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HOSPITAL, COUNTY—ALL EMPLOYES REFERRED TO IN SECTION 3137 G. C. IN CLASSIFIED SERVICE—SUBJECT TO APPOINTMENT AS PROVIDED BY SECTION 486-13 G. C.—REMOVAL ONLY FOR CAUSES AND IN MANNER PRESCRIBED BY SECTION 486-17a G. C.—EXCEPTION—SUCH EMPLOYES AS COMMISSION MAY FIND TO BE IN UNCLASSIFIED SERVICE—IMPRACTICAL TO DETERMINE FITNESS BY COMPETITIVE EXAMINATION.

SYLLABUS:

Except for such employes as your Commission may find to be in the unclassified service because of the impracticability of determining their fitness by competitive examination, all of the employes of a county hospital referred to in Section 3137, General Code, are in the classified service of the civil service, and are subject to appointment as provided by Section 486-13, General Code, and to removal only for the causes and in the manner prescribed by Section 486-17a, General Code.

Columbus, Ohio, October 23, 1951

The State Civil Service Commission of Ohio
Columbus, Ohio

Gentlemen:

I have before me your communication, requesting my opinion and reading as follows:

“Section 3137 of the General Code of Ohio, in reference to county hospitals, contains the following provision:

‘Such board shall employ an administrator, and upon the nomination by such administrator, shall confirm the employment of such physicians, nurses and other employes as may be necessary for the proper care, control and management of such hospital and its patients; and shall fix their respective salaries and compensation; and any such person including the administrator may be removed by such trustees at any time when, in their judgment, the welfare of such institution may so warrant.’

“This Commission has received an inquiry from the superintendent of a county hospital where a relatively large number of persons are employed, most of whom are in the classified civil service of the State, as to whether or not such employes are

precluded by the foregoing General Code Section 3137 from being in the classified service.

“Will you, therefore, please advise whether positions established in the administration of such county hospitals, as referred to in General Code Section 3137, are in the classified civil service?”

Section 3137, General Code, to which you refer, has been in force for a number of years, and the language quoted in your letter, relating to the employment and removal of physicians, nurses and other employes, remains precisely as theretofore enacted, except the administrator was added to the list of employes who may be removed. Since you have set this statute out in your letter, I do not deem it necessary to repeat it. It is to be noted, however, that under the recent amendment of this, and related statutes, the board of trustees of a county hospital is now authorized to construct and equip the hospital and to operate it after its completion, whereas prior to the recent amendment, the construction of the hospital was by one board and the operation was by a second board.

This board of trustees is under the terms of Section 3131, General Code, appointed by the county commissioners, together with the probate judge and the senior common pleas judge. However, it is clear that the county hospital is, and remains a county institution. Accordingly, the employes of the hospital are county employes.

The basis of the statutes relating to civil service is Section 10, of Article XV of the Constitution. That section reads as follows:

“Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.”

Let it be noted that the constitutional mandate relates only to “appointments and promotions” and does not include “removals.” Also that it requires competitive examinations only “as far as practicable.”

Section 486-1, General Code, defines “civil service” as follows:

“The term ‘civil service’ includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof.”

The term "classified service" is defined as follows :

"The term 'classified service' signifies the competitive classified civil service of the state, the several counties, cities and city school districts thereof."

The term "appointing authority" is defined as follows :

"The term 'appointing authority' signifies the officer, commission, board, or body having the power of appointment to or removal from positions in any office, department, commission, board or institution."

Section 486-8, General Code, divides the civil service of the State of Ohio and the several counties, cities and city school districts thereof, into unclassified service and classified service. This section enumerates those positions which are to be in the unclassified service. It then provides as follows :

"The classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class."

The positions referred to in Section 3137, General Code, which the board is authorized to fill by appointment or employment, do not fall within the list of those named as belonging in the unclassified service, and it therefore follows, in accordance with the explicit terms of Section 486-8, supra, that they are in the classified service, unless there is some other reason why they should fall within the unclassified service. As such, their appointment would be made pursuant to the provisions of Section 486-13, General Code.

A consideration of the provisions of the statutes to which I have referred leaves some doubt as to the status of those positions which are not listed as being in the unclassified service and are not in the unskilled labor class, but are of such character that it is impracticable to determine the merit and fitness of applicants by competitive examination.

In Opinion No. 37, Opinions of the Attorney General for 1915, page 59, it was held :

"Whether it is practicable to determine merit and fitness of a superintendent and matron of a county children's home is a question for the civil service commission."

Several other later opinions have announced the same rule. See Opinion No. 1921, Opinions of the Attorney General for 1916, page 1557; No. 285, Opinions of the Attorney General for 1921, page 503. Both of these opinions place the duty of determining the status of such position on the Civil Service Commission.

The courts have several times held that certain positions were of such character that it was not practicable to ascertain the fitness of applicants by competitive examination, but they sometimes appear to confuse this question with the consideration that the position is of such confidential nature that the appointing officer ought to have an employe of his own choosing, with the right to discharge at will. It was held in *State ex rel Day v. Emmons*, 126 Ohio St., 19, that the position of supervisor of cigaret stamps and that of assistant cashier in the office of the Treasurer of State were of that confidential character and therefore their fitness could not be determined by competitive examination, and they were accordingly held to be in the unclassified service.

A like holding is found in *State ex rel. Ryan v. Kerr*, 126 Ohio St., 26, relative to an assistant police prosecutor in the office of the Director of Law of the City of Cleveland. In this case, the court laid emphasis on the fact that the employe in question had already been required to pass the state bar examination. This might be a consideration for your Commission in determining the status of physicians and nurses of a county hospital. To like effect, see *De Woody v. Underwood*, 136 Ohio St., 575. In another case, it was held that the determination of the question whether an employe is within the classified service so far as concerns state or county employes, is within the rule making power committed by the law to the Civil Service Commission. *State ex rel. Emmons v. Guckenberger*, 131 Ohio St., 466.

Accordingly, with reference to the employes of the county hospital as authorized by Section 3137, *supra*, and having in mind that they include physicians and nurses in addition to other employes not listed, it would appear that the question whether any of these are of a class whose qualification cannot be determined by competitive examination, would be for your board to determine. Except for those so eliminated, it is my opinion that such employes are in the classified service, at least so far as concerns their appointment.

Your question, however, involves an inquiry as to the power of the county commissioners to remove these employes. Plainly, those who are found to be in the unclassified service may be removed at the will of the hospital trustees, since they are not protected in their tenure by the civil service law. *State ex rel. Jenkins v. Schueller*, 15 O. N. P. (N.S.), 438; *State ex rel. Ryan v. Kerr*, 126 Ohio St., 26.

However, as to employes who are in the classified service the civil service law would appear to give them protection from summary removal. Section 486-17a provides in part:

“The tenure of every officer, employe or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office. * * *”

This section further provides the procedure for removal of an employe, including furnishing him with a copy of the order of removal and the reasons for the same; his right to file an explanation, his right to a hearing and an appeal.

As I see it, the one perplexing question involved in your inquiry grows out of the provision contained in Section 3137 supra, to the effect that:

“Any such person may be removed by such trustees at any time when, in their judgment, the welfare of such institution may so warrant.”

If there is any real conflict between Section 3137 and 486-18a, supra, I would resolve it in favor of Section 3137. It would be quite within the power of the General Assembly to establish a different rule for the hospital trustees in dealing with their employes from that which it has established as to public employes generally. This would be true under the rule that a special provision will override a general provision; it may also be noted that Section 3137 in its present form is later in its enactment than Section 486-17a.

However, we may well inquire whether the two statutes are in any way inconsistent. Does Section 3137 give the board any wider latitude in finding a ground for discharging an employe than is contained in Section 486-17a? The latter, in addition to enumerated causes, concludes with the all embracing words: "or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance." I cannot believe that the legislature intended to give the board authority to discharge an employe who has passed a satisfactory civil service examination for reasons purely capricious and arbitrary, and without assigning any reason, or giving him an opportunity for explanation or a hearing in accordance with the procedure set forth in the civil service law.

It is a familiar rule of construction of statutes that repeals by implication are not favored, and that statutes will be construed as consistent, if possible. 37 Ohio Jurisprudence, 418; State ex rel. Mitman v. Commissioners, 94 Ohio St., 296.

It is my opinion that the language of Section 3137, General Code, which appears to give the board a peremptory right of removal of its hospital employes was merely a carry over from the original statute providing for a county hospital, as enacted in 99 Ohio Laws, page 486, long prior to the institution of the civil service system. There the authority given to the hospital trustees relative to employment and dismissal of physicians, nurses and other employes, read as follows:

"Such board of hospital trustees may employ such superintendent, physicians, nurses, and other employes as it deems necessary for the proper care and control of said hospital and its inmates, and fix their salaries and compensation, and any such persons *may be removed by said board at any time.*"

(Emphasis added.)

It was quite natural at a time when there was no civil service system in Ohio, for the legislature in granting authority to appoint, to couple with it unlimited authority to remove employes. With the coming of the civil service system, it would seem reasonable to hold that the trustees in question were to have the power of removal, but under the process provided by that system. I do not consider that in adding to Section 3137 the phrase "when in their judgment, the welfare of the institution may so warrant", the legislature intended to grant arbitrary power. It is significant

that in the laws setting out the powers of the appointing authorities as to municipal hospitals and county and district tuberculosis hospitals, no such power is granted.

I am of the opinion, therefore, that the provisions of Section 3137, General Code, do not give the board of trustees of a county hospital authority to discharge their employes who are in the classified service, except in accordance with the provisions of Section 486-17a, General Code.

Accordingly, in specific answer to your question, it is my opinion that except for such employes as your Commission may find to be in the unclassified service because of the impracticability of determining their fitness by competitive examination, all of the employes of a county hospital referred to in Section 3137, General Code, are in the classified service of the civil service, and are subject to appointment as provided by Section 486-13, General Code, and to removal only for the causes and in the manner prescribed by Section 486-17a, General Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General