

1934.

TEACHERS AND INSTRUCTORS IN OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME—ARE IN CLASSIFIED CIVIL SERVICE—REMOVAL OF SUCH TEACHER.

SYLLABUS:

1. *Persons holding the positions of teachers or instructors in the Ohio Soldiers' and Sailors' Orphans' Home, which positions the State Civil Service Commission has not found to be impracticable to include in the competitive classified service, are in the competitive classified civil service of the state and are subject to the civil service laws relating to the appointment and removal of employes in the classified civil service.*

2. *In determining the merit and fitness of applicants for the position of teachers in said institution, the State Civil Service Commission should take into account valid regulations or orders made by the Superintendent of Public Instruction touching the qualification of teachers in said institution under Section 1851-1, General Code. The violation of or failure to observe any such valid regulation or order of the Superintendent of Public Instruction by any teacher of said institution should be taken into consideration by the officers of said institution and by the State Civil Service Commission in proceedings relating to the removal of any such teacher.*

COLUMBUS, OHIO, April 5, 1928.

HON. M. R. LIMB, *President Board of Trustees, Ohio Soldiers' and Sailors' Orphans' Home, Wooster, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date, in which you ask my opinion upon the question therein stated, as follows:

“Will you give the Board of Trustees a ruling on the question as to whether we must go before the civil service to get rid of teachers who are not recommended by the State Department of Education to be retained at the home at Xenia?”

The Ohio Soldiers' and Sailors' Orphans' Home is a state institution under the charge of a board of trustees appointed by the Governor, with the advice and consent of the senate, in the manner provided by Section 1931-1, General Code, as amended 112 O. L. 163.

By Section 1946, General Code, as amended 112 O. L. 165, it is provided that “the board of trustees shall have complete control and supervision of the home and shall select and employ a superintendent, a chaplain, superintendent of schools, instructors and such other officers, assistants and employes as may be required or as they may deem necessary, and shall fix their compensation.”

Section 1936, as amended 112 O. L. 165, provides as follows:

“The trustees shall establish and maintain schools for such literary, technical, industrial, art and other education of all pupils therein as is practicable, and make necessary arrangements therefor. Within the grounds of the Ohio Soldiers' and Sailors' Orphans' Home, the trustees shall establish and maintain shops wherein suitable trades may be taught and practiced in a thorough and comprehensive manner. Subject to the regulations of the board of trustees, the superintendent of the home shall employ all teachers and instructors for such schools, and said superintendent shall have the right to dismiss and discharge any teacher, or instructor, when in his opinion such action is for the best interests of the Ohio Soldiers' and Sailors' Orphans' Home, and is ratified by the board of trustees.”

In Opinion No. 557, of this department, under date of June 2, 1927, construing the above quoted sections of the General Code, it was held:

"Sections 1936 and 1946, General Code, as amended by Amended Senate Bill No. 162, effective on and after July 26, 1927, confer upon the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home complete control and supervision of the home and vest in such board the power and duty to select and employ a superintendent, a chaplain, superintendent of schools, instructors and such other officers, assistants and employes, including teachers, as may be required or as the board deems necessary, and constitute the superintendent of the home the agent or active arm of the board to carry its mandates with respect to the employment and dismissal of all employes into execution."

Touching the question as to the application of the civil service laws of the state to those holding positions of instructors and teachers in this institution, it will be noted that Section 10 of Article XV of the State Constitution provides that "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." Pursuant to this mandate of the Constitution, the Legislature enacted the civil service act, which, with its amendments, has been carried into the General Code as Sections 486-1a to 486-31, inclusive.

Section 486-1a provides that "the term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof," and that the "state service shall include all such offices and positions in the service of the state, or the counties thereof, except the cities and city school districts." This section further provides that the term "classified service" signifies the competitive classified civil service of the state, the several counties, cities and city school districts thereof."

Section 486-2, General Code, provides as follows:

"On and after the taking effect of this act (G. C., Secs. 486-1 to 486-31), appointments to and promotions in the civil service of the state, the several counties, cities and city school districts thereof, shall be made only according to merit and fitness to be ascertained as far as practicable by competitive examination; and thereafter no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service of the state, the several counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act or by the rules of the state or municipal civil service commissions within their respective jurisdictions as herein provided."

Section 486-8, General Code, by separate paragraphs or subdivisions, enumerates certain positions in the unclassified service, and further provides that the classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class. Said Section 486-8 provides:

"The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.

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12. Such teachers and employes in the agricultural experiment stations; such teachers in the benevolent, penal or reformatory institutions of the state; such student employes in normal schools; colleges and universities of the

state; and such unskilled labor positions as the state commission or any municipal commission may find it impracticable to include in the competitive classified service; provided, that such exemptions shall be by order of the commission, duly entered on the record of the commission with the reasons for each such exemption.

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It will be noted from the provisions of the above quoted subsection of Section 486-8, General Code, that such teachers and employes in the benevolent, penal or reformatory institutions of the state, as the State Civil Service Commission may find impracticable to include in the competitive classified service, shall be included in the unclassified service and exempted from all examinations required by the civil service act.

In this connection I am advised that the State Civil Service Commission has not at any time found that the positions of teachers and instructors in the Ohio Soldiers' and Sailors' Orphans' Home are such as to make it impracticable to include such positions in the competitive classified service. On the contrary, said State Civil Service Commission has found it practicable to include said positions in the competitive classified service and to determine the merit and fitness of applicants for said positions by competitive examinations.

The question in your mind with respect to the application of the civil service laws with respect to the appointment and removal of teachers and instructors of the Ohio Soldiers' and Sailors' Orphans' Home doubtless arises from the fact that Sections 1936 and 1946, General Code, as amended, apparently give the trustees and superintendent of said institution absolute and unrestricted authority in the appointment and removal of instructors, teachers and other employes of said institutions.

A like question with respect to the application of the civil service act of the State of New York was considered by the Court of Appeals of that state in the case of *The People ex rel. McClellan vs. Roberts, Comptroller*, 148 N. Y. 360. In this case it appeared that a provision of the Constitution of the State of New York gave to the head of the Department of Public Works the exclusive and unrestricted power and duty of appointing and removing employes in a certain branch of said department. By reason of this constitutional provision the Court of Appeals had held that the civil service laws of the state had no application to the appointment and removal of such employes. Later a constitutional amendment was adopted by the people of said state which provided that appointments and promotions in the civil service of the state, and of all the civil divisions thereof, should be made according to merit and fitness, to be ascertained as far as practicable by examination, which, so far as practicable, should be competitive; and that laws should be passed to provide for the enforcement of said constitutional amendment. The case of *People ex rel. McClellan vs. Roberts, Comptroller*, arose after said constitutional amendment providing that appointments and promotions in the civil service of the state should be made according to merit and fitness, and the court in said case held that, by reason of said constitutional amendment, appointments and removals of employes in such branch of the Department of Public Works were subject to the civil service laws enacted to carry it into effect. Said court further held that the civil service act, enacted and carried into effect under said constitutional amendment, constituted a general system of statute law applicable to appointments and promotions in every department of the civil service of the state, with such exceptions only as are specified in the statute itself.

Touching this point, the court in its opinion in this case said:

"The principle that all appointments in the civil service must be made

according to merit and fitness, to be ascertained by competitive examinations, is expressed in such broad and imperative language that in some respects it must be regarded as beyond the control of the Legislature, and secure from any mere statutory changes. If the Legislature should repeal all the statutes and regulations on the subject of appointments in the civil service, the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal."

I am inclined to the view that a like observation may be made with respect to the scope and effect of the civil service laws of this state as to appointments, promotions and removals in the civil service of the state.

Section 10 of Article XV of the State Constitution, above noted, recognizes that there may be positions in the civil service of the state and in the political subdivisions thereof therein mentioned as to which it is not practicable to ascertain the merit and fitness of applicants therefor by competitive examinations. This question in any particular instance depends upon the nature and character of the duties of the position; and, when that has been ascertained, the question of exemption becomes one of law. *Staje ex rel. vs. Smith*, 101 O. S. 203; *Chittenden vs. Wurster*, 152 N. Y. 345. In absence of facts showing that any of the positions here in question cannot be filled by competitive examination, the question becomes one to be ascertained in the first instance by the State Civil Service Commission; and in this case, as above noted, said Commission has determined that it is practicable to fill said positions by competitive examinations.

By way of specific answer to your questions, therefore, I am of the opinion that the provisions of the civil service act apply with respect to the appointment and removal of instructors and teachers of the Ohio Soldiers' and Sailors' Orphans' Home.

In consideration of the question here presented, I note that Section 1851-1, General Code, provides as follows:

"All teachers who are employed or who shall hereafter be employed in any benevolent, correctional or penal institution of the state, except the state school for the deaf and the state institution for feeble-minded, shall on and after September 1, 1923, possess such teachers' certificate or have such qualifications and approval as the superintendent of public instruction after conference with the officers in charge of the several institutions may prescribe for the various particular types of service or service in the particular institutions."

It does not appear from your communication, or otherwise, that any complaint is made that any of the teachers employed at the Ohio Soldiers' and Sailors' Orphans' Home do not have proper certificates to teach at said institution. As to other valid regulations or orders made by the Superintendent of Public Instruction, under the authority of Section 1851-1, General Code, touching the qualification or duties of teachers at this institution, it is sufficient to observe that such regulations or orders would have to be taken into account by the State Civil Service Commission in determining the merit and fitness of applicants for positions on the teaching staff of the institution; and likewise, a violation of such regulations or orders, or a failure to observe the same by any teacher, would be a matter which the officers of the institution and the State Civil Service Commission would be authorized and required to take into consideration in proceedings relating to the removal of such teacher.

Respectfully,
EDWARD C. TURNER,
Attorney General.