

3065

THE EXISTING RULE AND THE PROPOSED RULE FOR EX-EMPTING POSITIONS FROM CIVIL SERVICE ARE IN CONFLICT WITH §145.08, R.C., AND ARE INVALID—§§143.08, 1.24, R.C., 154063, G.C., AHB 1 OF 100 G.A.

SYLLABUS:

Existing Rule II-2. of the Director of State Personnel, and proposed Rule II-2. of the Director of State Personnel (to be considered at hearing of June 18, 1962), are in conflict with Section 143.08, Revised Code, and are invalid.

Columbus, Ohio, June 13, 1962

Hon. James T. Welsh, Director, Department of State Personnel
Ohio Departments Building, Columbus 15, Ohio

Dear Sir:

In your May 17, 1962, Notice of Public Hearing, you state that on June 18, 1962, you will conduct a hearing on the adoption of new administrative rules for the department of state personnel. This opinion is written to state my objection to the adoption of proposed Rule II-2., which I find to be in conflict with the statutes of Ohio and therefore invalid.

Proposed Rule II-2. reads as follows:

“2. Designation of exemptions; no exemption after creation of eligible list.

“(a) Within thirty days after taking office, each elective officer and each principal appointive executive officer, board or

commission shall designate the position for which exemption from the competitive classified service is claimed under the provisions of paragraph 8, subsection (A), of Section 143.08 of the law, and thereafter no change in the designation of exemptions claimed under this provision which would result in the separation of a classified employee from the service shall be made during the incumbency of such officer, board or commission, except after the filing of a statement of reasons for such proposed change satisfactory to the Director of State Personnel and thirty days' notice thereof in order that a proper eligible list, if none is available, may be created by competitive examination from which to fill any position classified as the result of such change. If, at the expiration of thirty days after taking office, exemptions have not been designated by the appointing officer, board or commission as herein provided, the exemptions theretofore designated and in effect under this provision of the law shall be considered the exemptions claimed by such appointing authority and will be continued in effect.

“(b) After a proper eligible list has been created by competitive examination to fill any position in the classified service, no exemption under the provisions of paragraph 8, subsection (A), of Section 143.08 of the Civil Service Law may thereafter be claimed so long as a full and complete eligible list exists and so long as such list was created subsequent to an opportunity to claim such position exempt when no list existed.”

Regarding the positions exempt from the classified service allowed to each elective state officer, other elective officer, and each of the principal appointive executive officers, boards, or commissions, Section 143.08, Revised Code, reads in pertinent part:

“The civil service of the state and the several counties, cities, city health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.

“(A) 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 by sections 143.01 to 143.48, inclusive of the Revised Code:

* * *

* * *

* * *

“(8) Three secretaries, assistants, or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants, or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards, or commissions, except civil service

commissions, authorized to appoint such secretary, assistant, or clerk and stenographer ;

“* * *

* * *

* * *”

It will be noted that under the above language of Section 143.08, the elective and other officers concerned are allowed a certain number of exempt positions, *without qualification*. For example, an elected state officer is allowed four such exempt positions. Under the language used there can be no doubt that the intent is to allow these officers to designate which of their employees are to have an exempt status, and there is no authority in law by which the director of state personnel may impose restrictions on this clear grant of power by the legislature.

Proposed Rule II-2., *supra*, does, however, impose restrictions on the right of the officers concerned to the exempt positions allowed under Section 143.08, *supra*, and is in definite conflict with that provision of law. Under that rule, an officer could be deprived of the right to the exempt positions which are unqualifiedly given him by statute.

Section 154-63, General Code, before its repeal by Amended House Bill No. 1 of the 100th General Assembly, contained the following language:

“No agency shall adopt any rule which is inconsistent with the constitution of the United States, the constitution of the state of Ohio *or any law of this state.*” (Emphasis added)

While Section 119.02, Revised Code, the successor of Section 154-63, General Code, does not contain the above language, said Section 119.02 should, under the provisions of Section 1.24, Revised Code, be read as if it does contain such language. Section 1.24, *supra*, reads as follows:

“That in enacting this act it is the intent of the General Assembly not to change the laws as heretofore expressed by the section or sections of the General Code in effect on the date of enactment of this act. The provisions of the Revised Code relating to the corresponding section or sections of the General Code shall be construed as restatements of and substituted in a continuing way for applicable existing statutory provisions, and not as new enactments.”

Even without the above-noted language of former Section 154-63, General Code, it is, of course, axiomatic that an agency rule in conflict with a statute is invalid.

In 1 Ohio Jurisprudence 2d, Section 78, page 478, it is stated:

“Administrative rules must conform to the legal concept embraced in the standard or rule of conduct which the agency is designed to enforce. They may facilitate the operation of what has been enacted by the General Assembly *but may not add to or subtract from the legislative enactment.*”

“Accordingly, a rule is invalid where it clearly is in conflict with the law which is the source of the power of the agency enacting the rule or with any other statutory or constitutional provision.* * *” (Emphasis added)

Since, as noted earlier, proposed Rule II-2. is in clear conflict with the provisions of division (A) (8) of Section 143.08, Revised Code, such rule will be invalid if adopted as proposed.

I also note on reviewing the present Administrative Rules of the Director of State Personnel that existing Rule II-2. is identical to proposed Rule II-2., discussed above, and is, therefore, invalid for the same reason.

Further regarding division (A) (8) of Section 143.08, Revised Code, the language therein contained is clear and unambiguous and requires no rule or regulation to facilitate its operation. There can be no doubt that the officers therein mentioned are entitled to the exempt positions therein designated, and that the director of state personnel has a duty to comply with the directions of those officers as to the persons designated to fill exempt positions, whenever such designations are made.

In view of the foregoing, this opinion is issued as a formal objection to existing Rule II-2., and to the adoption of proposed Rule II-2.

In conclusion, it is my opinion and you are advised that existing Rule II-2. of the Director of State Personnel, and proposed Rule II-2. of the Director of State Personnel (to be considered at hearing of June 18, 1962), are in conflict with Section 143.08, Revised Code, and are invalid.

Respectfully,

MARK McELROY

Attorney General