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1. COMPATIBLE OFFICE—CHIEF, DIVISION OF CORRECTIONS IN DEPARTMENT OF PUBLIC WELFARE AND SUPERINTENDENT OF OHIO STATE REFORMATORY—SITUATION WHERE INCUMBENT OF ONE OFFICE TEMPORARILY IN ADDITION TO USUAL DUTIES AND WITH NO ADDITIONAL SALARY PERFORMS DUTIES ATTACHED TO BOTH OFFICES.
2. DIRECTOR OF WELFARE—NO LEGAL AUTHORITY TO APPOINT INDIVIDUAL TO PERFORM DUTIES OF CHIEF, DIVISION OF CORRECTIONS, AT CLASSIFICATION AND SALARY OTHER THAN THAT ALLOCATED UNDER SECTION 486-7a G. C.

SYLLABUS:

1. There is involved no question of the incompatibility of the offices of Chief Division of Corrections in the Department of Welfare and Superintendent of the Ohio State Reformatory in a situation where the incumbent of one such office temporarily, in addition to his usual duties, and with no additional salary, performs the duties attached to both offices.

2. The director of welfare has no legal authority to appoint an individual to perform the duties of Chief, Division of Corrections, at a classification and salary other than that to which such position is allocated under authority of Section 486-7a, General Code.

Columbus, Ohio, November 20, 1950

Mr. Carl W. Smith, Chairman, Civil Service Commission of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The State Civil Service Commission is in receipt of the following communications from the Director of the Department of Public Welfare, Judge J. H. Lamneck, under date of December 20, 1949.

“Subject to the approval of your honorable body, and effective as of January 1, 1950, we are reinstating and demoting Mr. Arthur L. Glatke, at his request, to his former position of Superintendent of the Ohio State Reformatory at a salary of \$630.00 a month, gross, from which position he was promoted on February 1st, 1949.

“Effective January 1, 1950, in connection with Mr. Arthur L. Glatke's duties as Superintendent of the Ohio State Reformatory, he has been designated as Acting Chief of the Division of Corrections.’

“The records of this office show that Mr. Arthur L. Glatke was permanently appointed under date of December 1, 1935, to the position of Superintendent of Ohio State Reformatory. Upon the request of the Director of the Department of Welfare Mr. Glatke's promotion from the position of Superintendent of the Ohio State Reformatory at a salary of \$400.00 per month to the position of Chief of the Division of Corrections at a salary of \$541.66 per month, effective February 1, 1949, was approved.

“We respectfully request your opinion as to whether Mr. Glatke may legally serve as Acting Chief of the Division of Corrections while at the same time occupying the position of Superintendent of the Ohio State Reformatory.”

It is to be observed that the position of Chief, Division of Corrections is, under the provisions of Section 486-7a, General Code, assigned a classification number of 5260; and under the provisions of Section 486-7c, General Code, that classification is assigned to Pay Range 45. These two sections were enacted as a part of Amended Substitute House Bill No. 382, 98th General Assembly, effective July 28, 1949.

Section 486-7a, General Code, reads in part as follows:

“As soon as possible after the effective date of this act, and, in no event later than January 1, 1950, the state civil service commission shall prepare specifications descriptive of the duties, responsibilities and desirable qualifications of each of the above classifications and shall allocate each present position, office or employment, paid in whole or in part by the state of Ohio, to the appropriate class of positions, offices and employments among those set forth above on the basis of the duties, responsibilities, qualifications and requirements of such positions, offices or employments in conformity with the report of the public administration service. * * *”

It is clear from your letter that the position of Chief, Division of Corrections, was a “present position, office or employment, paid in whole or in part by the state of Ohio” at the time of enactment of Section 486-7a; and that it was the duty of the Civil Service Commission on or before January 1, 1950, to allocate it to the appropriate classification. In deciding on the appropriate classification in this situation the Civil Service

Commission is given little, if any, discretion since the statute provides but one classification to which it could logically be allocated, viz., Chief, Division of Corrections, Classification Number 5260, in Pay Range 45.

The question thus presented is whether the Director of Welfare may combine the duties of this position with those of a subordinate position, all of such duties to be performed by the incumbent of such subordinate position.

Another question to be considered is whether it is within the power of the Director of Welfare to alter the organization of his department in such a way as to change the essential functions of the Division of Corrections therein and to provide for the discharge of the functions normally assigned to such division by an officer within the department other than the chief of such division. Prior to October 20, 1949, the power of the director to alter the organization of his department was specifically limited by Section 154-60e, General Code, which reads as follows:

“The director of public welfare shall not have power to alter the divisions established by this act nor to distribute the work of the department in any manner inconsistent therewith, anything in section 154-8 of the General Code to the contrary notwithstanding; but the director may assign to any division additional powers and duties not inconsistent with law. Any institution, bureau, or other administrative unit of the department not assigned by this act to a division may be assigned by the director to any division of the department now or hereafter established. Services may be organized to carry on work for two or more divisions.”

Effective October 20, 1949, this section was amended to read as follows:

“The director of public welfare shall be the executive head of the department of public welfare. All of the duties conferred on the various divisions and institutions of the department by law or by order of the director shall be performed under such rules and regulations as he may from time to time prescribe and shall be under his direction and control.”

Despite the elimination of this positive statutory limitation on the power of the Director to alter the organization of his department it may be doubted that his power in that respect is very greatly changed. Since the office of Director of Welfare is created by statute that office possesses

only such power as is conferred by statute; and in the absence of any statutory provisions conferring such power of reorganization, the elimination of a statutory provision denying him that power is largely without meaning. It should also be noted at this point that the authority extended by Section 154-8, General Code, to directors of departments to consolidate the divisions within their respective departments is not applicable in this case since the office of Chief, Division of Corrections is not one of the offices created by Section 154-6, General Code.

Moreover, this view is supported by the mandatory language of Section 154-60b, General Code, which specifically requires that certain powers and duties "shall be exercised and performed by and through the division of correction."

It is clear that the Division of Corrections cannot perform the duties and exercise the powers reposed in it by statute without an executive head. I must conclude further, therefore, that the Director of Welfare possesses no power to abolish the position of Chief, Division of Corrections.

The Director has not, of course, attempted such abolition. He has, however, acted to combine the duties of this position with those of another position, viz., the Superintendent of the Ohio State Reformatory, in such a way as to require the incumbent of the latter position to discharge the duties of the former position without receiving the classification or pay of the former position. In doing this he has designated the present incumbent of the latter position as "Acting Chief of the Division of Corrections."

There is not involved in this situation any question of the incompatibility of two offices in the true sense. That question usually involves a case where one individual holds two distinct offices, exercises the powers of each, and receives the full emoluments of each. The case which is here under consideration is one in which additional duties have been imposed on an incumbent of a particular office. It is more nearly analogous to a situation where, under authority of Section 154-5, General Code, an assistant director of a department (who may also be a division chief within that department) temporarily exercises the position of director of the department, when that position becomes vacant, in addition to his usual duties, until the vacancy is filled. There is, of course, no question of incompatibility of office in such a case.

There remains, however, the question of the authority of the Director of Welfare so to impose upon a subordinate all of the duties of a position superior to his own without the classification and salary which attach to the superior position.

I am unable to find any statutory provisions such as that found in Section 154-5, General Code, which would confer such authority on the Director of Welfare. This is not such a temporary exceptional appointment as is authorized by Section 486-14, General Code. It is simply the designation of an individual to discharge the duties of Chief, Division of Corrections, coupled with a statement of intention that he shall receive the classification and salary of Superintendent of the Ohio State Reformatory because such individual has been designated to perform the duties of that position also. Such a designation, when made by a director of a department to the Civil Service Commission, is the legal equivalent of an appointment to a particular office at a classification and salary other than that established by the Civil Service Commission in compliance with Sections 486-7a and 486-7c, General Code. Because such purported classification and designation of salary by the director is without statutory authority, specific or implied, and because it is contrary to the plain provisions of Section 486-7a, General Code, requiring the Civil Service Commission to allocate the position involved to a proper classification and pay range, I must conclude that the director's action is void and without legal effect.

From this it necessarily follows that since the individual concerned was regularly appointed to fill the position of Chief, Division of Corrections, on February 1, 1949, his status as the incumbent of that position was unchanged by the director's action of December 20, 1949; and that his classification and salary in that position should be that to which such position was allocated by the Civil Service Commission on January 1, 1950, under authority of Section 486-7a, General Code.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. There is involved no question of the incompatibility of the offices of Chief, Division of Corrections, in the Department of Welfare and Superintendent of the Ohio State Reformatory in a situation where the incumbent of one such office temporarily, in addition to his usual duties, and with no additional salary, performs the duties attached to both offices.

2. The director of welfare has no legal authority to appoint an individual to perform the duties of Chief, Division of Corrections, at a classification and salary other than that to which such position is allocated under authority of Section 486-7a, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.