

3288.

APPROVAL, BONDS OF KNOX COUNTY, \$46,200, FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, July 3, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

3289.

ADMINISTRATIVE CODE—APPOINTMENT AND REMOVAL OF DEPUTIES, ASSISTANTS AND OTHER EMPLOYEES VESTED IN DIRECTOR OF INDUSTRIAL RELATIONS—SECTION 871-14 G. C. CONSTRUED—BOARD OF BOILER RULES.

Powers formerly exercised by the Industrial Commission under section 871-14 G. C. in the appointment and removal of deputies, assistants and other employes are vested under the Administrative Code in the Director of Industrial Relations. The Industrial Commission, therefore, has no authority to abolish a position in the Department of Industrial Relations even though that position constitutes an agency created for the purpose of assisting the Commission in the performance of the functions retained by it.

COLUMBUS, OHIO, July 3, 1922.

Department of Industrial Relations, HON. PERCY TETLOW, Director, Columbus, Ohio.

GENTLEMEN:—You have requested the advice of this department as follows:

“I am submitting for your consideration a question at law which arises between the Director of Industrial Relations and the Industrial Commission of Ohio regarding the director's appointment of Herbert F. Cook to fill a vacancy in the Ohio Board of Boiler Rules caused by the death of H. A. Baumhart.

The statute creating the Ohio Board of Boiler Rules provided that said board would be appointed by the Boiler Division, with the approval of the Governor, and that the salary would be \$1,000 per annum. The Industrial Commission act—Section 871-11—permitted the legal existence of this board. On and after the first day of September, 1913, the board was superseded by the Industrial Commission. The records of the Industrial Commission, the journal entry, disclose that by resolution, acting under Section 871-14, the Commission created the Ohio Board of Boiler Rules in the same manner, and within the same resolution, as were the Chief Inspector of Mines, the Chief Inspector of Workshops and Factories and the Chief Examiner of Steam Engineers, the employes, with their salaries, being enumerated for each division.

The salary of the members of the Board of Boiler Rules was fixed at \$10 per diem when rendering active service in the capacity as a member of the board, with expenses incident thereto. They receive the salary fixed by the Commission with all legitimate expenses in connection with their duties.

The Director of Industrial Relations proceeded to fill the vacancy caused by H. A. Baumhart's death and made the appointment, as stated above, of Herbert F. Cook, of Cleveland, assuming that the board was created by the Commission in the same manner as other employes under Section 871-14, and that he was acting only within his rights in the filling of such vacancy.

The Industrial Commission in business session, May 12, 1922, by a majority vote, abolished the Ohio Board of Boiler Rules. The Commission then by a majority vote proceeded to appoint a new board to act in an advisory capacity to the Industrial Commission, the Commission indicating that this action was taken under Section 154-45, General Code. (Copy of such action is herewith enclosed.)

One legal point in question which I desire to present is whether or not the Industrial Commission of Ohio has authority to abolish the Board of Boiler Rules, or any office established by them under Section 871-14, as indicated by the journal record of August 30, 1913.

Second, another point at issue is whether the Commission, under Section 154-45, General Code, has the right to abolish the Board of Boiler Rules.

Third, if the act of the Commission abolishing the Board of Boiler Rules, under Section 154-45, is legal and one coming within their jurisdiction, can the members of such board receive compensation for their services?

I might state that the Governor of Ohio in a communication addressed to the Industrial Commission advised such Commission that the power of appointment and removal of all employes should be deemed as resting within the Department of Industrial Relations."

Attention will first be given to the state of the law governing this subject as it was under the act creating the Industrial Commission of Ohio and prior to the enactment of the Administrative Code of 1921. In the first place, there had been prior to 1913 a state board known as the Board of Boiler Rules, but this board ceased to exist as such on September 1, 1913, under section 871-11 of the General Code, which provided as follows:

"On and after the first day of September, 1913, the following departments of the state of Ohio, to wit: * * * board of boiler rules * * * shall have no further legal existence, except that the heads of the said departments, and said boards, shall within ten days after the said date submit to the governor their reports of their respective departments for the portion of the year 1913 during which they were in existence, and on and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred by law upon the said departments."

In this same connection, section 871-24 should be observed. It provides as follows:

"All duties, liabilities, authority, powers and privileges conferred and imposed by law upon the * * * board of boiler rules * * * are hereby

imposed upon the industrial commission of Ohio and its deputies on and after the first day of September, 1913.

All laws relating to the * * * board of boiler rules * * * on and after the first day of September, 1913, shall apply to, relate and refer to the industrial commission of Ohio, and its deputies. Qualifications prescribed by law for said officers and their assistants and employes shall be held to apply, wherever applicable, to the qualifications of the deputies of the commission assigned to the performance of the duties not cast upon such officers, assistants and employes."

At the same time the Commission was given the following powers:

"Sec. 871-14. The commission is authorized and empowered to employ, promote and remove a secretary, or secretaries, deputies, clerks, stenographers, and other assistants, as needed; to fix their compensation, and to assign to them their duties. Such employments and compensation to be first approved by the governor."

"Sec. 871-22. It shall also be the duty of the industrial commission, and it shall have full power, jurisdiction and authority:

(1) To appoint advisers, who shall without compensation, assist the industrial commission in the execution of its duties; to retain and assign to their duties any or all officers, subordinates and clerks of the * * * board of boiler rules * * *."

The Commission then in 1913 had the power to employ deputies and assistants for such purpose, retaining and assigning to their duties any officers or employes in the abolished departments, the functions of which the Commission then took over; and the Commission also had the power to appoint advisers to serve without compensation in assisting the Industrial Commission in the execution of its duties. It could have done either or both in any case requiring action in the organization of the department of the Industrial Commission; that is, it could have employed deputies or assistants in any of the divisions which supplanted the former department, and it could also have appointed advisers to serve without compensation. It had the express power to remove those whom it employed, and it had the power necessarily implied to abolish positions of this character by simply removing the incumbent of such position, and assigning his duties to some other employe or taking them over itself. The Commission could, at the same time, do away with advisers appointed by it by the simple expedient of failing to call upon them for assistance. In short, both employes and advisers were creatures of the Industrial Commission, having no independent functions whatever, and no existence independent of the will of the Commission. Obviously, however, the two kinds of duties were distinct. The same person could not well have been an adviser serving without compensation as such, and an employe serving with compensation at one and the same time.

It appears from your letter that the Board of Boiler Rules about which you are inquiring was created as a group of deputies or assistants of the Commission. It was not and is not, strictly speaking, a board. Some doubt is engendered by your reference to it as such. Yet, on the whole it is believed that it was competent for the Commission to effect such a grouping of employes in its service as to require of them united action within the scope of the duties assigned to them. Certainly the persons appointed on this new board of "boiler rules" seem to have been regarded as employes, for their compensation was fixed, which could not lawfully have been the case had they been appointed as advisers. In view of the long continued prac-

tice of the Industrial Commission, this department is disposed at this time to assume the legality of the original designation of these persons as employes, assistants or deputies of the Industrial Commission and the allowance to them of compensation, though this question is not entirely free from doubt. Being employes, they were not originally to be classed as advisers.

Had the law continued in the condition which has been described, it would have been competent for the Industrial Commission, as previously stated, to abolish these employments and to designate or appoint advisers to assist the commission in discharging its functions pertaining to boiler rules. However, the enactment of the Administrative Code did change the law in this particular. Section 154-45 of the General Code provides as follows:

“The department of industrial relations shall have all powers and perform all duties vested by law in the industrial commission of Ohio, excepting the following:

Those powers and duties of the commission which it exercises as successor of the state liability board of awards, the state board of arbitration, the board of boiler rules, and in the investigation, ascertainment and determination of standards, devices, safeguards, and means of protection, being all powers and duties mentioned in paragraphs 3 to 8, both inclusive, of section 871-22 of the General Code, sections 871-23, 871-26, 871-27, 871-28, 871-30, 871-32, 871-33, 871-34 and 871-35, sections 1058-8 to 1058-12, both inclusive, 1058-16, 1063 to 1077, both inclusive, and sections 1465-37 to 1465-108, both inclusive, of the General Code, and the powers of the commission as successor of the board of boiler rules under section 1058-18 of the General Code, which shall continue to be exercised and performed by the industrial commission of Ohio in the manner provided by law for the exercise of such powers and the performance of such duties.

The industrial commission of Ohio shall be a part of the department of industrial relations for administrative purposes in the following respects: The director of industrial relations shall be ex-officio the secretary of said commission, shall succeed to and perform all of the duties of the secretary of said commission, and shall exercise all powers of said secretary as provided by law; but such director may designate any employe of the department as acting secretary to perform the duties and exercise the powers of secretary of the commission. All clerical, inspection and other agencies for the execution of the powers and duties vested in the said industrial commission shall be deemed to be in the department of industrial relations, and the employes thereof shall be deemed to be employes of said department and shall have and exercise all authority vested by law in the employes of such commission. But the industrial commission of Ohio shall have direct supervision and control over, and power of appointment and removal of, such employes whose position shall be designated by the governor as fully subject to the authority of such commission.

The commission may appoint advisers, who shall without compensation assist the commission in the execution of the powers and duties retained by it under this section.”

This section begins by transferring to the Department of Industrial Relations from the Industrial Commission all the powers and duties of the Industrial Commission, with the exceptions named in the second paragraph. One of those exceptions is the powers and duties of the Commission which it exercises as the successor

of the Board of Boiler Rules. This power, however, does not include the power to appoint the Board of Boiler Rules as employes, deputies or assistants of the Commission. The power formerly exercised by the Commission owed its existence to section 871-14 of the General Code, above quoted, and this power is one that is transferred to the Department of Industrial Relations, not being one of the expected powers enumerated in the second paragraph of section 154-45. In other words, the power which the Commission formerly had to employ, promote or remove deputies, secretaries and other assistants under section 871-14 was transferred by section 154-45 of the General Code, a section of later enactment, to the Department of Industrial Relations. All that has been hereinbefore said therefore with respect to the plenary authority of the Industrial Commission under the former law to create and abolish positions in the nature of employments now applies to the Department of Industrial Relations under and by virtue of the transfer clause found in section 154-45. In this same connection, see section 154-24 of the General Code, which provides in part as follows:

“Whenever rights, powers or duties which have heretofore been vested in or exercised by any officer, board, commission, institution or department, or any deputy, inspector or subordinate officer thereof, are, by this chapter, transferred, either in whole or in part, to or vested in a department created by this chapter, or any other department, office or institution, such rights, powers and duties shall be vested in, and shall be exercised by the department, office or institution to which the same are hereby transferred, and not otherwise; * * *”

It is therefore not even necessary to look to section 154-19 for the authority of the Department of Industrial Relations to exercise the powers mentioned in section 871-14, which was not repealed by the Administrative Code. However, said section 154-19 provides in part as follows:

“Each department is empowered to employ, subject to the civil service laws in force at the time the employment is made, the necessary employes, and, if the rate of compensation is not otherwise fixed by law, to fix their compensation. Nothing in this chapter shall be construed to amend, modify or repeal the civil service laws of the state, except as herein expressly provided.”

Going further in section 154-45, the conclusion already reached is strengthened by the latter part of the third paragraph of the section above quoted. You state in your letter that the authority reposed in the governor by the last sentence of the paragraph was not exercised, so that none of the employes whose functions constitute clerical, inspection and other agencies for the exercise of the powers and duties of the Industrial Commission have been designated as fully subject to the authority of the Commission.

It should be observed that the power of the Commission to appoint advisers is expressly reserved by the last paragraph of section 154-45.

The conclusion is therefore forced that the Industrial Commission has not at the present time the authority to abolish the positions held by those persons who have been heretofore designated as the board of “Boiler Rules,” nor any other position formerly established by the Commission under section 871-14 of the General Code. This statement answers all of your questions.

However, this department feels constrained to go a step further and to point out that the Commission has unquestioned authority to create a board of advisers, to serve without compensation. So much, therefore, of the Commission's recent resolution as creates the board of advisers would, if standing by itself, be lawful. The enclosed copy of the Commission's resolution, however, shows that the two acts of the Commission cannot be readily separated. Therefore, in the opinion of this department, the entire resolution was nugatory.

Respectfully,

JOHN G. PRICE,
Attorney-General.

3290.

INHERITANCE TAX LAW—PROBATE COURT—WHERE MORE THAN YEAR AFTER AN ORDER DETERMINING SAID TAX ENTERED BY PROBATE COURT, THE SAID COURT ON MOTION AND WITHOUT NOTICE TO TAX COMMISSION MODIFIED SUCH ORDER BY REDUCING TAX AND DIRECTING REFUNDER—CERTAIN PROPERTY APPEARED TWICE IN APPLICATION—PROCEDURE FOLLOWED ILLEGAL—HOW TO PROCEED.

Where more than a year after an order determining inheritance tax was entered by a probate court, the said court on motion, and without notice to the Tax Commission of Ohio, modified such order by reducing the tax and directing a refunder of the excess on the ground that certain property had by mistake and inadvertence appeared twice in the application for determination.

Held:

1. *That at the date of the filing of the motion the probate court was without jurisdiction to act upon it.*

2. *The probate court is without power to modify an inheritance tax determination in any case and at any time after the expiration of the term at which the same is made, without first giving the Tax Commission notice of the proceedings to secure such modification, unless the Commission is itself the applicant; in which event, all other persons interested in the determination of the tax should be likewise notified.*

3. *The order of the probate court made on such motion being void, it is not binding upon the Tax Commission so as to make it necessary for the Commission to issue a refunding order under section 5339 G. C., but as a matter of practice, a motion should be filed in the probate court to set aside the modifying order, and in the event such motion is overruled, error should be prosecuted to the common pleas court.*

COLUMBUS, OHIO, July 3, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The Commission has requested the opinion of this department upon the following questions:

“On the 2nd day of August, 1920, the probate court of Cuyahoga county determined inheritance tax in connection with the above estate in the sum of \$2,083.63.