created within the department of finance a *division of capital planning and improvement*. The chief of the division of capital planning and improvement, with approval of the director of finance, shall employ such architects, engineers, and other personnel as may be required to perform the duties of the division of capital planning and improvement as provided in section 125.82 of the Revised Code.” (Emphasis added.)

This reference to the “chief of the division of capital planning and improvement,” and the language there following, conferring certain express powers on such officer, is quite clearly sufficient, in my opinion, to continue such office after January 3, 1956, the effective date of Section 121.04, Revised Code, as amended, the reasoning advanced in the 1953 opinion, *supra*, being applicable with equal force in the case at hand.

It will be observed that during the period October 5, 1955, to January 3, 1956, the appointment of a chief of this division, his service at the pleasure of the director, and his status in the unclassified service of the state, are all adequately provided for in Sections 121.06 and 121.14, Revised Code. However, because these sections refer to “offices created by Section 121.04, Revised Code,” these provisions will no longer apply after the effective date of this section as amended.

It is to be noted, however, that Section 121.14, Revised Code, provides:

“Each department may employ, subject to the civil service laws in force at the time the employment is made, the necessary employees, and, if the rate of compensation is not otherwise fixed by law, fix their compensation.” * * *

Because it has been concluded that the office here involved is continued in existence despite the amendment of Section 121.04, *supra*, the incumbent of such office must be regarded as a “necessary” employee, and may, therefore, be employed by the department concerned. His compensation not being “otherwise fixed by law,” it may be fixed by the department as provided in Section 121.14, Revised Code.

I conclude, therefore, in specific answer to your inquiry, that the provisions of Sections 125.81, 125.82, 127.21 and 127.26, Revised Code, as enacted in Amended Substitute House Bill No. 490, 101st General Assembly, and of Section 153.04, Revised Code, as amended in such enactment, are sufficient to continue in existence the office of “chief of the division of capital planning and improvement” within the state department of finance, notwithstanding the deletion of the listing of such office in Section 121.04, Revised Code, by the amendment of such section in Amended House Bill No. 212, 101st General Assembly. Such office may be filled by appointment by the department of finance, prior to January 3, 1956, the effective date of Section 121.04, Revised Code, as amended, under authority of Section 121.06, Revised Code; and following such date such office may be filled by like appointment under authority of Section 121.14, Revised Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General