

In view of the foregoing it is my opinion :

1. That an appointing officer cannot be required to make a permanent appointment from a list containing the names of less than three eligible persons, even though one of the persons whose name appears upon the eligible list, as certified, is serving as a provisional appointee in the position for which the eligible list is created.

2. Under such circumstances, your commission cannot refuse to certify the payroll containing the name of such provisional appointee.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1338.

UNITED SPANISH WAR VETERANS MEMORIAL COMMISSION—
AUTHORITY TO ERECT MEMORIAL UNDER SECTIONS 15289-13;
ET SEQ., GENERAL CODE--SECTIONS 154-40 AND 2314, ET SEQ.,
GENERAL CODE DO NOT APPLY.

SYLLABUS:

Neither the provisions of Section 154-40, General Code, nor those of Sections 2314, et seq., General Code, are applicable in erecting a monument in honor of the memory of the soldiers and sailors of the Spanish-American War, the Philippine Insurrection and the Chinese Relief Expedition, since the legislature by the enactment of Sections 15289-13, et seq., General Code, 112 O. L. 133, has placed the entire authority and responsibility of selecting the design, securing the plans and estimates and the letting of a contract for the erection of such a memorial in the United Spanish War Veterans Memorial Commission.

COLUMBUS, OHIO, December 8, 1927.

HON. HERBERT B. BRIGGS, *State Architect and Engineer, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your recent communication, as follows :

“In re: Contract, Spanish-American War Memorial, H. B. 402, 87th General Assembly, 1927.

Does House Bill 402 of the 87th General Assembly vest in the commission created by it authority to award the contract for the sculptural service and the erection of the memorial?

The commission has decided to award the contract to Mr. F. L. J. of Cleveland. I have prepared a contract to be executed by the Director of Highways and Public Works the same as is done with other construction work. Section 154-40 (7) of House Bill 67 of the 87th General Assembly raises the above question.

The commission is particularly anxious to have the work proceeded with without delay so that the memorial may be dedicated April 21st, 1928, the 30th anniversary of the Spanish-American declaration of war. In consequence I would be pleased to have your opinion at an early date.”

House Bill No. 402, to which you refer, is now designated as Sections 15289-13 to 15289-18, both inclusive, General Code, 112 O. L. 133, and said bill provides for the

appointment by the governor of a commission to be known as the United Spanish War Veterans Memorial Commission. Said commission consists of seven members, five of whom are veterans of the Spanish-American War. The Adjutant General and the Director of Highways and Public Works serve, *ex officio*, as the other two members of said commission.

Under the provisions of Section 15289-14 of said act, said commission is expressly empowered "to erect on the state house grounds a suitable memorial to the Ohio soldiers and sailors of the Spanish-American War, the Philippine Insurrection and the China Relief Expedition from April 21, 1898 to July 4, 1902."

Section 15289-15, General Code, which is a part of the same act, provides, in part, as follows:

"The commission may request the submission of designs from which it may choose the most appropriate, and it shall have authority to secure and have prepared plans and estimates and *contract* for the construction and erection of such monument. It shall be the duty of the state architect to co-operate with the commission at any time upon its request. * * * "

You speak of paragraph seven of Section 154-40, General Code, as amended in House Bill No. 67, 112 O. L. 430, as probably being in conflict with the provisions of the above quoted section.

Section 154-40, General Code, provides, in part, as follows:

"The Department of Public Works shall have all powers and perform all duties vested by law in the Superintendent of Public Works and the state building commission. Wherever powers are conferred or duties imposed upon any such departments, offices or officers, such powers and duties shall, except as herein provided, be construed as vested in the Department of Public Works.

In addition to the powers so transferred to it, the Department of Highways and Public Works shall have the following powers:

* * * * *

(7) To erect, supervise and maintain all public monuments and *memorials* erected by the state, *except where the supervision and maintenance thereof is otherwise provided for by law.* * * * " (Italics the writer's.)

It will be observed that under the provisions of Section 15289-15, *supra*, the commission appointed to erect a suitable memorial to the soldiers and sailors of the Spanish-American War, the Philippine Insurrection and the China Relief Expedition is expressly authorized to select the design, secure the preparation of plans and estimates and to contract for the erection of such a memorial. Under the provisions of paragraph seven of Section 154-40, *supra*, the legislature has definitely withheld from the Department of Public Works the authority to supervise and maintain memorials where other provision has been made. In the instant case such other provision has been made in Section 15289-15, *supra*. It is, therefore, apparent that the provisions of Section 154-40, *supra*, are not applicable to the memorial in question.

It is a matter of common knowledge that the planning and erection of a statue of this nature is such as requires a skill that may be personal to the sculptor who is selected. Because of this uniqueness, the legislature has taken such a contract outside of the field of competitive bidding.

It may be well in passing to direct your attention to an opinion of this department addressed to you under date of April 25, 1927, being Opinion No. 382. On page one of this opinion you will note the following:

"Since the proposed monument is not in my opinion a building or structure within the contemplation of the laws pertaining to public buildings (Sections 2314 et seq., General Code,) it is not deemed necessary that the steps laid down in said Sections 2314, et seq., General Code, be complied with."

In view of the foregoing it is my opinion that neither the provisions of Section 154-40, General Code, nor those of Sections 2314, et seq., General Code, are applicable in erecting a monument in honor of the memory of the soldiers and sailors of the Spanish-American War, the Philippine Insurrection and the Chinese Relief Expedition, since the legislature by the enactment of Sections 15289-13, et seq., General Code, 112 O. L. 133, has placed the entire authority and responsibility of selecting the design, securing the plans and estimates and the letting of a contract for the erection of such a memorial in the United Spanish War Veterans Memorial Commission.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1339.

COUNTY COMMISSIONERS—NO AUTHORITY TO FIX NUMBER OR COMPENSATION OF ASSISTANTS TO COUNTY OFFICIALS—COMPENSATION OF ASSISTANTS NOT TO EXCEED APPROPRIATION OF COMMISSIONERS.

SYLLABUS:

Although the board of county commissioners has nothing to do with the question as to the number of deputies, assistants or clerks that may be appointed by the sheriff and other officers of the county for their respective offices, nor with the amount of compensation to be paid any deputy, assistant or clerk in said several offices, the board of county commissioners is charged with the duty, to be exercised in its sound discretion, of making appropriations to pay the compensation of deputies, assistants and clerks in such offices; and the amount that may be expended by the sheriff or other county officers for deputies, assistants or clerk high, may not in the aggregate exceed the appropriations made by the board of county commissioners for said purpose with respect to the said several county offices.

COLUMBUS, OHIO, December 8, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of your recent communication in which you enclose a letter from the board of county commissioners of Belmont County, Ohio. My opinion is requested with respect to the questions therein stated, as follows:

- "1. Can county commissioners be made to pay special deputies taken on by the sheriff of a county during a strike when no appropriation has been made for same and when there is no money to be appropriated?
2. Can the sheriff, probate judge, prosecuting attorney, or clerk of courts spend more money than has been appropriated to each office by the county commissioners and compel the county to pay the excess amount spent?"

With respect to the appointment by county officers of deputies, assistants and clerks, and the payment of compensation of such appointees, Section 2981, General Code, as amended 112 O. L. 107, and Section 2987, General Code, provide as follows: