

scribed property to the state of Ohio by full fee simple title with a covenant of warranty that the same is free and clear of all encumbrances whatsoever.

Upon examination of contract encumbrance record No. 3, above referred to, I find that the same has been properly executed and that there is shown thereby a sufficient unencumbered balance to the credit of your department for the purchase of lands in connection with the construction of the Nimisila Creek Basin Reservoir to pay the purchase price of the property above described, which purchase price is the sum of \$1700.00.

Subject only to the exceptions above noted, the title of Kelly Myers in and to the property above described is approved as is likewise the warranty deed and contract encumbrance record submitted to me. I am herewith enclosing the certificate of title, warranty deed and contract encumbrance record.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5806.

CIVIL SERVICE COMMISSION—MAY NOT CERTIFY LIST OF THREE NAMES OF A PARTICULAR SEX WHERE EXAMINATION WAS NOT SO LIMITED—APPOINTING AUTHORITY MAY REFUSE IMPROPER LIST.

**SYLLABUS:**

1. *Under the Civil Service Laws of the State of Ohio, the Civil Service Commission of the State of Ohio does not have the authority, when certifying an eligible list, as provided by Section 486-13, General Code, to certify only the names of males or females, as the case may be, where the Civil Service Commission in creating an eligible list does not limit the applicants who may take such competitive examinations to persons of a particular sex. The Civil Service Commission after an eligible list has been created, cannot certify to an appointing authority for the purpose of filling a vacancy in a position in the classified civil service two eligible lists, one containing the names of the three male persons standing highest on the list and another containing the names of the three female persons standing highest on the list.*

2. *The County Commissioners of a county, when empowered by law to act as the appointing authority in filling a vacancy in a position in the classified civil service of the county, can and should refuse to accept an eligible list certified by the civil service commission of the state of Ohio*

*to the appointing authority, when such eligible list does not contain the names of the three persons standing highest on the eligible list.*

COLUMBUS, OHIO, July 6, 1936.

HON. FRAZIER REAMS, *Prosecuting Attorney, Toledo, Ohio.*

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

“Recently, an examination was given for the position of Administrator, Grade 2, Lucas County Division of Aid for the Aged, Department of Public Welfare. The Civil Service Commission certified to the appointive power lists, one a list of three male persons and another a list of three female persons. Appointment was made from the list of females. Objection has been made by a person on the list of males to the fact that two lists were certified, claiming that this is a certification of six persons instead of three, as provided for by Section 486-13 of the General Code.

Will you please advise whether or not it was within the scope of the authority of the Lucas County Commissioners, acting as the commission in this county for the administration of the law for the aid of the aged, to question the act of the Civil Service Commission in certifying two lists.”

The Legislature, by the enactment of the Civil Service Law (Sections 486-1 to 486-31, General Code), placed the responsibility of administering and enforcing that Act upon the Civil Service Commission of the State of Ohio. (Section 486-3, General Code.) The Legislature in that Act divided the Civil Service of the State, which, according to Section 486-1, General Code, “includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof” into the classified and unclassified civil service. (Section 486-8, General Code.) The Legislature did not define the unclassified service, but merely listed as being exempted from the classified civil service, a group of twelve different positions and employments occupied by persons who are either elected, appointed or who sustain or hold a relationship to their superior officers which makes it impracticable to determine their merit and fitness by competitive civil service examinations. (Section 486-8a, General Code.)

The Legislature divided the classified civil service into the competitive civil service and the unskilled labor class. (Section 486-8b, General Code.) The classified civil service is defined in Section 486-8b, General

Code, as comprising "all persons in the employ of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service."

Whether a position in the classified or unclassified civil service, as described in Section 486-8, General Code, or whether the merit and fitness of a person seeking an appointment or promotion to a position in the classified civil service of the state or the several counties, can be ascertained as far as practicable by competitive examination as decreed in Section 10 of Article XV of the Constitution of the State of Ohio, is primarily a matter for the Civil Service Commission of the State of Ohio to determine.

The Civil Service Commission of the State of Ohio, in the administration of the Civil Service Laws, including the creation of eligible lists for positions in the classified civil service, is guided by and subject to, among other provisions of the Civil Service Laws, the provisions contained in Sections 486-2, 486-7, 486-9, 486-10, 486-11, 486-12 and 486-13, General Code. Section 486-2, General Code, provides:

*"On and after the taking effect of this act, appointments to and promotions in the civil service of the state, the several counties, cities and city school districts thereof, shall be made only according to merit and fitness to be ascertained as far as practicable by competitive examination; and thereafter no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service of the state; the several counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act or by the rules of the state or municipal civil service commission within their respective jurisdictions as herein provided." (Italics ours.)*

Section 486-7, General Code, reads in part:

"The commission shall,

First: Prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of this act. \* \* \*

Section 486-9, General Code, provides in part:

"As soon as practicable after the taking effect of this act, the commission shall put into effect rules for the classification of

offices, positions and employments, in the civil service of the state and the several counties thereof; \* \* \*"

Section 486-10, General Code, reads in part:

"All applicants for positions and places in the classified service shall be subject to examination which shall be public, and open to all, within certain limitations, to be determined by the commission, as to citizenship, residence, age, sex, experience, health, habit and moral character; \* \* \*

The state commission shall have control of all examinations, except as otherwise provided in this act. No questions in any examination shall relate to political or religious opinions or affiliations.

Reasonable notice of the time and place and general scope of every competitive examination for appointment to a position in the civil service, except as otherwise provided for in this act, shall be given by the commission. \* \* \*"

Section 486-11, General Code, provides in part:

"The commission shall require persons applying for admission to any examination, provided for by this act or by the rules of the commission prescribed thereunder, to file with the commission within a reasonable time prior to the proposed examination a formal application in which the applicant shall state under oath or affirmation:

- (1) Full name, residence and postoffice address.
- (2) Nationality, age and place and date of birth.
- (3) Health and physical capacity for the public service sought.
- (4) Business and employments and residences for five previous years.
- (5) Such other information as may be reasonably required touching the applicant's merit and fitness for the public service sought; but no inquiry shall be made as to any religious or political opinions or affiliations of the applicant. \* \* \*"

By Section 486-7, General Code, the commission is given authority, among other things, to promulgate rules and regulations for the purpose of administering the Civil Service Laws.

By Section 486-9, General Code, the Civil Service Commission is

required to put into effect rules for the classification of offices, positions and employments in the classified civil service, and for appointments thereto.

Section 486-10, General Code, provides that all applicants for positions and places in the classified civil service shall be subject to competitive examination which shall be public, and open to everyone, subject to such restrictions as may be determined by the commission as to "citizenship, residence, age, sex, experience, health, habit and moral character" of any applicant. Under the provisions of this section the Civil Service Commission can, if the conditions of employment warrant it, restrict a competitive civil service examination to males or females. However, in restricting a competitive civil service examination to males or females, the Commission is required to so inform the general public since Section 486-10, General Code, provides that the Civil Service Commission shall in its notice of examination state the "general scope of every competitive examination for appointment to a position in the classified service."

The Civil Service Commission is also empowered by Section 486-11, General Code, to refuse to examine an applicant, or, after an examination, to refuse to certify an eligible person who is found "to lack any of the established preliminary requirements for the examination, or who is physically disabled as to be rendered unfit for the performance of the duties of the position which he seeks, or who is addicted to the habitual use of intoxicating liquors or drugs to excess, or who has been guilty of any crime or of infamous or notoriously disgraceful conduct, or who has been dismissed from either branch of the civil service for delinquency or misconduct, or who has made false statements of any material facts, or practiced, or attempted to practice, any deception or fraud in his application or in his examination in establishing his eligibility or securing his appointment."

An eligible list for a position in the classified civil service can be created by the Civil Service Commission only from those applicants who have successfully passed a competitive examination, except in respect to an eligible list pertaining to unskilled labor. Section 486-12, General Code, reads:

"From the returns of the examination the commission shall prepare an eligible list of the persons whose general average standing upon examinations for such grade or class is not less than the minimum fixed by the rules of the commission and who are otherwise eligible; and such persons shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by the examination without reference to priority of time of examination. In the event of two or more applicants receiving the same mark in an examination, priority in the time of

application shall determine the order in which their names shall be placed on the eligible list. The term of eligibility of each list shall be fixed by the commission at not less than one year nor more than two years. When an eligible list is reduced to three names or less a new list shall be prepared."

Section 486-13, General Code, reads :

"The head of a department, officer of institution in which a position in the classified service is to be filled shall notify the commission of the fact, and the commission shall, except as provided in section 486-14 and 486-15 of the General Code, certify to the appointing officer thereof the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which said position belongs. In the event that an eligible list becomes exhausted, through inadvertence or otherwise, and until a new list can be created, or when no eligible list for such position exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified. A person certified from an eligible list more than three times to the same appointing officer for the same or similar positions, may be omitted from future certification to such officer, provided that certification for a temporary appointment shall not be counted as one of such certifications. Every soldier, sailor, marine, member of the army nurse corps or red cross nurse who has served in the army or navy, or hospital service of the United States in the war of the rebellion, the war with Spain, including the Phillippine insurrection and the Chinese relief expedition or from April 21, 1898, to July 4, 1902, or the war with the Central Powers of Europe, between the dates of April 6th, 1917, and November 11th, 1918, who has been honorably discharged therefrom and is a resident of Ohio, and whose name is on the eligible list for a position shall be entitled to preference in original appointments to any such competitive position in the civil service of the state and the civil divisions thereof over all persons eligible for such appointments and standing on the list therefor with a rating equal to that of such soldier, marine, member of the army nurse corps, or red cross nurse. Appointments to all positions in the classified service, as herein defined, that are not filled by promotion, transfer or reduction, as provided for in this act and the rules of the commission prescribed thereunder, shall be made only from those persons whose names are certified to the appointing officer in accordance with the pro-

visions of this act, and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof. The appointing officer shall notify the commission of such position to be filled and shall fill such position by appointment of one of the three persons certified to him as provided in this act. Forthwith, upon such appointment and employment, each appointing officer shall report to the proper civil service commission the name of such appointee or employe, the title and character of his office, the duties of same, the date of the commencement of same and the salary or compensation thereof, and such other information as the commission requires in order to keep the roster herein mentioned.

All original and promotional appointments shall be for a probationary period of not to exceed three months to be fixed by the rules of the commission, and no appointment or promotion shall be deemed finally made until the appointee has satisfactorily served his probationary period. At the end of the probationary period the appointing officer shall transmit to the commission a record of the employe's service, and if such service is unsatisfactory, the employe may, with the approval of the commission, be removed or reduced without restriction; but dismissal or reduction may be made during such period as is provided for in sections 486-17 and 486-17a of the General Code. Any person who is appointed to a position in the classified service under the provisions of this act, except temporary and exceptional appointments, shall be or become forthwith a resident of the state."

By virtue of the provisions of Section 486-13, General Code, the appointing authority is required in filling a vacancy in the classified service to notify the Civil Service Commission of such vacancy, and it is the duty of the Civil Service Commission if an eligible list is available, to certify to the appointing authority the names of three persons standing highest on the eligible list for "the class or grade to which said position belongs." It will be observed that there is no provision in Section 486-13, General Code, which authorizes the Civil Service Commission, in its discretion, or when necessary, to select for the purpose of certification, the names of the three persons of a particular sex standing highest on the eligible list. Under Section 486-12, General Code, it is the duty of the Civil Service Commission, in establishing an eligible list, to place upon such list the names of the successful applicants according to their ranking as determined by the competitive examination, and it is likewise

the duty of the Commission under Section 486-13, General Code, when certifying an eligible list to an appointing authority for the purpose of filling a vacancy, to certify the names of the three persons standing highest on the list, irrespective of their sex, where the examinations were not limited to a particular sex.

The legislature has empowered the Commission to refuse to certify the name of a successful applicant only for the causes enumerated in Section 486-12, General Code, quoted herein. The legislature, having expressly enumerated the causes for which the Civil Service Commission can refuse to certify the name of a successful applicant for appointment, it follows under the rule of statutory construction of "*expressio unius est exclusio alterius*" that the Civil Service Commission of the State of Ohio does not have the authority after an eligible list is once created, to certify to an appointing authority an eligible list which contains only the names of persons belonging to a particular sex.

I am quite aware that the Civil Service Commission of the State of Ohio, under its authority to adopt rules and regulations, has promulgated Section 3 of Rule VII, which reads:

"3. Whenever the sex of those whose names are to be certified is specified in request for certification with specific reasons therefor, the commission may, in its discretion, certify only those of the sex so specified, provided the reasons for certifying only persons of either sex are found by the Commission to be good and sufficient. In all other cases, certification shall be made without regard to sex."

Although the Civil Service Commission of the State of Ohio has the express authority to adopt administrative rules and regulations, it must be borne in mind that such rules and regulations must be in furtherance only of the public policy laid down by the legislature in its statutory enactments and such rules and regulations cannot be promulgated for the purpose of amending the provisions contained in a statute or act. In other words, the power to make rules and regulations for administrative purposes does not include the power to legislate so as to increase the power of an administrative board or to announce a rule of public policy other than that stated by the legislature itself, no matter how desirable or advisable such public policy may be.

The Supreme Court of Ohio in the case of *Davis v. State, ex rel. Kennedy*, 127 O. S., 261, held that:

"1. Where a certain jurisdiction is duly conferred, duties assigned and powers granted to a board or commission, such



board or commission cannot confer upon itself further jurisdiction or add to its powers by the adoption of rules under authority granted to adopt rules of procedure.

2. Jurisdiction of the civil service commission of the city of Cleveland is conferred by the city charter, and that commission has only such powers as are thus vested in it. Jurisdiction in appeal from action of dismissal of employes is conferred upon such commission only in cases of dismissals from the department of fire and police. If additional jurisdiction is to be conferred, it must be accomplished by an appropriate amendment of the city charter."

Matthias, J., at pages 263 and 264, said :

"Thus we have clearly presented the question whether, when a certain jurisdiction is conferred, certain duties assigned, and powers delegated to a board or commission by a city charter, that board or commission may confer upon itself further jurisdiction, *or add to its powers by the adoption of rules* under the authority granted by the charter to adopt rules for its procedure not inconsistent with the charter. The mere statement of the question is its own answer. There should be some limit to the tendency to confer upon boards, commissions, and individual executive officers power to *proclaim an ipse dixit having the practical effect and force of law, and there should be some restriction upon the tendency of boards and commissions to confer power upon themselves under the guise of rules of procedure which are authorized only in the exercise of powers duly granted. Here the power sought to be exercised by the commission was not granted by the city charter.* A limited jurisdiction in appeal was granted, but the right of appeal was restricted to employes in specific departments . Thereby all others were excluded, and of course could not be added by the action of the recipient of the powers granted. The application of the principle, 'expressio unius est exclusio alterius' is itself decisive of the question. Curtis, Safety Director, v. State, ex rel., Morgan, 108 Ohio St., 292, 140 N. E., 522; 2 Lewis' Sutherland on Statutory Construction, 916, Section 491.

If additional jurisdiction is to be conferred, it must be sought at the source of such power, the people of the city of Cleveland, who may grant it, if they choose so to do, by an appropriate amendment to the city charter. A city board or commission can no more amend a city charter, and thus extend its

powers by adopting a rule, than a state commission may in like manner amend the Constitution or laws of the state providing for its creation and defining its powers. Jurisdiction conferred by the Constitution is not subject to legislative control; nor is jurisdiction conferred by law upon boards or commissions subject to extension by them. (*Italics ours.*)

The rule of law announced in that case and the reasons therefor apply with like force to Section 3 of Rule VII adopted by the Civil Service Commission of the State of Ohio, since the rule attempts to clothe the Civil Service Commission with a power which the legislature did not see fit to expressly confer upon it and which also modifies the provisions contained in Section 486-13, General Code, relative to the certification of eligible lists, a modification or restriction which finds no basis either in Section 486-13, General Code, or any other provision of the Civil Service Laws of the State of Ohio.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5807.

BOARD OF EDUCATION—NOT VIOLATIVE OF SECTION 12932, G. C. FOR PRESIDENT OR CLERK OF BOARD OF EDUCATION TO SIGN CONTRACT TO EMPLOY SISTER AS TEACHER WHERE HE DOES NOT VOTE OR PARTICIPATE IN MAKING CONTRACT—SALE OF FORFEITED LANDS—PURCHASER SECURES FEE SIMPLE TITLE.

*SYLLABUS:*

1. *It is not a violation of Section 12932, of the General Code of Ohio, for the president of a board of education or for the clerk of a board of education who is also a member of such board, to sign a contract to employ a teacher to whom he or she is related as father or brother, mother or sister, provided such president or clerk does not vote for such employment or participate in the making of such contract otherwise than by signing a written contract which may be drawn up between the parties or performing whatever ministerial duties as may devolve upon him as such president or clerk in connection with the making of the said contract.*

2. *Under the terms of Section 5762, General Code, the certificate of sale which is given to the purchaser of lands which have been forfeited to the State of Ohio, conveys the lien only of the state for taxes and*