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COMMERCE DEPARTMENT—RAZING BUILDINGS UNDER SECTIONS 835, ET SEQ., GENERAL CODE—ROTARY FUND—BIDS UNNECESSARY—PROCEDURE DISCUSSED.

COLUMBUS, OHIO, July 22, 1929.

SYLLABUS:

1. *All orders made by the State Fire Marshal, under the provisions of Sections 835, et seq., of the General Code, must be made in the name of the Department of Commerce, authenticated by the seal of the Director of Commerce, and before the State Fire Marshal can proceed to exercise any authority, the power must be delegated to him by the Director of Commerce, and such delegation of authority must be shown by the records of the Department of Commerce.*

2. *The Department of Commerce may expend such funds as now exist in the rotary fund established by the 83rd General Assembly (108 O. L. Pt. 1, p. 761), for the purpose of tearing down or repairing buildings and correcting or removing hazardous conditions in pursuance of the provisions of Section 836-2, General Code.*

3. *No bids are required for the letting of work such as is authorized by Section 836-2 of the General Code.*

4. *Further powers and duties of the State Fire Marshal and methods of procedure under Sections 835, et seq., of the General Code, discussed.*

COLUMBUS, OHIO, July 22, 1929.

HON. RAY R. GILL, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

“The State Fire Marshal has at different times endeavored to proceed under G. C., Sections 835, et seq., and in particular under G. C., Section 836-2. Methods of procedure under Section 836-2 have been at different times called into question to the embarrassment of the Fire Marshal.

Your opinion is respectfully requested as to the proper method of procedure to be followed by the Fire Marshal incident to the sections above mentioned, and in particular under Section 836-2.

In your opinion, please indicate whether or not it is necessary to secure bids for work done under section mentioned; and, if so, indicate the form of the bids and anything that should be done in such connection. Please also indicate the form to be followed by the State Fire Marshal in certifying the expenses and penalty mentioned in the section to the county auditor.

Further, in connection with the above, your opinion is also requested as to whether or not any of the funds appropriated and at the disposal of the Fire Marshal may be used to defray costs of work done, or any other expenses incident to the above.”

Before entering into a discussion of the procedure to be followed by the State Fire Marshal, in accordance with the provisions of Sections 835, et seq., of the General Code, it is well to direct your attention to the fact that the Administrative Code which went into effect July 1, 1921, abolished the position of State Fire Marshal, and the powers and duties of the State Fire Marshal were vested in the Department of Commerce. Under Section 154-6 of the General Code the office of Fire Marshal was created within the Department of Commerce, and under Section 154-8, General Code,

the Fire Marshal can only perform such duties as the Director of Commerce prescribes.

Section 154-39 of the General Code provides that the Department of Commerce shall have all powers and perform all duties vested in the State Fire Marshal, and the Department of Commerce shall have all powers and perform all duties vested by law in any and all officers, deputies and employes of such office. Section 154-3 provides that the Department of Commerce shall be administered by the Director of Commerce.

From a reading of these sections it appears that the Fire Marshal can perform only such duties and has only such powers as are prescribed by the Director of Commerce, and all duties and powers formerly had by the State Fire Marshal, under the provisions of Sections 835, et seq., of the General Code, are now vested in the Department of Commerce.

In the case of *State ex rel. the State Fire Marshal vs. Geo. W. Blickenderfer*, 25 N. P. (N. S.) 389, decided April 15, 1925, the headnotes are as follows :

"Under the administrative code, effective July 1, 1921, the position of State Fire Marshal was abolished and the powers and duties of said State Fire Marshal were vested in the Department of Commerce.

All orders, relating to fire hazards, issued under Sections 835 and 836, G. C., emanating from the state must be made in the name of the Department of Commerce, and such orders must have affixed thereto, the seal of the Department of Commerce."

The court in its opinion says :

"Under Section 154-26, G. C., the office of the State Fire Marshal was abolished and under 154-39, G. C., the Department of Commerce was created, vested with all the powers and duties formerly vested in the State Fire Marshal. The section further provides that where powers are conferred or duties imposed upon the State Fire Marshal by statute, enacted prior to July 1, 1921, such powers and duties shall be construed as vested in the Department of Commerce. The court is, therefore, of the opinion that wherever the words 'state fire marshal' appear in any of the statutes in effect, prior to the passage of the administrative code, they must be construed 'the department of commerce.' "

The court, after referring to the sections of the Administrative Code, then says :

"In view of all the foregoing sections of the statute, the court is of the opinion that, before a valid order to raze a building can be made under the provisions of Section 835, G. C., by the state itself, it must be made in the name of the Department of Commerce, and such order should be authenticated by the seal of the Department of Commerce. Appeals for hearing from orders issued under authority of 835, G. C., should be made to the Department of Commerce and not to the State Fire Marshal."

In the case of *Swartz vs. Board of Education*, 18 Ohio App. Reps. 17, the court, in considering the effect of the Administrative Code as to the authority of the chief of the division of factory inspection to issue a lawful order, says on page 23 :

"We know of no law which authorizes the head of that department to delegate authority to a subordinate to make such an order in his own name,

without the same being passed upon and approved by the head of the department and shown by the official record of the proceedings of the department to have been officially authorized or approved. And in any event such order must be shown on the official records of the proceedings of the department.

As we construe the law, such an order, to be lawful and enforceable, must be, and must purport to be, the act of the department, not that of a chief of division of the department, and must be evidenced by a proper record showing its official character and duly proven in the manner provided by the law already referred to."

Therefore, all orders which are authorized by Sections 835, et seq., must be made in the name of the Department of Commerce, and must be authenticated by the seal of the Director of Commerce, and before a State Fire Marshal can proceed to exercise any authority whatever, the power must be delegated to him by the Director of Commerce, which delegation of authority must be shown by the records of the Department of Commerce.

Section 835 of the General Code provides as follows :

"If the State Fire Marshal, a deputy State Fire Marshal, or Assistant Fire Marshal, or any officer mentioned in the preceding section, upon an examination or inspection finds a building or other structure, which for want of proper repair, by reason of age and dilapidated condition, defective or poorly installed electrical wiring and equipment, defective chimneys, defective gas connections, defective heating apparatus, or for any other cause or reason is especially liable to fire and which building or structure is so situated as to endanger other buildings or property, such officer shall order such building or buildings to be repaired, torn down, demolished, materials removed and all dangerous conditions remedied. If such officer finds in a building or upon any premises any combustible or explosive materials, rubbish, rags, waste, oils, gasoline or inflammable conditions of any kind, dangerous to the safety of such buildings or premises, buildings or property, he shall order such materials removed or conditions remedied. Such orders shall be made against and served personally or by registered letter upon the owner, lessee, agent, or occupant of such building or premises, and thereupon such order shall be complied with by the owner, lessee, agent or occupant and within the time fixed in said order."

The order authorized by Section 835 should name the owner, lessee, agent or occupant to whom the order is to be issued and set forth specifically the condition of the building or premises to be remedied. It should include the date the order is issued and the date the order is to be complied with. The time allowed for the order to be complied with should be a reasonable time, so as to give the person sufficient opportunity to comply with the order. The order should be served on the party named either personally or by registered mail.

Section 836 of the General Code provides as follows :

"If the owner, lessee, agent or occupant deems himself aggrieved by an order of an officer under the preceding section and desires a hearing he may complain or appeal in writing to the State Fire Marshal within three days from the service of the order and the State Fire Marshal shall at once investigate said complaint and he shall fix a time and place not less than five

days nor more than ten days thereafter, when and where said complaint will be heard by the State Fire Marshal.

The State Fire Marshal at said hearing may affirm, modify, revoke or vacate said order, and unless such order is revoked or vacated by the State Fire Marshal it shall remain in force, and be complied with by such owner, lessee, agent, or occupant and within the time fixed in said order or within such time as may be fixed by the State Fire Marshal at said hearing."

Under the provisions of Section 836, the party aggrieved may appeal from the order issued by virtue of Section 835, General Code. Such appeal must be made in writing to the Department of Commerce within three days after service of the order. The Department of Commerce, through its duly authorized officer, should then investigate the complaint, and such officer, if he is authorized by the department so to do, shall fix a time and place not less than five days nor more than ten days after receiving the complaint in writing, when and where the complaint will be heard. The party aggrieved should be notified of the place and time of hearing and also as to which officer the Department of Commerce has authorized to hear said complaint. The officer of the Department of Commerce hearing the complaint may affirm, modify, revoke or vacate said order. Unless the order is vacated or revoked the order shall be in full force and effect and be complied with either within the time fixed by the order or within such time fixed by the officer hearing the complaint.

Section 836-1, General Code, provides as follows :

"If a person is aggrieved by the final order of the State Fire Marshal as made at the hearing provided for in the preceding section, such person may within five days thereafter, appeal to the probate court of the county in which the property is situate, notifying the State Fire Marshal in writing of such appeal within three days thereafter, which notice shall be in writing and delivered personally to the the State Fire Marshal or left at his principal office in the city of Columbus.

The party so appealing shall within two days thereafter, file with the probate court in which said appeal is made a bond in an amount to be fixed by the court but in no case less than one hundred dollars (\$100) with at least sufficient sureties, to be approved by the court, conditioned to pay all the costs on the appeal in case the appellant fail to sustain the same or the appeal be dismissed for any cause. The probate court shall hear and determine said appeal within ten days from the date of the filing of the same and the State Fire Marshal shall make a complete transcript of the proceedings had before him and certify the same together with all the original papers filed in his office and transmit them to the probate court at least three days prior to the date of hearing as fixed by the court. The decision of the probate court shall be final and in case the decision is against the appellant or for any cause the appeal be dismissed judgment for costs shall be entered against the appellant."

Under the provisions of Section 836-1 an appeal may be taken to the Probate Court of the county in which the property is situated, within five days after the final order is made by the officer who heard the appeal. Written notice must be given to the Department of Commerce or to an officer duly authorized by the Department of Commerce to receive such notice, either by service at the principal office of the Department of Commerce at Columbus, Ohio, or upon the officer personally. This notice must be served within three days after the case is appealed to the Probate Court. Two days after such notice is served, a bond must be filed by the appellant

in the Probate Court. The Probate Court must hear and determine the appeal within ten days after it is filed. The officer hearing the appeal in the name of the Department of Commerce shall make a complete transcript of the proceedings had before him and certify the same and transmit them, together with all the original papers filed with the Department of Commerce, to the Probate Court at least three days prior to the date of hearing fixed by the Probate Court.

Section 836-2, General Code, provides as follows:

"If any person fail to comply with an order of an officer under the last three preceding sections and within the time fixed then such officer is empowered and authorized to cause such building or premises to be repaired, torn down, demolished, material removed and all dangerous conditions remedied, as the case may be and at the expense of such person, and if such person within thirty days thereafter fail, neglect or refuse to repay said officer the expense thereby incurred by him, such officer shall certify said expenses, together with twenty-five per centum penalty thereon to the county auditor of the county in which said property is situate and said county auditor shall enter said expense on the tax duplicates of said county as a special charge against the real estate on which said building is or was situate and the same shall be collected as other taxes and when collected, shall together with the penalty thereon be refunded to such officer."

You will observe from a reading of Section 836-2 of the General Code that prior to the enactment of the Administrative Code the Fire Marshal was authorized and empowered to carry out the orders as provided by this section at the expense of the person on whom they were served, and if such person neglected or refused to pay said officer, the officer was required to certify the expense and a twenty-five per cent penalty to the county auditor who entered the expense and penalty upon the tax duplicate, and when it was collected, it was refunded to the officer. It appears from a reading of this section that the expense so incurred by the Fire Marshal or other officer was to be advanced by him, and for his services he was to receive the twenty-five per cent penalty as a fee. Such a construction would be correct if the Legislature failed to make any appropriation for the purpose of carrying into effect the provisions of Section 836-2 of the General Code, and were it not for the existence of Section 24 of the General Code, which provides that every state officer shall pay to the Treasurer of State on or before Monday of each week all moneys received for the State or for the use of any such state officer during the preceding week from fees, penalties, etc.

However, in 1919, 108 O. L. Pt. 1, page 761, the Legislature established a rotary fund of one thousand dollars to be used for the purpose of tearing down and repairing buildings, and correcting or removing hazardous conditions according to the provisions of Section 836-2, General Code. This rotary fund was continued in effect by each succeeding Legislature in the same manner as it was continued in effect by the 88th General Assembly, which provided in House Bill No. 510, Section 6, paragraph 3, as follows:

"All moneys to the credit of existing rotary funds are hereby appropriated and all existing rotary funds except as herein appropriated are hereby continued in effect for the full period during which this act is effective."

Since, by the Administrative Code, the Department of Commerce was given the same powers that were vested in the Fire Marshal, the Department of Commerce has authority to expend such funds as now exist in the rotary fund established in 1919 to carry out the purposes as provided in Section 836-2 of the General Code.

Paragraphs 1 and 2 of Section 6 of House Bill No. 510, provide as follows :

"The term 'Rotary' as used in Sections 1 and 2 of this act, means a fund set aside to enable a department or institution to carry on a function or activity the receipts from which are to be used for the function or activity for which the rotary fund is established.

Money obtained from the function or activity for which a rotary fund is provided shall be turned into the treasury, and such moneys so turned into the treasury between January 1, 1929, and December 31, 1930, both inclusive, are hereby appropriated for the purpose for which such rotary fund is now maintained, provided, the director of finance shall have power to designate which moneys collected by any agency for which a rotary fund is established by this act shall be paid into such rotary fund."

In view of these provisions, all funds collected by the Department of Commerce by virtue of the provisions of Section 836-2, General Code, are to be turned into the state treasury, and such funds are appropriated for the same purpose for which the rotary fund is maintained. In other words, the expense and penalty collected as taxes and refunded to the Department of Commerce under the provisions of Section 836-2 of the General Code, are to be turned into the state treasury and appropriated for the same purpose for which the rotary fund is maintained.

In your letter you request that I submit a form of a certificate that may be used by your department where the expense and penalty are certified to the county auditor. The following form is suggested :

"I, _____, being the duly appointed, qualified and acting Director of the Department of Commerce of the State of Ohio, do hereby certify that the above and foregoing is a true and correct statement of the expenses incurred by the Department of Commerce in (repairing, tearing down, etc.) premises described in the foregoing statement, together with a penalty of twenty-five per cent as authorized by Section 836-2 of the General Code.

DEPARTMENT OF COMMERCE,

(SEAL)

By _____
Director of the Department of Commerce."

You will observe that I have drawn this form for the use of the Director of Commerce. However, the same may be used by an officer delegated by the Director to make such certification and in such case the form should be drawn to apply to the officer making the certification.

Section 836-2 of the General Code does not provide for the taking of bids for work to be let under its provisions, and there are no general statutes requiring bids for such contract. Therefore, I am of the opinion that bids are not required for the letting of work such as is authorized by Section 836-2 of the General Code.

In view of the foregoing, I am of the opinion that :

1. All orders made by the State Fire Marshal, under the provisions of Sections 835, et seq., of the General Code, must be made in the name of the Department of Commerce, authenticated by the seal of the Director of Commerce, and before the State Fire Marshal can proceed to exercise any authority, the power must be delegated to him by the Director of Commerce, and such delegation of authority must be shown by the records of the Department of Commerce.

2. The Department of Commerce may expend such funds as now exist in the rotary fund established by the 83rd General Assembly (108 O. L. Pt. 1, p. 761), for

the purpose of tearing down or repairing buildings and correcting or removing hazardous conditions in pursuance of the provisions of Section 836-2, General Code.

3. No bids are required for the letting of work such as is authorized by Section 836-2 of the General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

637.

HOUSE BILL NO. 343—LIMITING TRANSFERS OF SCHOOL DISTRICT TERRITORY—RETROSPECTIVE.

SYLLABUS:

After the effective date of House Bill No. 343 of the 88th General Assembly, no territory of a school district, or part of such territory, which had at any time been transferred to another school district by authority of Section 4696, General Code, may be transferred out of the district to which it had been transferred by authority of said section of the Code, until after five years from the date of the original transfer, without the approval of the state director of education to such transfer.

COLUMBUS, OHIO, July 22, 1929.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

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

“House Bill 343 provides that if territory is transferred by Section 4696 it may not be retransferred for five years. Does this govern those districts, or parts of districts, which were transferred prior to the date that the new bill takes effect? In other words, if a piece of territory was transferred from one county school district to another July 1, 1927, and has continued to this time as transferred, must it remain in the county school district in which it now is until July 1, 1932?”

Section 4696, General Code, as it existed prior to the enactment of House Bill No. 343 of the 88th General Assembly, authorized a county board of education to transfer “a part or all of a school district of the county school district to an exempted village, city or county school district, the territory of which is contiguous thereto,” upon petition of a majority of the electors residing in the territory to be transferred, and provided that upon petition of seventy-five per cent of the electors residing in the territory proposed to be transferred, the duty to make such transfer was mandatory.

As amended in said House Bill No. 343, said Section 4696 was not changed except that there was added a limitation to the authority and duty to make transfers under the statute, in the following language:

“Any territory which has been transferred to another district, or any part of such territory, shall not be transferred out of the district to which it has been transferred during a period of five years from the date of the original transfer without the approval of the state director of education to such a transfer.”