

29.

APPROVAL, DEEDS TO MIAMI AND ERIE CANAL LANDS IN THE CITY
OF CINCINNATI—3 GRANTEES.

COLUMBUS, OHIO, January 28, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication enclosing three deeds of the State of Ohio conveying parcels of surplus Miami and Erie Canal Lands relinquished by the city of Cincinnati to the State of Ohio under the provisions of Amended Senate Bill No. 123, as passed by the 87th General Assembly of Ohio (112 O. L. 210).

The deeds enclosed for my examination and approval are as follows:

<i>Parcel No.</i>	<i>Names and Addresses of Grantees.</i>	<i>Consideration.</i>
65	Gordon Weil, 3901 Reading Rd., Cincinnati, Ohio.....	\$756 00
143	Anna B. Breyer, 3648 Bless Avenue, Cincinnati, Ohio.....	110 00
147	Anna B. Breyer, 3648 Bless Avenue, Cincinnati, Ohio.....	378 00

I have examined the forms submitted and am of the opinion that they are in conformity with law. You are accordingly advised that these deeds have my approval as to form.

By virtue of the provisions of Section 9 of the act hereinbefore referred to, the sales of these tracts are made by you, subject to the approval of the Governor and Attorney General. These sales meet with my approval, and I have accordingly endorsed my approval upon the forms submitted which are herewith returned.

Respectfully,

GILBERT BETTMAN,
Attorney General.

30.

CIVIL SERVICE—DUTY OF APPOINTING POWER TO FILL VACANT
POSITION FROM ELIGIBLE LIST OF COMMISSION—TERM OF PRO-
VISIONAL APPOINTEE—RIGHTS OF INNOCENT THIRD PERSONS.

SYLLABUS:

1. *When an eligible list for any position in the classified civil service of the state or any subdivision thereof is certified by the Civil Service Commission to the appointing power, it becomes the duty of the appointing power, if the position is not at the time being occupied by a person appointed from a regularly certified eligible list to make an appointment to the position from the eligible list so certified*

2. *A provisional appointee occupying a position in the classified civil service may lawfully perform the duties of the position only until a regular appointment can be made from a duly certified eligible list for the position although third persons, who are not fully advised of his status, will be protected in their dealings with him, even*

though he performs the duties of the position after the appointing power should have made an appointment thereto from a duly certified eligible list.

COLUMBUS, OHIO, January 28, 1929.

HON. EMERSON C. WAGNER, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion as follows:

“On September 19, 1928, J. McD., Superintendent of the County Home, died. Mr. McD. was an appointee under the civil service laws of Ohio. This board requested an eligible list from the Civil Service Commission from which to make an appointment. However, as there was not an eligible list the Civil Service Commission notified the Board of County Commissioners that an examination would be held on November 8, 1928, for such position. In the meantime the Board of County Commissioners appointed Mr. J. E. McD. as the provisional appointee, according to law. From the examination held by the Civil Service Commission for such position, there was certified to this board on November 27, 1928, an eligible list of three persons. Now on January 3, 1929, the Civil Service Commission refused to approve the payroll of J. E. McD. as Superintendent of the County Home, this payroll being for the month of December, 1928.

The following questions arise:

1. Must the Board of County Commissioners appoint one of the three persons certified to them by the Civil Service Commission?
2. Has J. E. McD. the right to purchase supplies for the county home?
3. Has J. E. McD. the right to act as provisional superintendent of the county home since the Civil Service Commission has refused to approve the payroll?
4. Now, if any, what action must the Board of County Commissioners take in making this appointment?”

The law relating to civil service in the State of Ohio is found in Sections 486-1, et seq., of the General Code. An examination of these sections discloses that the position of superintendent of a county home is in the classified civil service and appointments thereto must be made from an eligible list certified by the Civil Service Commission, which is made up from those who stand highest in a competitive examination for the position. Such has been the purport of former opinions of this office, under laws substantially the same as the present civil service law. See Annual Report of the Attorney General for 1914, Volume I, page 376, and Opinions of the Attorney General for 1915, Volume III, page 2021. In the latter opinion it is held:

“The position of superintendent of a county infirmary is in the classified service as defined by the civil service law, 106 O. L., 400, and the incumbent thereof when classified under the provisions of said law may not be removed except for cause.”

Provisional appointments may be made in the absence of an eligible list, as was done in your county, but such a provisional appointment is made to fill the position only until an eligible list can be created. Section 486-14, General Code, provides in part, as follows:

“Positions in the classified service may be filled without competition as follows:

1. Whenever there are urgent reasons for filling a vacancy in any posi-

tion in the classified service and the commission is unable to certify to the appointing officer, upon requisition by the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter. * * * "

Section 1 of Rule VIII of rules adopted by the Commission reads as follows:

"Upon receipt of requisition for certification to a position for which no appropriate eligible list is available, the Commission shall modify the appointing officer that nomination for provisional appointment may be made to fill such position until an eligible list can be created."

From the foregoing, it is apparent that the provisional appointee continues to hold the position only until an eligible list is created and when it is created the position must be filled from such eligible list. The Commission is not authorized to approve a payroll or account for salary or compensation containing the name of a provisional appointee who is holding a position for which there has been created an eligible list from which a regular appointment might be made; and it is unlawful for the fiscal officer of any subdivision to issue a warrant for the payment of salary or compensation to an officer unless the payroll or account for such salary has the certification of the proper Civil Service Commission that persons named in such payroll or account are being employed in pursuance of law, Section 486-21, General Code.

The terms of Section 486-13, General Code, are pertinent in this connection. Said section provides in part as follows:

"The head of a department, officer or institution in which a position in the classified service is to be filled shall notify the commission of the fact, and the commission shall, except as provided in Sections 486-14 and 486-15 of the General Code, certify to the appointing officer thereof the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which said position belongs. * * * Appointments to all positions in the classified service, as herein defined, that are not filled by promotion, transfer or reduction, as provided for in this act and the rules of the commission prescribed thereunder, shall be made only from those persons whose names are certified to the appointing officer in accordance with the provisions of this act, and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof. The appointing officer shall notify the commission of such position to be filled and shall fill such position by appointment of one of the three persons certified to him as provided in this act. * * * "

The provisions in the above section are mandatory. No discretion is left to the appointing power and no reason or excuse exists for not complying with the statute.

The opinion of the Attorney General rendered under date of September 5, 1928,

Opinion No. 2541, a copy of which you already have, seems to be dispositive of the question before us. It is there held:

“A person employed in a position in the classified civil service of the state under a provisional appointment can legally continue in such employment only until such time as a regular appointment to the position can be made from an eligible list submitted to the appointing authority by the State Civil Service Commission, and in such case such appointing authority cannot legally continue the status of such person as a provisional employe by refusing or neglecting to make a regular appointment to such position from the eligible list submitted.”

Until an eligible list was certified to the county commissioners, Mr. ———, the provisional appointee, had full and complete authority to perform the duties incident to the position of superintendent of the home, including the purchase of supplies. Even if he continued to act as superintendent, under color of title to the position, after an eligible list for the position had been certified by the Civil Service Commission, and after the time when a regular appointment from the eligible list should have been made, and before such appointment was actually made, his acts were valid as to the public, and third persons, who were not fully advised of his status but dealt with him on the strength of his color of title to the position are protected in their dealings with him. This rule of law is founded on public policy, based on the ground that the public good requires that acts of such officers be held to be valid. *Hussey vs. Smith*, 99 U. S. 20. The rule is stated in *Corpus Juris*, Volume 46, at page 1060, as follows:

“The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party. But, to be valid, the acts of a de facto officer must comply with the requirements of applicable law, to the same extent and in the same manner as valid acts of de jure officers. The rule cannot be invoked for the advantage of the officer himself, or of one who is fully advised of his status.”

A late case in Ohio on this subject is the case of *Greenlee vs. Cole*, 113 O. S. 585. In specific answer to your questions in the order asked, I am of the opinion:

First, it is the duty of the county commissioners to appoint one of the three persons certified to them as an eligible list by the Civil Service Commission, and this duty may be enforced by an action in mandamus.

Second, Mr. ———, the provisional appointee, has the legal right to hold the position only until a regular appointment can be made from a duly certified eligible list for the position; however, if he continues to purchase supplies and to act as superintendent of the home, under color of title to the position, third persons who are not fully advised of his status, will be protected in their dealings with him as such superintendent. He cannot be paid for his services unless the payroll or account for his compensation bears the certificate of the Civil Service Commission that he is being employed in pursuance of law.

Third, Mr. ———, the provisional appointee, has the legal right to act as superintendent of the county home only until a regular appointment can be made by the county commissioners from the eligible list certified to them by the Civil Service Commission.

Fourth, the action which should be taken by the board of county commissioners, after an eligible list for the position of superintendent of the county home has been certified to them by the Civil Service Commission, is to make an appointment to the position from the said eligible list.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

31.

EXTRADITION—FUGITIVES WITHIN OHIO—RIGHT OF GOVERNOR TO
 DELEGATE AUTHORITY TO HEAR MATERIAL FACTS BEFORE
 TAKING ACTION UPON THE DEMAND.

SYLLABUS:

The Governor, upon receipt of a demand from the chief executive authority of another state for extradition of a person found within the jurisdiction of this state, may properly delegate to a subordinate in his office the authority to hear matters relating to such extradition and report to him, and if satisfied from such report, may take action thereof.

COLUMBUS, OHIO, January 28, 1929.

HON. MYERS Y. COOPER, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—This will acknowledge your letter of January 18, 1929, as follows:

“The Governor of Ohio is authorized by law to grant requisitions upon Governors of sister states and upon other countries for the arrest and rendition of persons charged with crime in this state and who have fled the jurisdiction. Applications are frequently made to the Governor that he hear certain defenses which the alleged fugitive might have, tending to establish that, first, he is not the person charged in the papers; and, second, that the demand is not made in good faith for the punishment of crime, but for the purpose of collection of debt or pecuniary mulct.

When such application is made, prior to the presentation of the requisition papers, it has been the policy to give the alleged fugitive an opportunity to be heard. Can the Governor delegate this power to an attorney in his office or to a member of the Attorney General's department, or must he hear it personally?

If you will advise me on this point, I will appreciate it very much.”

While the first sentence of your letter would apparently not so indicate, I am informed that your particular question is as to the necessity for a hearing and the rules governing such hearing where demand is made on you by the Governor of another state for the return of a person claimed to be a fugitive from justice from that state. Particularly you inquire as to your authority to delegate the power to hear matters relating to such extradition to an attorney in your office or to a member of this office, so as to avoid the necessity of personally hearing all of these matters.

The right of extradition is derived primarily from Section 2 of Article IV of the