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1. ARMED FORCES OF UNITED STATES—PERSON WHO HERETOFORE SERVED—ENTITLED TO BE RESTORED TO POSITION IN CLASSIFIED SERVICE—APPOINTED THROUGH COMPETITIVE EXAMINATION PRIOR TO ENTERING SERVICE—SECTION 486-16a G. C., EFFECTIVE AUGUST 11, 1943.
2. WHERE POSITIONS IN CLASSIFIED SERVICE WERE JOINTLY HELD BY HUSBAND AND WIFE—WIFE LEGALLY CAN NOT BE COMPELLED TO TAKE NON-COMPETITIVE EXAMINATION TO BE REAPPOINTED—REINSTATEMENT OF HUSBAND GIVES WIFE RIGHT TO HOLD HER FORMER POSITION.

SYLLABUS:

(1) A person who heretofore served in the armed forces of the United States as that term is defined by section 486-16a, General Code, as effective August 11, 1943, is entitled to be restored to a position in the classified service to which he was appointed as the result of a competitive examination prior to entering such armed services.

(2) In those instances where positions in the classified service were held jointly by husband and wife, when the husband is reinstated to his former position pursuant to section 486-16a, General Code, his wife cannot be legally compelled to take a non-competitive examination in order to be reappointed to her former position. Her right to hold said position results by reason of the reinstatement of her husband.

Columbus, Ohio, March 20, 1946

Hon. Glenn E. Detling, Prosecuting Attorney
Springfield, Ohio

Dear Sir:

Your request for my opinion reads:

“In August, 1942, the superintendent and the matron of the Clark County Children’s Home were granted a military leave of absence for the duration of the war or ninety days after the honorable discharge of Mr. B., the superintendent. It was necessary to grant a leave to the matron, Mrs. B., as the position of ‘superintendent and matron’ is considered as one position.

Following this action, another superintendent and matron were appointed and served until the return of Mr. B. from military service. In February, 1946, Mr. and Mrs. T. the appointees following Mr. and Mrs. B., resigned, inasmuch as 'the terms and conditions of their appointment had been completed.'

Following this, Mr. and Mrs. B. assumed their former position as 'superintendent and matron,' and the Civil Service Commission reinstated Mr. B., the superintendent. The Commission, however, refused to reinstate Mrs. B., the matron. Our situation, as it stands now, has Mr. B. reinstated and under Civil Service, while Mrs. B., who, of course, did not serve in the armed forces, but holds her position by virtue of her husband's position, is not under Civil Service."

Our interpretation is that the position of 'superintendent and matron' is a single position and that the statute 486-16a is applied. The word 'person' should be interpreted as to include both parties in the situation where one party is inducted or enlisted into the Army, and the other party must cease to continue on the job.

The Clark County Child Welfare Board, which appoints the superintendent and matron, is desirous of clearing this situation. I am requesting an opinion from your office as to the status of Mrs. B., 'the matron.' I am also enclosing some correspondence between the Civil Service Commission and our Child Welfare Board here, which may add additional facts."

It appears from a letter attached to said request that a member of the Clark County Child Welfare Board heretofore made inquiry of the Civil Service Commission of Ohio as to the civil service status of Mrs. B. In reply thereto it is stated in part in a communication bearing the signature of the chairman of said Commission that:

"It will be necessary that a new provisional appointment be consummated for Mrs. B. since the one year leave of absence to which she was entitled under Section 486-16 G. C. has long since expired through statutory limitation.

This Commission regrets to advise you that it is unable to reinstate Mrs. B. under the provisions of Section 486-16a, G. C., which reads in part as follows: * * *

If Mrs. B. was inducted into any one of the auxiliary branches of the armed forces and can furnish this Commission with an honorable discharge we will then be very glad to restore her with status. Otherwise our only alternative, under the law, is to request a provisional appointment for Mrs. B. which, when received, will be promptly entered on the records of this office."

It is clear the Commission properly determined that, since Mrs. B.'s application for reinstatement was not timely, no right of restoration is authorized pursuant to the provisions of Section 486-16, General Code. And it is equally clear that, since it is not suggested she served in the "armed forces of the United States" as that term is defined by present Section 486-16a, General Code (120 O. L. 151), her rights thereunder are not comparable to those of Mr. B.

The basic question for determination is whether Mrs. B. may now be required to take a non-competitive examination in order to serve legally as matron of the institution mentioned in your inquiry. In this connection it should be noted that a person who is appointed to a position by reason of a non-competitive examination is a provisional employe as distinguished from a person whose appointment is made from an eligible list prepared by the Commission.

It is suggested in your said inquiry that there is a single position involved. Accordingly I felt it desirable to examine the Commission's bulletin with respect to the examinations, that were heretofore conducted and by reason of which an eligible list was thereafter prepared. The Civil Service Commission has furnished me with a copy of said bulletin which reads in part as follows:

"OPEN COMPETITIVE EXAMINATIONS
WILL BE HELD AT
COURT HOUSE, SPRINGFIELD, OHIO, THURSDAY,
OCTOBER 24, 1940 at 9:00 A. M. Local Time
FOR THE POSITIONS OF

#5550—SUPERINTENDENT OF THE CLARK COUNTY
CHILDREN'S HOME

#5551—MATRON OF THE CLARK COUNTY CHIL-
DREN'S HOME

NOTE: These examinations are open only to residents of Clark County. Conditions of employment of the Superintendent and Matron are such that the examinations for these positions are open only to man and wife respectively or other persons of such close blood relationship as would justify the Commission's waiver of this rule."

Certainly it is evident therefrom that there are two positions involved. I might further mention that said bulletin also makes reference to the fact that the salary of the superintendent shall be "\$1400.00 per annum and maintenance" and of the matron "\$750.00 per annum and maintenance." Please note especially the statement in said bulletin that "these positions are open only to man and wife respectively," etc. It cannot seriously be disputed that at the time of the holding of said examinations the Commission had the right to so provide. The authority for such action is found in Rule VI, Section 3 of the Rules and Regulations of said Commission that were then in force and effect and which then read:

"In positions where the nature of the public service requires the joint employment of persons related by blood or marriage, such as husband and wife, father and daughter, mother and son, or brother and sister, both such persons must be eligible in order that either be certified. In such cases, standing on the eligible register will be determined by the average of the grades of both. When two or more persons have been jointly employed by appointment from a joint certification from an eligible register prepared in accordance with this rule, the death, removal, dismissal, layoff, resignation or other vacation of the position of one of the joint appointees shall operate automatically to remove the other or others of the joint appointees from their position or positions. The same rule shall also apply to positions requiring joint employment whether or not joint certification is required."

The rule now in force and effect similarly so provides. See Rule VII, Section 3.

While it is true that there are two positions, nevertheless the right of Mr. B. to now serve in the capacity of superintendent is dependent upon Mrs. B. serving as matron and vice versa. Both parties can continue to hold jointly their positions subject however to the contingency of death, removal, dismissal, layoff, resignation or other vacation of the position by one of such joint appointees. It is manifest, however, that if the death, for example, of Mrs. B. had occurred while her husband was serving in the armed forces he could not have claimed the right of reinstatement notwithstanding the specific provisions of section 486-16a, General Code, which provides inter alia:

“Any person who at the time he held or holds an office or position under the classified service and has held such office or position for a period of ninety days or more, enlisted or enlists in the armed services of the United State subsequent to December 8, 1941, * * * shall, within thirty days after making application therefor, *be restored to the office or position held by him* immediately prior to his entering into the armed services of the United States, provided, such person is at such time physically able to perform the duties of *such office or position*. Such application for restoration shall be made to the appointing officer of such person within a period of ninety days after receipt of an honorable discharge or certificate or other evidence showing satisfactory completion of his period of service.”

(Emphasis added.)

By virtue of this section Mr. B. was entitled to reinstatement without being required to take a non-competitive examination. The Commission heretofore took cognizance of said section or his appointment would not have been authorized. And it must be conceded that he cannot be legally required at some future date to undergo another competitive examination such as was held in October, 1940.

The views heretofore expressed by the Commission with respect to the status of Mrs. B. were obviously based on the fact that section 486-16 provides in part that:

“Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department.”

Standing alone that section would support those views. However, I am of the opinion that when the matter is considered in its broader aspects and particularly in the light of Section 486-16a, General Code, there is reason and logic to support the conclusion that of necessity Mrs. B. should also be restored to her position without being required to take a non-competitive examination.

In this connection I desire to revert to Rule VI, Section 3, under which “the death, removal * * * or other vacation of the position of one of the joint appointees shall operate automatically to *remove* the other,” etc. Had Mrs. B.’s position been vacated while her husband was

-serving in the armed forces he could not have been legally reinstated. Therefore it can be argued that the converse of this situation would follow in that his reinstatement should operate to restore his wife to her former position.

Needless to say, your inquiry presents a somewhat unique and peculiar situation in so far as it involves the matter of determining Mrs. B.'s legal status. At the time the General Assembly passed Section 486-16a, which became effective August 11, 1943, it probably did not anticipate a case such as has now arisen. Unquestionably the number of positions in the state, as well as in the county service, that require joint appointment such as husband and wife, etc., as distinguished from single appointments are relatively few.

The section just mentioned is remedial in character and should be liberally construed. That construction which enables Mr. B. to enjoy all the rights and privileges which he formerly enjoyed is the only sound interpretation to be given the same. And if it becomes necessary to implement his rights by the appointment of his wife without the necessity of her taking a non-competitive examination when she is apparently ready and willing to render the services that were heretofore rendered in connection with said position as matron, then the provisions of Section 486-16, General Code, with respect to reinstatement must be held to be inapplicable under the circumstances. In other words, Section 486-16a must be considered as controlling. To make the husband's right of reinstatement dependent upon the taking of a non-competitive examination by Mrs. B. would seemingly thwart the legislative intent.

As I have previously suggested herein, a person who is appointed as a provisional employe may ordinarily anticipate that he will continue in service until competitive examinations are held and an eligible list established. Section 486-14, General Code, provides in part that when there are urgent reasons for filling a vacancy in a position "the appointing officer may nominate a person to the commission for non-competitive examination" and if found by the Commission to be qualified such person "may be appointed provisionally to fill such vacancy *until a selection and appointment can be made after competitive examination.*" If it can be urged that Mrs. B. must now take a non-competitive examination in order to be appointed, then it logically follows it is contemplated that at

some subsequent date a competitive examination will be held to determine her merit and fitness for said position. But on the other hand there is no authority in law to compel her husband to take another competitive examination. As I see it, the taking of such non-competitive examination would in effect be pointless and serve no useful purpose. It is not generally the policy of the law to require the doing of a vain act.

The question presented is one that has afforded considerable difficulty and the conclusion reached is not entirely free from doubt. But a contrary view would clearly mean that Mr. B., instead of being aided, would be penalized because of circumstances over which he had no control. It was certainly not the intent of the General Assembly of this state to enact a law that would operate unfavorably to a person who had served in the armed forces of the United States.

In conclusion and by way of specific answer to your inquiry, it is accordingly my opinion that:

(1) A person who heretofore served in the armed forces of the United States as that term is defined by section 486-16a, General Code, as effective August 11, 1943, is entitled to be restored to a position in the classified service to which he was appointed as the result of a competitive examination prior to entering such armed services.

(2) In these instances where positions in the classified service were held jointly by husband and wife, when the husband is reinstated to his former position pursuant to section 486-16a, General Code, his wife cannot be legally compelled to take a non-competitive examination in order to be reappointed to her former position. Her right to hold said position results by reason of the reinstatement of her husband.

Respectfully,

HUGH S. JENKINS,
Attorney General