

The brief also argues that the error with respect to the listing of the surplus did not occur through a mistake of law but was intentional. This, of course, is a question of fact. The opinion as drafted assumes that the commission has correctly found that a mistake of law occurred, but here again the burden is on the taxpayer to show that such was the case.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*

2362.

DEPARTMENT OF COMMERCE—WHAT POSITIONS IN SAID DEPARTMENT ARE IN UNCLASSIFIED SERVICE OF STATE CIVIL SERVICE.

*The following positions in the department of commerce are definitely in the unclassified service of the state civil service:*

*Director of commerce, superintendent of insurance, superintendent of building and loan associations, fire marshal.*

*If in the department of commerce an assistant director of commerce has been appointed and made the head of a division, other than the division of building and loan associations, fire marshal, insurance or banks, and created under section 154-8 of the General Code, such assistant director of commerce is in the unclassified service.*

*The director of commerce may designate, in addition to the foregoing positions, three positions in the department as in the unclassified service. One of these positions must be a personal stenographer of the director; one other may be an assistant, who may or may not be the head of a division created under section 154-8 of the General Code; the third may be a secretary in the department, who may or may not be the employe designated as acting secretary of the public utilities commission; or the director of commerce may, in lieu of designating an assistant as in the unclassified service, designate two secretaries as in such service, including such acting secretary of the public utilities commission.*

*The superintendent of banks is, for the purposes of the civil service law, to be regarded as the head of a principal department, though for the purpose of the Administrative Code, the division of banks is regarded as within the department of commerce. The superintendent of banks, as head of such division, is therefore himself in the unclassified service and entitled to two secretaries or assistants and one personal stenographer immune from the classified civil service.*

*The employes of the department of commerce performing service under the public utilities commission are in general, for the purposes of the civil service law, regarded simply as employes of the department of commerce. The authority of the public utilities commission to designate two secretaries, assistant or clerks and one personal stenographer as exempt from the classified service can be exercised only with respect to such employes as the governor shall determine shall be fully subject to the appointing authority of the utilities commission.*

*All other employes in the department of commerce for whose positions it is practicable to determine merit and fitness by competitive examination are within the classified civil service of the state.*

COLUMBUS, OHIO, August 24, 1921.

*Department of Commerce, HON. W. H. PHIPPS, Director, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date requests the advice of this department, as follows:

"The director of commerce finds some difference of opinion and actions by various divisions of this department that do not accord in this: that it has been thought by some division heads that the division head and three of his employes were not subject to the state classified service. It therefore becomes necessary that definite determination of who are under the classified service, and who are not, be decided upon.

For instance, the question arises as to whether or not the chief clerk in the oil inspection division is in the classified service; also, is the chief of the division of securities under the classified service? We understand the law to contain provision that the director of a department may designate three persons not in the classified service. Section 152-26 abolishes a large number of offices. Among them are to be found the following:

The secretary of the public utilities commission,  
The superintendent of insurance,  
The inspector of building and loan associations,  
The superintendent of banks, and  
The commissioner of securities,

all of which are in charge of the department of commerce. Some of these offices are recreated, to-wit:

The superintendent of building and loan associations,  
The state fire marshal, and  
The superintendent of insurance.

The office of commissioner of securities and the state inspector of oils are omitted in the statute recreating the offices, to-wit, section 154-6.

In section 154-39, the office of superintendent of banks is recreated and one provision thereof relates to and defines the province, powers and duties of the public utilities commission.

Will you please advise us as to what place in each of the several divisions in the department of commerce are subject to the regulations of the classified service and those that are not? This should determine for our more thorough accord with the division of classified service."

The following provisions of the statutes are applicable to the questions which you submit:

"Sec. 486-8. \* \* \* The unclassified service shall comprise the following positions \* \* \*:

3. The members of all boards and commissions and heads of principal departments, boards and commissions appointed by the governor or by and with his consent; \* \* \*.

8. Three secretaries, assistants or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistant or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer. \* \* \*."

Section 154-19 of the General Code:

"Each department is empowered to employ, subject to the civil

service laws in force at the time the employment is made, the necessary employes, \* \* \*. Nothing in this chapter shall be construed to amend, modify or repeal the civil service laws of the state, except as herein expressly provided.

All offices created by section 154-5 and 154-6 of the General Code shall be in the unclassified civil service of the state."

"Sec. 154-5. In each department there shall be an assistant director, who shall be designated by the director to fill one of the offices within such department, enumerated in section 154-6 of the General Code, or as the head of one of the divisions created within such department as authorized by section 154-8 of the General Code. When a vacancy occurs in the office of director of any department, the assistant director thereof shall act as director of the department until such vacancy is filled."

"Sec. 154-6. Offices are created within the several departments as follows:

\* \* \* \* \*

In the department of commerce:

Superintendent of building and loan associations,

Fire marshal,

Superintendent of insurance

\* \* \* \* \*

"Sec. 154-4. Each director whose office is created by section 154-3 of the General Code (including the director of commerce) shall be appointed by the governor by and with the advice and consent of the senate, and shall hold his office during the pleasure of the governor."

Coming now to the specific positions in question, it is obvious that the director of commerce himself, as the "head of a principal department \* \* \* appointed by the governor," is in the unclassified service of the state by virtue of section 486-8 of the General Code. It is also obvious that the superintendent of building and loan associations, the state fire marshal and the superintendent of insurance are in the unclassified service by virtue of section 154-19 of the General Code.

Your letter does not advise whether or not the director of commerce has discharged the duty incumbent upon him under section 154-5 G. C. by the appointment of an assistant director. If this has been done, and if the assistant director so designated holds one of the positions just referred to, viz., superintendent of building and loan associations, fire marshal or superintendent of insurance, then there is by virtue of the designation of such assistant director no additional unclassified position; but if the director has designated, or in the future does designate, as the assistant director the head of a division created within the department under favor of section 154-8 of the General Code, then such division head, designated as the assistant director, will be in the unclassified service by virtue of section 154-19 of the General Code.

In this connection section 154-8 of the General Code may be partially quoted, as follows:

"\* \* \* With the approval of the governor, the director of each department shall establish divisions within his department, and dis-

tribute the work of the department among such divisions. Each officer created by section 154-6 of the General Code shall be the head of such a division.

With the approval of the governor, the director of each department shall have authority to consolidate any two or more of the offices created in his department by section 154-6 of the General Code, or to reduce the number of *or create new divisions therein.* \* \* \*"

So, reading sections 154-19, 154-5 and 154-8 together the head of a new division created in the department of commerce, if such has been done, who is designated as the assistant director of the department of commerce under favor of section 154-5, would be in the unclassified service according to the terms of the administrative code itself, and without recourse to the provisions of section 486-8 of the General Code.

Your letter mentions chief clerk in the oil inspection division and chief of the division of securities. Let it be observed that there are no such divisions, unless the director has created them with the approval of the governor under section 154-8. If this has been done, then so far as the administrative code is concerned the heads or chief clerks in these divisions are not ipso facto in the unclassified service. But, still according to the administrative code, if the head of either of these divisions is designated as the assistant director of commerce, or, to be more accurate, if the assistant director of commerce is designated as the head of one of these divisions, then by virtue of his position as assistant director he becomes a member of the unclassified service.

Turning now to the general civil service law, it becomes apparent that paragraph 3 of section 486-8 G. C. is not operative to take division heads as such out of the classified service; because that section relates only to the appointees of the governor; whereas the heads of divisions are appointed by the director of the department, and not by the governor (section 154-7 G. C.); and if the division is created by the director and the governor instead of by the law, as is the case with what you designate as the oil inspection division and the division of securities, then the heads of these divisions are not officers at all but are mere employes, who owe their positions to section 154-19 of the General Code and who are not taken out of the classified service by the terms of that section.

Therefore, so far as paragraph 3 of section 486-8 G. C. is concerned, it has no effect upon any of the positions so far considered except that of the director of commerce himself.

We come now to paragraph 8 of section 486-8 G. C. It works an exemption from the classified civil service of

"two secretaries, assistant or clerks and one personal stenographer for \* \* \* each of the principal appointive executive officers, boards or commissions \* \* \* authorized by law to appoint such secretary, assistant or clerk and stenographer."

Let it be observed that in order for this section to operate the appointive executive officer whose subordinates are affected must be authorized by law to make the appointment. The only officer authorized to make appointments in the department of commerce, in the divisions so far considered, is the director of commerce. He is therefore entitled to designate two secretaries, assistant or clerks and one personal stenographer; that is, three positions in all, as exempt from the classified list. The stenographer must be his per-

sonal stenographer. The director therefore cannot designate a stenographer assigned to a division as in the unclassified service, but must designate one of his own personal stenographers.

The other two exempt positions may be selected from his secretaries and clerks, and one of them only may be an assistant. In the opinion of this department, any secretary or clerk in the department of commerce may be chosen for one of these positions. Thus, the chief clerk in the oil inspection division is subject to such designation, or the person designated by the director of commerce as acting secretary of the public utilities commission under favor of section 154-39, last paragraph, may be exempted from civil service requirements. If these two are so chosen, the power of the director to act under section 486-8, paragraph 8, is exhausted.

Another question may arise here, namely, whether one of the two persons authorized by section 486-8, paragraph 8, to be exempted from the classified service in the department of commerce may be an assistant, i. e., the head of a division created by the joint action of the director and the governor and not established by law. Section 486-8, paragraph 8, uses the word "assistant" in the singular number, so that apparently not more than one of the two persons authorized by that clause of the statute to be exempted from the classified service may be an assistant. On the other hand, the position designated as "assistant director" is expressly placed in the unclassified service by section 154-19 of the General Code. The question is as to whether this provision of the administrative code is to be looked upon as exclusive; that is, as designating the only assistant in the department of commerce whom the director of that department may place in the unclassified service. This question is answered, it is believed, by the provision of section 154-19, above quoted, which declares that

"Nothing in this chapter shall be construed to amend, modify or repeal the civil service laws of the state, except as herein expressly provided."

This sentence has the effect of emphasizing the rule against implied repeals or amendments.

It is therefore the opinion of this department that the director of a department under the administrative code may select one of the two persons whose positions he may place in the unclassified service from his assistants, in addition to the appointment of the assistant director referred to in section 154-5 of the General Code.

It is impossible to state just what positions are or are not in the unclassified service further than such as are specifically so designated in this opinion, but the foregoing statement will disclose that the director of commerce has power to designate certain positions as in the unclassified service.

Thus far no mention has been made of the division of banks. The position of this division under the administrative code is unique. Section 154-39 of the General Code provides, in part, as follows:

"The department of commerce shall have all powers and perform all duties vested in the inspector of building and loan associations, the state fire marshal, the superintendent of insurance, the state inspector of oils, and the commissioner of securities; and said department shall have all powers and perform all duties vested by law in any and all officers, deputies and employes of such offices and departments. Wherever powers are conferred or duties imposed upon any

of such departments, offices or officers, such powers and duties shall be construed as vested in the department of commerce.

There is hereby created in the department of commerce a division of banks which shall have all powers and perform all duties vested by law in the superintendent of banks. Wherever powers are conferred or duties imposed upon the superintendent of banks, such powers and duties shall be construed as vested in the division of banks. The division of banks shall be administered by a superintendent of banks, who shall be appointed by the governor by and with the advice and consent of the senate, and hold his office for a term of two years, unless sooner removed at the will of the governor. A vacancy in the office of superintendent of banks shall be filled by appointment for the unexpired term. All provisions of law governing the superintendent of banks shall apply to and govern the superintendent of banks herein provided for; all authority vested by law in the superintendent of banks with respect to the management of the department of banks heretofore existing shall be construed as vested in the superintendent of banks hereby created with respect to the division of banks herein provided for; and all rights, privileges and emoluments conferred by law upon the superintendent of banks shall be construed as conferred upon the superintendent of banks as head of the division of banks herein provided for. The director of commerce shall not impose upon the division of banks any functions other than those specified in this paragraph, nor transfer from such division any of such functions. \* \* \*

The following will be noted:

(1) The department of commerce, as such, is not invested with the powers of the abolished superintendent of banks. These powers are vested in the division of banks, and not in the whole department.

(2) The head of the division of banks is appointed by the governor. In the opinion of this department, the head of the division of banks answers the description of "head of a principal department \* \* \* appointed by the governor," within the meaning of paragraph 3 of section 486-8 of the General Code. The only doubt is as to whether the department of banks is a "principal department" within the meaning of this provision, now that it is designated as a division in the department of commerce. However, the question is relatively unimportant inasmuch as the appointment is to be made by and with the advice and consent of the senate and the term of office is for two years, unless sooner removed at the will of the governor. These provisions are so far inconsistent with the framework of the civil service act as to make it clear that the superintendent of banks is in the unclassified service.

(3) All provisions of law governing the abolished superintendent of banks are to apply to and govern the new superintendent of banks as head of the division of banks. Among the provisions thus adopted are those of section 710-7 of the General Code, still in effect. That section provides as follows:

"The superintendent of banks may employ from time to time necessary deputies, assistants, clerks and examiners to assist in the discharge of the duties imposed upon him by law. He may remove any such deputies, assistants, clerks or examiners. He shall summarily remove any such deputy, assistant, clerk or examiner upon

the violation by any such deputy, assistant, clerk or examiner of any of the provisions of section 11 of this act."

By virtue of the foregoing the appointments in the division of banks are not made by the director of commerce, but by the superintendent of banks. The intent of the general assembly is manifestly to confer upon the superintendent of banks, as head of the division of banks, all the powers, "rights, privileges and emoluments conferred by law" upon the former superintendent of banks. Among these, in the opinion of this department, are the rights and privileges which the former superintendent of banks had under paragraph 8 of section 486-8 of the General Code.

The conclusion of this department is, therefore, that the superintendent of banks, as head of the division of banks, now has the authority to appoint "two secretaries, assistant or clerks and one personal stenographer"—that is, three persons in all, including the personal stenographer, in the division of banks, who when so designated by the superintendent of banks are in the unclassified service.

It is otherwise, as previously intimated, with the employes in the division of public utilities commission. These employes are expressly declared by section 154-39 "to be employes of said department" (of commerce). Generally speaking, therefore, the employes of the public utilities commission, with the exception of the secretary, whose case has been dealt with hereinbefore, are all in the classified service. That is to say, there is nothing in the administrative code which operates to take any of them out of the classified service, and the utilities commission not having the power of appointment generally, none of them can be placed in the unclassified service by virtue of paragraph 8 of section 486-8 of the General Code.

However, section 154-39 of the General Code provides that—

"The public utilities commission shall have direct supervision and control over, and power of appointment and removal of, such employes whose positions shall be designated by the governor as fully subject to the authority of such commission."

If and when the governor shall designate the positions of certain employes as fully subject to the authority of the public utilities commission under the provisions of this sentence, the utilities commission may under favor of section 486-8, paragraph 8, of the General Code designate two secretaries, assistant or clerks and one personal stenographer as within the unclassified service, if the positions designated by the governor are such in number and character as to permit such designation by the commission.

No attempt has been made to examine the appropriation bill for a complete list of all the positions in the department of commerce. It is believed that the statements and principles above made will enable you to determine for yourself the application of the civil service laws to the several divisions of the department.

This opinion does not cover the question of deputies in the several divisions.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*