

277.

UNEMPLOYMENT COMPENSATION COMMISSION OF OHIO
—ABOLISHED BY AMENDED SENATE BILL 57, 93RD GENERAL ASSEMBLY—STATUS, EMPLOYEES HIRED PRIOR TO SUCH TIME—SERVICES NOT TERMINATED BY SUCH ENACTMENT.

SYLLABUS:

The service of employment of the employes hired by the Unemployment Compensation Commission of Ohio, prior to the time said Commission was abolished by the enactment of Amended Senate Bill No. 57 of the 93rd General Assembly, was not terminated by the enactment of said bill.

COLUMBUS, OHIO, March 9, 1939.

HON. HERSCHEL C. ATKINSON, *Administrator, Bureau of Unemployment Compensation, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your communication of March 3, which reads as follows:

“A question has arisen as to whether the enactment of Amended Senate Bill No. 57, entitled ‘A bill to create a Bureau of Unemployment Compensation superseding the Unemployment Compensation Commission of Ohio, etc.’ which was passed by the General Assembly as an emergency measure and signed by the Governor and filed in the office of the Secretary of State on the 28th day of February, 1939, terminated the employment of all persons who were employed by the Unemployment Compensation Commission of Ohio.

I would appreciate it, therefore, if you will advise me specifically upon this question: Was the employment of all the employees of the Unemployment Compensation Commission of Ohio terminated by Amended Senate Bill No. 57, and if so, what was the effective date of such termination?”

The Unemployment Compensation Act, so-called, (Sections 1345-1 to 1345-35 of the General Code) which was enacted by the 91st General Assembly (116 O. L. 286) provided for the establishing of a system of unemployment insurance and the creation of an unemployment compensation commission for the purpose of administering said act.

Amended Senate Bill No. 57 of the 93rd General Assembly, which repealed Sections 1345-12, 1345-23 and 1345-29 of the General Code, became effective on the 28th day of February, 1939, and by the provisions contained in section 2 thereof abolished the then existing Unemployment Compensation Commission of Ohio. Said section reads in part as follows:

“The administrator of the Bureau of Unemployment Compensation shall supersede, and, except as hereinafter provided, perform all of the duties provided by law for the unemployment compensation commission of Ohio on and after the date upon which the administrator, appointed as provided in section 1 hereof, takes his oath of office and on such date, said administrator, as successor to the unemployment compensation commission of Ohio shall be vested with and assume and exercise all powers and duties cast by law upon the unemployment compensation commission of Ohio and on such date the unemployment compensation commission of Ohio and the terms of office of each member thereof shall cease and terminate together with all rights, privileges and emoluments connected therewith.”

At the outset, it will be noted that, while as stated, said bill by the above language abolishes the Unemployment Compensation Commission of Ohio created by the 91st General Assembly, yet such Commission and the terms of office of each member thereof do not terminate upon the effective date of said bill, but that members of said Commission continue in office until the administrator of the Bureau of Unemployment Compensation provided for in said bill takes his oath of office and qualifies as successor to the Unemployment Compensation Commission of Ohio.

The employes of the Unemployment Compensation Commission of Ohio were appointed by said Commission in the exercise of powers conferred upon it by the terms of section 1345-13 of the General Code of Ohio. Said section, which was not repealed by the enactment of Amended Senate Bill No. 57, supra, and which defines the powers conferred and the duties enjoined upon the Unemployment Compensation Commission of Ohio, reads as follows:

“(a) In addition to all other duties imposed on the commission and powers granted by the provisions of this act, the commission shall have full power:

(1) To adopt and enforce reasonable rules and regulations relative to the exercise of its powers and authority, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings; to prescribe the time, place and manner of making claims for benefits under this act, the kind and character of notices required thereunder, the procedure for investigating, hearing and deciding claims, the nature and extent of the proofs and evidence and the method of taking and furnishing the same to establish the right to benefits, and the method and time within which adjudication and awards shall be made; to adopt rules and regulations with respect to the collection, maintenance and disbursements of the unemployment and administrative funds; and to amend and modify any of its rules and regulations from time to time in such respects as it may find necessary or desirable;

(2) To employ, subject to the civil service laws of this state, secretaries, deputies, accountants, superintendents of employment districts and offices, clerks, stenographers, and other assistants as may be required for the administration of the provisions of this act, and to determine their salaries and duties;

(3) To appoint advisors or advisory employment committees, by local districts or by industries, who shall, without compensation but with reimbursements of necessary expenses, assist the commission in the execution of its duties;

(4) To require all employers, including employers not otherwise subject to the provisions of this act, to furnish to it from time to time information concerning the amount of wages paid, the number of employees employed, the regularity of their employment, the number of employees hired, laid off and discharged from time to time and the reasons therefor, and the numbers that quit voluntarily; and to require such employers to give other and further information respecting any other facts required for the proper administration of this act;

(5) To classify generally industries, businesses, occupations and employments, and employers individually, as to the hazard of unemployment in each business, industry, occupation or employment, and as to the particular hazard of each employer, having special reference to the conditions of regularity and irregularity of the employment provided by such employer and of the fluctuations in payrolls of such employer;

(6) To determine, within the limits and provisions of this act, the contribution rates upon employers subject to this act; and to provide for the levy and collection of the contributions from all employers subject to the act;

(7) To receive, hear, and decide claims for unemploy-

ment benefits, and to provide for the payment of such claims as are allowed;

(8) To promote the regularization of employment and the prevention of unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, and advise and assist in the establishment and operation by municipalities, counties, school districts and the state, of prosperity reserves of public works to be prosecuted in times of business depression and unemployment; to promote the re-employment of unemployed workers throughout the state in any other way that may be feasible, and to take all appropriate steps within its means to reduce and prevent unemployment; and to these ends to carry on, and publish the results of, any investigations and research which it deems relevant;

(9) To make such reports to the social security board created by the social security act enacted by the congress of the United States as that board may require, and to comply with such provisions as the board may from time to time find necessary to assure the correctness and verification of such reports;

(10) To make available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment benefits under this act and a statement of such recipient's rights to further benefits under the same.

(b) The commission shall also establish a division of research. The head of the division of research shall be a 'grade I statistician' under the civil service laws of this state. His (or her) official title shall be 'chief of the division of research'. The chief of the division of research may not be removed without the consent of the advisory council, nor may the duties of his office be altered, suspended or abolished without the consent of the advisory council."

The fact that the Legislature in the enactment of Amended Senate Bill No. 57, *supra*, provided for the repeal of only certain parts of the original Unemployment Compensation Act, clearly indicates that it was the intention of that body to have those parts of the former act which were not repealed continue in full force and effect. And on this point, it might be further stated that it was the intention of the Legislature, by reason of its not having abolished the Unemployment Compensation Commission until its successor was qualified, to have the operation of the former act continue in full force and effect without interruption.

Pertinent hereto in said regard is the case of *State, ex rel. Taylor, v.*

Cowen, 96 O. S. 277, wherein it is stated in the opinion of Jones, J., at page 282:

“Had the legislature in passing the Cass highway law been content to rest upon the repeal of the former law, undoubtedly the office would have been abolished; but, when, although expressly repealing the existing statute, it at the same time reenacted the former sections of the repealed law relating to the state highway department and to the state highway commissioner, and continued the latter in force, with the same title, tenure and salary, and with substantially the same functions attached to the office as it theretofore possessed, expressed in substantially the same identical terms, it thereby neutralized the repeal and continued the office in force. (1 Lewis’ Sutherland on Statutory Construction, 2 ed., Section 238.) In the construction of legislation of this character the legal principle has become well established that when the amendatory or reenacted law substantially reenacts the existing law, the latter is held to be in effect continuous and undisturbed, and in contemplation of law the amendatory measure is not a repeal but merely a reaffirmance of the former law. In re Allen, 91 Ohio St., 315, and In re Hesse, 93 Ohio St. 230.

The question is, What was the legislative intent? ‘To abolish an office the intention of the competent authority to abolish such office must be clear.’ 29 Cyc., 1368, and authorities cited.”

A close examination of Amended Senate Bill No. 57, supra, discloses that the only language contained therein which expressly abolishes an office or position is that which appears in section 2 thereof and which reads as follows:

“* * * on such date the unemployment compensation commission of Ohio and the terms of office of each member thereof shall cease and terminate together with all rights, privileges and emoluments connected therewith.”

Nothing is contained in said bill which might in any way be construed as abolishing the positions provided for in Section 1345-13, supra.

With reference to the failure of the Legislature to expressly abolish an office, it is declared in the first branch of the syllabus in the case of State, ex rel. Taylor, v. Cowen, supra, as follows:

“Where, in the codification and reenactment of the state highway laws, the legislature, though expressly repealing the existing highway laws, has at the time of such repeal substan-

tially reenacted former sections of the existing highway law relating to the state highway department and to the state highway commissioner, and has not expressly abolished the latter office but continued the same in force with the same title, tenure and salary, and with substantially the same functions which it theretofore possessed, such office will not be considered as having been abolished by such repeal, but as continuing and undisturbed."

A reading of Amended Senate Bill No. 57, supra, in its entirety, discloses that the bodies created therein are clothed with such functions which would require the employes necessary for the administration of said act to perform the same duties that such employes performed when the powers and duties relative to the administration of said act were conferred and imposed upon the Unemployment Compensation Commission of Ohio.

In other words, the functions of government which were carried on by the former Unemployment Compensation Commission of Ohio are in their essential details the same as those now carried on under the terms of Amended Senate Bill No. 57, supra, by the administrator of the Bureau of Unemployment Compensation.

The Unemployment Compensation Commission of Ohio has been divested of the power to administer the Unemployment Compensation Act, and that power has been transferred to and is now vested in its successor, the newly created administrator of the Bureau of Unemployment Compensation.

True, the manner and method of administering the act have by the terms of Amended Senate Bill No. 57, supra, been changed, yet, the employes hired under the provisions of Section 1345-13, General Code, are now just as they were prior to the enactment of Amended Senate Bill No. 57, required to perform such duties as will carry into effect the purpose of the act.

While there are very few, if any, court decisions touching the precise question presented herein, yet the authorities are all in accord on the proposition that a position is not abolished by dismissal of the incumbent and appointment of another to perform the same or similar duties.

In the case of State, ex rel. Miller, v. Witter, 114 O. S. page 122, it was stated in the opinion of the Court on page 125:

"It is true that Gaver was later given the position of 'claim investigator,' at a salary of \$1,560 per year, and that salary readjustments were made at the Dayton branch, so as to save the state the sum of \$440 a year, which certainly was worthy of accomplishment, but the fact remains that Gaver had charge of the office and its paraphernalia, performed the same functions that relator had previously performed, apparently covered the same

territory, and continued to act as deputy in an office claimed to be abolished. The whole record sustains the claim that what was really done was to readjust the salaries covering the Dayton branch—leaving the office intact, but its incumbent dismissed—and to displace the incumbent for another, who, while assuming to act as deputy, actually performed the same duties as had been previously performed by the relator, and none other.

We are of the opinion that, under the facts disclosed by the record, there was no abolishment of the office.”

Of like tenor is the statement contained in Volume 7, Ohio Jur., pages 594 and 595, which reads as follows:

“It is essential, however, that the position be actually abolished in good faith, for one who is under the protection of the civil service law may not be removed under the guise of abolishing his office when in fact the transaction amounts only to a change in the name of the position and the appointment thereto of another person, the duties remaining substantially unchanged.”

A statement to the same effect appears in Volume 10, Am. Jur., at page 933, wherein it is stated:

“The civil service laws cannot be evaded by a sham or pretended abolition, as where the incumbent of an office is ousted, a colorable change made in the title of the office, and another person appointed to perform substantially the same duties.”

In the rendition of an opinion in 1929 by the then Attorney General (Opinions of the Attorney General, 1929, Vol. I, page 19), a question which bears some analogy to the one presented herein was considered. The question under consideration was whether or not the creation of the Court of Common Pleas, Division of Domestic Relations for Franklin County abolished the former Juvenile Court of Franklin County, together with the classified Civil Service positions thereunder. The answer thereto is contained in the first branch of the syllabus of said opinion, which reads as follows:

“The positions of probation officers of the juvenile court of Franklin County in the classified civil service, heretofore appointed by the Probate Judge of said county, while sitting by designation in said juvenile court and exercising the jurisdiction thereof, are not abolished by the election and qualification of the additional common pleas judge, division of domestic relations,

provided for by Section 1532-7, General Code, and his exercise of the jurisdiction of said juvenile court.”

In light of the foregoing discussion, it would therefore appear that the conclusion to be reached herein must be that the employment of the employes hired by the Unemployment Compensation Commission was not terminated by the enactment of Amended Senate Bill No. 57.

However, in connection therewith I feel that the provisions contained in Section 5 of Amended Senate Bill No. 57, supra, should be called to your attention. Relevant to the point in hand is the following portion of said section:

“It shall be the duty of the administrator forthwith to consolidate, wherever possible, the offices, functions and duties of employes of the bureau of unemployment compensation and to utilize the information, offices and personnel of other departments of the state government whenever the work of two departments is such that a consolidation of duties may be effected.”

If in the discharge of his duties set out above the administrator effects a consolidation of functions and duties of employes and utilizes certain information of other departments of state government, it is conceivable that certain duties now performed by employes hired by the Unemployment Compensation Commission of Ohio prior to its abolition might be eliminated. In such case, obviously the person performing such duties, even though in the classified Civil Service of the state, could be discharged. The Civil Service laws do not require the head of a department to find work for an employe in the classified service whom he considered to be unnecessary, nor do such laws require the retention of persons whose positions it is desired to abolish in the interest of economy. In such case, the position may be abolished and the incumbent discharged even though he or she is wholly without fault.

In arriving at the conclusion above stated, I am not unmindful of the general principle of law to the effect that the authority in government which possesses the power to create an office has, in the absence of some provision of the Constitution or law passed by higher authority, the implied power to abolish the office it has created.

This was clearly done by the Legislature by the enactment of Amended Senate Bill No. 57, supra. The Unemployment Compensation Commission of Ohio and the state advisory council created by the Legislature in the enactment of former Section 1345-12, General Code, were in the exercise of the powers of that body, abolished by it when said section was repealed. However, as stated above, the employes hired under the provisions of Section 1345-13, General Code, are performing substantially the same duties under the successor to said Commission as were performed

by them prior to the time of the abolition of said Commission, and it is, consequently, in specific answer to your question, my opinion that the service of employment of the employes hired by the Unemployment Compensation Commission of Ohio was not terminated by the enactment of Amended Senate Bill No. 57 of the 93rd General Assembly.

Respectfully,

THOMAS J. HERBERT,
Attorney General.