

"1. Each witness in a state case attending before a mayor under subpoena is entitled to receive one dollar for each day's attendance, and five cents for each mile necessarily traveled from his place of residence to the place of giving testimony and return, provided the distance be more than one mile, to be paid out of the county treasury upon the certificate of the mayor whether the defendant be discharged upon preliminary hearing or bound over to the grand jury."

The above opinion, a copy of which I am herein enclosing, is determinative of the question which you present.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1383.

FRANKLIN COUNTY TUBERCULOSIS HOSPITAL—REMOVAL OF  
SUPERINTENDENT—DUTY OF CIVIL SERVICE COMMISSION.

*SYLLABUS:*

1. *Mrs. A. P. Lawin is at the present time the actual head or superintendent of the Franklin County Tuberculosis Hospital and is entitled to act as such, during good behavior and efficient service, until such time as the board of county commissioners of Franklin County determines to and does appoint a suitable person medical superintendent of said hospital.*

2. *Upon the appointment of such medical superintendent, Mrs. Lawin will cease to have entire charge and control of the hospital, but will continue to perform any other duties which have been exercised by her as superintendent of nurses, during good behavior and efficient service, subject to the right of the board of county commissioners at any time to abolish the position or change the duties thereof. If the position of superintendent of nurses is abolished, such abolishment must be in good faith and must not leave the door open to creating the same position under another name and filling the same by employing a person other than Mrs. Lawin.*

3. *It is the duty of the civil service commission, upon the request of the county commissioners, to certify a list of eligible candidates from which an appointment can be made to the position of medical superintendent of the Franklin County Tuberculosis Hospital, or if such list is not available to hold a competitive examination to provide such list.*

COLUMBUS, OHIO, December 17, 1927.

*The State Civil Service Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—Acknowledgment is made of the receipt of your recent communication reading as follows:

"We are attaching hereto recent correspondence between this office and the Franklin County commissioners relative to the situation at the Franklin County Tuberculosis Hospital. You will note their letter of November 12, 1927, states their opinion that Mrs. Aloysia Lawin is not in law the superintendent of that institution, and they request this commission to certify to them an eligible list of candidates for that position and in the absence of an eligible list to fill such position by provisional appointment.

The first Civil Service Laws of Ohio were those of 1913, which were changed in 1915, the most important change being the substitution of a bipartisan board of two commissioners in place of a board of three commissioners. It will be readily understood, then, the immense task confronting these first two Civil Service Commissions relative to the adjustment of the new system of employment made applicable to all state departments, state institutions, county offices and county institutions. Remarkable progress in the right direction was made by these commissions and they speedily adjusted in conformity with the new laws. However, their first attention was directed to state departments and institutions and later to county offices and county institutions.

Our records show that under date of February 8, 1915, Mrs. A. P. Lawin was permanently appointed from certification by the Franklin County commissioners to the position of superintendent of nurses at the Franklin County Tuberculosis Hospital. A complete search of our available records fails to show that Mrs. Lawin was thereafter promoted in accordance with the Civil Service Law, to the position of superintendent of the institution, although the correspondence of this commission from November 20, 1915, to the present time, treats Mrs. Lawin as such, and all appointments, promotions, reductions, and all other matters pertaining to the status of civil service employes at that institution since that date have been handled by Mrs. Lawin acting as the superintendent of the institution. The Franklin County commissioners have ever since 1915 placed her on the payrolls as superintendent and this commission has certified the payrolls accordingly.

A letter from the clerk of the board of Franklin County commissioners under date of March 1, 1916, to this commission, notifies us of changes in salaries of employes of the Franklin County Tuberculosis Hospital, effective March 1, 1916, and includes,—'Mrs. A. P. Lawin, superintendent—\$150.00 per month.' A copy of this letter you will find attached hereto.

The question as now presented to this commission, and upon which we respectfully request your opinion, is as follows:

In view of the necessarily incomplete records of the early civil service commissions and the fact that limited space has required all records of the commission prior to 1920 to be boxed and placed in the basement of our quarters where they have not at all times received the best possible preservation, together with the fact that all civil service commissions since November of 1915 have treated Mrs. Lawin as the superintendent of the Franklin County Tuberculosis Hospital and the Franklin County commissioners have so placed her on the payrolls since that date and to which payrolls this commission has certified its approval that the employes mentioned therein have been appointed, promoted, or are being employed in pursuance of the Civil Service Laws and the rules adopted thereunder, is Mrs. Lawin entitled to the tenure of office of superintendent of the institution specified by Section 486-17a, which is during good behavior and efficient service, keeping in mind that the records of this office fail to show that she was ever actually promoted in accordance with the civil service laws or the rules and regulations of this commission, from the position of superintendent of nurses to which she was permanently appointed in accordance with the law, to the position of superintendent of the institution, the duties of which latter position she has unquestionably exercised since November, 1915.

It is clear to this commission that in any event Mrs. Lawin is at least entitled to the position of superintendent of nurses at her present salary of \$250.00 per month, but it is not clear whether under the circumstances we

have the authority to refuse to conduct an examination for superintendent of the institution in the absence of an eligible list existing for same and as requested by the Franklin County commissioners, taking the position that the position of superintendent of the institution is not vacant."

Attached to your communication are copies of correspondence between your commission and the board of county commissioners of Franklin County and copies of certain resolutions passed by said board of county commissioners. Among the correspondence is a letter from the board of county commissioners containing a statement of facts essentially the same as that contained in your communication and a discussion of the statutes applicable to your question.

In considering the question which you present it will not be amiss to discuss the history of the legislation pertaining to county and district tuberculosis hospitals.

County tuberculosis hospitals were first provided for in an act of the 77th General Assembly, passed April 2, 1908, (99 O. L. 62), which act made it unlawful on and after January 1, 1909, to keep any person suffering from pulmonary tuberculosis in any county infirmary except in separate buildings to be provided and used for that purpose only. Under Section 2 of that act boards of county commissioners were authorized and directed to provide proper buildings, separate and apart from the infirmary buildings, to be known as county tuberculosis hospitals, and furnish and equip the same, provided there was not already established in the county a hospital for such purpose, and were authorized to levy taxes and issue bonds for such purposes. Said Section 2 also provided that :

"The infirmary directors shall provide for the treatment, care and maintenance of patients received at said county hospital, and for necessary nurses and attendants, and all expenses so incurred shall be audited and paid as are other expenditures for county infirmary purposes."

Section 4 of the act provided :

"The county hospital for tuberculosis shall be devoted to the care and treatment of those admitted to the county infirmary who are afflicted with pulmonary tuberculosis, and of other residents of the county who may be suffering from said disease and who are in need of proper care and treatment; and the board of infirmary directors shall investigate all applicants for admission to the county hospital for tuberculosis who are not inmates of the county infirmary and require satisfactory proof that they are in need of proper care, and have pulmonary tuberculosis; provided, that the infirmary directors may require from any such applicant admitted a payment of not to exceed \$3.00 a week, or such less sum as they may determine, for hospital care and treatment. The physician to the county infirmary shall have the medical care of patients in the county hospital; provided, that any patient not an inmate of the county infirmary shall have the privilege of calling other medical attendance in consultation with the regular infirmary physician, but not at the expense of the county."

By the terms of Section 5, the state board of health was given general supervisory powers over all county tuberculosis hospitals, to make rules and regulations for their government, and for nurses and attendants and others as deemed necessary. Your attention is directed to the provisions of Sections 2 and 4, *supra*, which placed the full control and management of county tuberculosis hospitals in the hands of the infirmary directors, even to the investigation of all applicants for admission other than inmates

of the infirmary. Section 4 gave the medical care of patients into the hands of the infirmary physician.

On March 12, 1909, the legislature amended Sections 1 and 2 of the above act without, however, changing the powers and duties of infirmary directors in respect of such hospitals, and supplemented the act of April 2, 1908, by enacting supplemental Sections 6 to 10 inclusive, to provide for the establishment of district hospitals, (100 O. L. 86). Briefly, the provisions of the act relative to district tuberculosis hospitals were as follows:

The commissioners of two or more counties not exceeding five might form themselves into a joint board for the purpose of establishing and maintaining a district hospital for the care and treatment of persons suffering from tuberculosis, and such commissioners might provide the necessary funds for the purchase of a site and the erection of the necessary buildings thereon. Immediately upon the organization of the joint board they were directed to appoint a board of trustees to consist of one member from each county represented. The board of trustees was then authorized to prepare plans and specifications and proceed to erect the necessary buildings and furnish the same. Section 8 of the act provided:

“The board of trustees herein provided for shall prepare plans and specifications, subject to the provisions of this act, and proceed to erect the necessary buildings, and furnish the same, for a district hospital for tuberculosis. They shall appoint some suitable person who shall act as medical superintendent of such hospital and, upon the recommendation of the superintendent such nurses and other employes as may be necessary for the proper conduct of such hospital, and the trustees shall fix the compensation of said medical superintendent and of the other employes. The superintendent shall have entire charge and control of said hospital, subject to such rules and regulations as may be prescribed by the board of trustees. The trustees shall serve without compensation, but their necessary expenses when engaged in services of the board shall be paid.”

The act also contained other provisions for the meetings of the board of trustees, annual and quarterly reports, and for the annual levy of taxes by the respective boards of county commissioners for the support of such district hospitals. It will be noted that the powers of the medical superintendents in regard to the control and management of the hospitals applied only to district hospitals. There was in the two acts above referred to no provision for medical superintendents for county tuberculosis hospitals. The control and management of county tuberculosis hospitals were vested in the infirmary directors and only the care and treatment of patients in such county hospitals were given to the infirmary physician.

In the codification of 1910 the provisions of the act of April 2, 1908, (99 O. L. 62), relating to county tuberculosis hospitals, the first two sections of which were amended by the act of March 12, 1909, (100 O. L. 86), were carried into the General Code as Sections 3139 to 3147, both inclusive. The provisions of the act of March 12, 1909, relative to district tuberculosis hospitals, were carried into the General Code as Sections 3148 to 3153, both inclusive.

On April 17, 1913, the legislature passed an act amending Sections 3139 to 3148, General Code, both inclusive, and also Sections 3151 to 3153, General Code, both inclusive, (103 O. L. 492). Sections 3149 and 3150, General Code, were not amended by this act. Instead of clarifying the law relating to county and district tuberculosis hospitals, the act of April 17, 1913, left the law in a state of confusion. The act repealed all the previous provisions authorizing county commissioners to construct county tuberculosis hospitals and all provisions as to management and medical care

and treatment of patients except that Section 3141, as therein amended, provided that in any county where a county tuberculosis hospital had been erected the same might be maintained by the county commissioners. It was evidently the intention of the legislature to relieve the infirmary directors of the management and control of such county hospitals and to vest the same in the county commissioners, but the language of the act is very vague in this regard. An indication that such was the intention may be found in Section 3153, General Code, as amended in the act which directed "such board of trustees" (namely, trustees of district hospitals) to file with the joint board of county commissioners and with the state board of health, an annual report of the operation of such district hospital, including a statement of all receipts and expenditures during the year, etc., and directed the county commissioners maintaining a county hospital to file with the state board of health a similar statement. Inasmuch as the management and control of a district hospital was vested in a board of trustees, it seems that the legislature by requiring similar reports from both a board of trustees and county commissioners, considered county commissioners as having the control and management of a county hospital. The 1913 act did not materially disturb the machinery provided in the 1909 act for the construction, maintenance, management and control of district hospitals, but did affect that of county hospitals destroying the former machinery and leaving nothing tangible in its place.

If it was the intention of the legislature to place the management and control of county hospitals in the hands of medical superintendents, it did not make any provision for the appointment or employment of medical superintendents for such county hospitals. The only authority for appointing or employing such medical superintendents was vested in the trustees of district hospitals.

In 1919 the legislature, apparently recognizing the confusion in the law pertaining to county tuberculosis hospitals, enacted Sections 3148-1 to 3148-3, General Code, both inclusive, (108 O. L., Pt. 1, p. 253). As so enacted, said sections provided :

Section 3148-1. "The county commissioners of any county wherein is located a municipal tuberculosis hospital, may provide the necessary funds for the purchase or lease of a site, and the erection or lease of the necessary buildings thereon, for the operation and maintenance of a county hospital for the treatment of persons suffering from tuberculosis. Any municipality within said county at present maintaining and operating a hospital for the treatment of tuberculosis may continue to maintain said hospital as a municipal hospital, or may lease or sell the same to the county."

Section 3148-2. "The management and control of such tuberculosis hospital shall be vested in a board of trustees, which board of trustees, shall have all the powers conferred by law upon the board of trustees of district hospitals for the care of persons suffering from tuberculosis, and all laws applicable to the levy of taxes for the erection, maintenance and operation of said district hospitals shall apply to the leasing, erection, operation and maintenance of said county hospital for the treatment of persons suffering from tuberculosis."

Section 3148-3. "The county commissioners shall constitute the board of trustees of such hospital."

On April 29, 1921, the legislature amended Sections 3148-1 and 3148-3, supra, (109 O. L. 212), to read as they now appear in the general Code. Said sections provide:

Section 3148-1. "The county commissioners of any county having more than 50,000 population as shown by the last federal census may, with the consent of the State Department of Health, provide the necessary funds for the

purchase or lease of a site and the erection and equipment or lease and equipment of the necessary buildings thereon for the operation and maintenance of a county hospital for the treatment of persons suffering from tuberculosis.

Any municipality within said county at present maintaining and operating a hospital for the treatment of tuberculosis may continue to maintain said hospital as a municipal hospital or may lease or sell the same to the county."

Section 3148-3. "The county commissioners may constitute the board of trustees of such hospital."

The principal changes in the above amendment were to provide for county tuberculosis hospitals in counties having more than fifty thousand population and to provide that the county commissioners *may* constitute the boards of trustees of such hospitals instead of the previous provision that they *shall* constitute such boards of trustees. While the language of Section 3148-3, General Code, clearly permits of the appointment of a board of trustees of a county tuberculosis hospital other than the county commissioners, it is my understanding that no such appointment has been made in Franklin County and that the board of county commissioners of Franklin County has been, and still is, acting as the board of trustees of the Franklin County Tuberculosis Hospital.

The intention, as expressed in the enactment of the above sections, seems clearly to require that medical superintendents be appointed for county tuberculosis hospitals, as provided in Section 3153, General Code, such superintendents to have entire charge and control of the hospitals as provided in said section.

You will note that there are two sections of the General Code bearing the number 3153. This is apparently due to an error on the part of the legislature in amending Section 3151, General Code, on March 21, 1917, (107 O. L. 495, 498). Section 3153, hereinafter quoted, should really bear the number 3151. However, as the section was numbered 3153, and so appears in the General Code, it is referred to by that number in this opinion. Said section provides:

"Subject to the provisions of this chapter, such board of trustees shall prepare plans and specifications and proceed to erect and furnish the necessary buildings for a district hospital for tuberculosis. They shall appoint a suitable person medical superintendent of the hospital, who shall not be removed except for cause, and, upon the recommendation of the superintendent, such nurses and other employes as may be necessary for the proper conduct of the hospital. The trustees shall fix the compensation of the medical superintendent and other employes. Subject to the rules and regulations prescribed by the board of trustees, the superintendent shall have entire charge and control of the hospital. The trustees shall serve without compensation, but their necessary expense when engaged in the business of the board shall be paid. The trustees, medical superintendent or nurses of such hospital are authorized to attend conferences where the care, treatment or prevention of tuberculosis is a subject for consideration."

In your communication you state that your records show that under date of February 8, 1915, Mrs. Lawin was permanently appointed from certification by the Franklin County commissioners to the position of "superintendent of nurses" at the Franklin County Tuberculosis Hospital. You further state that your records fail to show that Mrs. Lawin was thereafter promoted, in accordance with the civil service law, to the position of "superintendent of the institution," although the correspondence of your commission from November 20, 1915, to the present time treats Mrs. Lawin as such, that she discharged the duties of such superintendent since the date last above

mentioned and has appeared on all payrolls of the county commissioners as "superintendent," and that your commission has certified the payrolls accordingly. You also submit a copy of a letter from the clerk of the Franklin County board of county commissioners, dated March 1, 1916, notifying your commission of changes in salaries of employees of the hospital, in which it is stated:

"Mrs. A. P. Lawin, superintendent—\$150.00 per month."

The position of "superintendent of nurses" was never created nor the duties thereof ever defined by statute.

In a letter from the board of county commissioners of Franklin County to your commission, under date of November 12, 1927, a copy of which letter has been submitted with your communication, it is stated that so far as the records of the board of county commissioners of Franklin County show, Mrs. Lawin was appointed by said board to the office of "head nurse" on February 7, 1914, effective February 9, 1914. The letter further states that there is no record in the office of the board of county commissioners of Franklin County showing that said board by any action has at any time changed the title of the position held by Mrs. Lawin, but that some time after the date of her appointment your commission classified her as "superintendent of nurses." The title of the position would apparently imply that the incumbent acts in a supervisory capacity over the nurses at the institution. However, it does not appear that Mrs. Lawin's duties as superintendent of nurses were ever limited by the board of county commissioners of Franklin County to the supervision of nurses only. On the contrary, it affirmatively appears that duties of a managerial and administrative nature were made a part of Mrs. Lawin's duties as superintendent of nurses.

In view of the above, coupled with the fact that prior to 1919 there was no provision for the appointment of a "medical superintendent" for county tuberculosis hospitals and that the statutes relative to the management and control of county tuberculosis hospitals prior to 1919 were vague, to say the least, I am led to the conclusion that Mrs. Lawin was actually and legally the head or superintendent of the institution, at least up to the time of the enactment of Sections 3148-1 to 3148-3, General Code, supra, in 1919 (108 O. L. Pt. 1, p. 253), and was legally authorized to exercise all the powers and duties of such head or superintendent, regardless of the name or official title of the position which she filled.

However, as pointed out above, the legislature in 1919, apparently recognizing the deficiencies in the statutes relating to county hospitals, provided that the management and control of county tuberculosis hospitals be vested in a board of trustees, that the board of county commissioners should constitute such board of trustees, (Sections 3148-2 and 3148-3, General Code), and further provided in Section 3148-2 that such board of trustees should have all the powers conferred by law upon the board of trustees of district tuberculosis hospitals. Inasmuch as Section 3153, General Code, supra, makes it the mandatory duty of a board of trustees of a district tuberculosis hospital to appoint a medical superintendent, the effect of the 1919 amendment is, in my opinion, to make the appointment of a medical superintendent of a county tuberculosis hospital equally mandatory. It follows that whenever the board of county commissioners of Franklin County, acting as the board of trustees of the Franklin County Tuberculosis Hospital, appoints a suitable person medical superintendent of the hospital, such medical superintendent will, by operation of law, be vested with all the duties and powers attendant upon such position, which include entire charge and control of the hospital, subject to the rules and regulations prescribed by the board of trustees, as provided in Section 3153, General Code, supra. However, unless and until the board of county commissioners of Franklin County, acting as the board of trustees of the Franklin County Tuberculosis Hospital, does appoint such medical superin-

tendent, I am of the opinion that Mrs. Lawin continues to be the actual head or superintendent of the institution, regardless of her official designation upon the records of the board of county commissioners or your commission and is authorized to exercise all the powers and duties attendant upon such position.

It is not my intention to hold in this opinion, nor do I so hold, that the appointment of a medical superintendent for the Franklin County Tuberculosis Hospital will operate to discharge Mrs. Lawin as one of the employes of the hospital. It is my opinion that upon the appointment of such medical superintendent, Mrs. Lawin will be relieved of the full charge and control of the hospital but that any other powers or duties exercised by Mrs. Lawin, as superintendent of nurses will still be performed by her and she will be entitled to retain her position as superintendent of nurses during good behavior and efficient service, subject, of course, to the right of the board of county commissioners at any time to abolish the position or change the duties thereof.

It should, however, be pointed out that if the board of county commissioners abolishes the position of superintendent of nurses, that position can not be again created under another name. Such abolishment must be in good faith and must not leave the door open to creating the same position under another name, and filling the same by employing a person other than Mrs. Lawin.

Among the papers submitted with your communication are copies of two resolutions adopted by the board of county commissioners of Franklin County, Ohio, on November 12, 1927, in one of which the former action of the board creating the position of resident physician was rescinded and in the other of which it was resolved to request your commission for a list of eligible candidates for the position of medical superintendent of the Franklin County Tuberculosis Hospital, or if your commission does not have such list to hold an examination for such position and supply the board with the proper procedure for a provisional appointment until such examination can be held. In my opinion, the board of county commissioners in passing the above resolutions has clearly indicated its intention to comply with the direction in Sections 3148-2, et seq., and 3153, General Code, relating to the appointment of a medical superintendent.

Section 3153, General Code, provides for the appointment of a medical superintendent and "upon the recommendation of the superintendent such nurses and other employes as may be necessary for the proper conduct of the hospital." The section further provides that "subject to the rules and regulations prescribed by the board of trustees the superintendent shall have entire charge and control of the hospital." While Section 3153, General Code, uses the words "medical superintendent" and "superintendent," it is my opinion that "superintendent" refers to "medical superintendent," which is the subject of that section, and the law pertaining to county and district tuberculosis hospitals does not create the position of "superintendent."

Your attention is directed to an opinion of this department appearing in 1919, Opinions, Attorney General, Volume I, page 613, defining the qualifications of medical superintendents of district tuberculosis hospitals, the syllabus of which reads:

"The provision of Section 3153, G. C., (107 O. L. 498) that the board of trustees of a district hospital for tuberculosis shall appoint a 'suitable person medical superintendent,' requires that a person be appointed who possesses the qualifications of a person authorized to practice medicine in the state, and who has had experience with tuberculosis."

It requires no discussion of the proposition that the qualifications of medical superintendents of county tuberculosis hospitals are the same as those of district hospitals.



In passing, your attention is directed to a statement in a letter from your commission to the Franklin County board of county commissioners under date of October 24, 1927, to the effect that the county commissioners are the appointing officers for the superintendent of the Franklin County Tuberculosis Hospital, but for all other positions at that institution the appointing authority is the superintendent. Section 3153, General Code, provides that upon the recommendation of the superintendent the board of trustees (county commissioners) shall appoint such nurses and other employes as may be necessary for the proper conduct of the hospital. This section specifically makes the board of trustees the appointing authority for all employes of the hospital.

It is therefore my opinion:

1. That Mrs. A. P. Lawin is at the present time the actual head or superintendent of the Franklin County Tuberculosis Hospital and is entitled to act as such, during good behavior and efficient service, until such time as the board of county commissioners of Franklin County determines to and does appoint a suitable person medical superintendent of said hospital.

2. Upon the appointment of such medical superintendent, Mrs. Lawin will cease to have entire charge and control of the hospital but will continue to perform any other duties which have been exercised by her as superintendent of nurses, during good behavior and efficient service, subject to the right of the board of county commissioners at any time to abolish the position or change the duties thereof. If the position of superintendent of nurses is abolished, such abolishment must be in good faith and must not leave the door open to creating the same position under another name and filling the same by employing a person other than Mrs. Lawin.

3. It is the duty of your commission, upon the request of the county commissioners, to certify a list of eligible candidates from which an appointment can be made to the position of medical superintendent of the Franklin County Tuberculosis Hospital, or if such list is not available to hold a competitive examination to provide such list.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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1384.

APPROVAL, BONDS OF THE CITY OF DEFIANCE, OHIO—\$15,033.84.

COLUMBUS, OHIO, December 17, 1927.

*Industrial Commission of Ohio, Columbus, Ohio.*

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1385.

APPROVAL, BONDS OF THE VILLAGE OF MIDDLE POINT, VAN WERT COUNTY—\$2,000.00.

COLUMBUS, OHIO, December 17, 1927.

*Industrial Commission of Ohio, Columbus, Ohio.*