

3310.

APPROVAL, NOTES OF CONCORD RURAL SCHOOL DISTRICT, DELAWARE COUNTY, OHIO—\$2,846.00.

COLUMBUS, OHIO, June 9, 1931.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

3311.

PUBLIC UTILITIES COMMISSION—POWER TO ABOLISH IN GOOD FAITH A CIVIL SERVICE POSITION AND CONTINUE A SIMILAR UNCLASSIFIED SERVICE POSITION.

*SYLLABUS:*

1. *The Public Utilities Commission of Ohio may abolish a position under the classified service and continue a similar position under the unclassified service, if the position be abolished in good faith.*

2. *Section 496, as amended in 113 O. L. 16, does not give an employe in the classified service a right to require that the position he holds be continued by the Public Utilities Commission for his benefit, nor does it require that an unclassified employe in a similar position be discharged by the Public Utilities Commission to make place for him.*

COLUMBUS, OHIO, June 9, 1931.

*State Civil Service Commission, Columbus, Ohio.*

GENTLEMEN:—This is to acknowledge receipt of your letter of recent date, which reads as follows:

“We desire to respectfully request your opinion on the following matter.

Section 496 of the General Code provides in part as follows:

‘The Commission (Public Utilities Commission) shall have the power to appoint Attorney-Examiners, Experts, Engineers, and Accountants deemed necessary to carry out the provisions of this act, who shall be in the unclassified division of the civil service, and shall serve during the pleasure of the Commission at such salaries and compensation as the Commission may fix, provided that nothing in this act shall be construed to take out of the classified service any employes now in the classified service.’

About November 1, 1929, three appointments were made by the Public Utilities Commission in the unclassified service in accordance with Section 496, G. C., mentioned above. On January 31, 1930, there were employed in the Public Utilities Commission approximately eight Engineers in the classified service, together with the three Engineers in the unclassified service just mentioned.

The Public Utilities Commission determined to abolish a position of Engineer and chose one of the positions which was occupied by a classified employe. This employe has appealed to the State Civil Service Commission that he was discriminated against by the Public Utilities Commission in abolishing his position, which was a classified position, instead of abolishing one of the three unclassified positions, and basing his contention upon that part of the above quoted Section 496 which states that—'provided that nothing in this act shall be construed to take out of the classified service any employes now in the classified service.'

Will you kindly inform us relative to this situation at your earliest opportunity?"

Your inquiry is whether or not section 496, General Code, as amended in 113 O. L. 16, creates a preference between similar positions in the classified service and the unclassified service, particularly in the matter of abolishing a position in the classified service by the Public Utilities Commission of Ohio.

As a general rule it has been held that the appointing authorities can abolish a position held under civil service provided the position is actually abolished in good faith. See Opinions of the Attorney General for 1927, page 2525; *Curtiss v. State*, 108 O. S. 292; *State v. Witter*, 114 O. S. 122, at page 124; *Vansuch v. State*, 112 O. S. 688, at page 690. This is so even though the abolishment of the office may by indirection remove the incumbent from his position without fault or a charge being placed against him.

The rule of law concerning abolishment of a public office under civil service is expressed as follows in 7 O. Jur. 594:

"The civil service law cannot be given the effect of requiring the head of a department to find work for an employee in the civil service whom he considers to be unnecessary nor of requiring the retention in the service of persons whose positions it is desirable to abolish in the interest of economy. In such case the position may be abolished and the incumbent discharged even though he is wholly without fault and no charges are made against him. It is essential, however, that the position be actually abolished in good faith \* \* \*"

The authority to abolish an office under classified service is provided for by section 486-16, General Code, which in part reads as follows:

" \* \* \* whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, \* \* \*"

The question of whether or not the Public Utilities Commission may, under section 496, as amended in 113 O. L. 16, abolish a position under classified service and continue a similar position under the unclassified service depends on the interpretation to be given section 496, as amended, and the civil service law.

In my examination of the civil service law, sections 486-1 to 486-31, I have been unable to find any provision which requires that a position under the unclassified service be abolished in preference to a similar position under the classified service. Section 486-8 provides that the civil service of Ohio be divided into classified and unclassified service. This section merely provides a method of

classification, and section 496, as amended, merely adds another unclassified service to section 486-8. The civil service act as a whole does not give or create a preference to either the classified or unclassified service, the only difference being that an examination is required of an applicant under the classified service, whereas no examination is necessary or required in the unclassified service, and a person under classified service can not be removed, suspended or discharged from office without written charges being preferred against him. Furthermore, there is no section in the civil service act which requires that a position in the unclassified service be abolished before abolishing a similar position held under the classified service. The provision of section 496, as amended, providing that the act was not to affect certain employes under classified service, was intended to fix the status of the incumbent already in office and to continue that status under the new act. To hold otherwise would be to hold that the legislature intended to give to persons in the classified service employed by the Public Utilities Commission of Ohio a higher status or greater right to their positions than is generally given to others in the classified service of this state. It is not difficult to understand why the legislature, in enacting section 496, as amended in 113 O. L. 16, would provide that the act should not affect employes already under the classified service. It is quite apparent that the legislature intended, so far as possible, by that reservation to provide that certain employes in office when section 496, as amended in 113 O. L. 16, went into effect should not be disturbed in their employment. However, it would be difficult to understand why a position under the classified service could not be abolished if the Public Utilities Commission deemed it necessary, regardless of whether the same position under the unclassified service was abolished or not. It would be a harsh and unreasonable rule to hold that the appointing authorities, in this instance the Public Utilities Commission, could not exercise their discretion in the matter of abolishing a position in the classified service and to continue a similar position under the unclassified service. I am of the opinion that there is nothing in section 496, as amended in 113 O. L. 16, which creates a preference between similar positions in the classified and unclassified service, nor is there anything in that act relating to the method or procedure to be followed in abolishing a position or positions either under the classified or unclassified service. Section 496, as amended, does not require the commission to continue the position in the classified service and to discontinue a similar position under the unclassified service when a reduction of employes is deemed necessary by the Public Utilities Commission.

Even should section 496, as amended, be considered as creating a preference between similar positions in the classified and unclassified service, I would still be of the opinion that the Public Utilities Commission would have the authority to abolish a position in the classified service and continue a similar position in the unclassified service, for the reason that many courts have held that a position under classified service may be abolished by the appointing authorities even though the incumbent is entitled to preference by virtue of the so-called veteran soldier and life tenure statutes. The reasons given for sustaining such abolishments in view of the preference statutes is that there is no obligation on the part of the people or the state to keep a useless office or continue to pay a person who is not needed. Thus it has been held that the appointing authorities could abolish a position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran preference act. See *People v. Davison*, 213 N. Y. 130; *People v. Sayer*, 233 N. Y. 615. In the case of *People v. Leo*, 135 N. Y. 234, it was held that a city employe who had entered military service and whose former position had been abolished while he was in service

was not entitled under the soldiers' preference act to a preference over others remaining in the employment of the city who held similar positions and that it was not necessary to discharge such others to make place for him. It was also held in the case of *Funston v. School Board*, 278 Pac. 1075, that a tenure of office act prohibiting the dismissal of a teacher holding a life certificate, except for cause, did not deprive a board of education of the power to terminate an incumbent's employment when there ceased to be any further need for the teacher, either through a program of economy in good faith adopted or through a lessening of the number of pupils. The courts have agreed, as a general rule, that civil service statutes were not intended to perpetuate the existence of an office, but were enacted merely to prevent removal without cause and that a position held under civil service could be abolished when found to be unnecessary or for reasons of economy and that such abolishment was not an interference with the civil service law.

Thus section 496, as amended in 113 O. L. 16, does not give a classified employe a right to require that the position he holds be continued for his benefit, nor that an unclassified employe be discharged to make place for him, since it is well settled that a statute forbidding removal of an employe in classified service, except for cause, is not intended to take away from the appointing official the power of abolishing a position if done in good faith.

The facts, as you set them forth in your letter, indicate that three new appointments as engineers in the unclassified service were made on November 1, 1929, under the authority of section 496 of the General Code, which you quote. Three months thereafter the Public Utilities Commission abolished one of the engineer positions in the classified service, still retaining the three unclassified engineers theretofore appointed. This in and of itself is not in violation of law since, as I have heretofore indicated, the applicable provisions of law can not be construed as requiring the continuance in office of all classified engineers until all similar positions in the unclassified service are abolished. It may, however, have created in your minds some question as to the good faith of the Public Utilities Commission in creating the unclassified positions such a comparatively short time prior to the abolishment of the classified position. Apparently this is the circumstance which prompted your inquiry.

It may be assumed that your question is submitted in anticipation of a possible investigation by your commission under authority of section 486-22 of the General Code. The determination of whether good faith was exercised in the specific instance before you is one of fact for your commission, and it is the uniform policy of this office to refrain from expressing opinions upon questions of fact. I feel, however, that the foregoing discussion of the legal principles involved will be sufficient for your guidance.

It is therefore my opinion that:

1. The Public Utilities Commission of Ohio may abolish a position under the classified service and continue a similar position under the unclassified service, if the position be abolished in good faith.

2. Section 496, as amended in 113 O. L. 16, does not give an employe in the classified service a right to require that the position he holds be continued by the Public Utilities Commission for his benefit, nor does it require that an unclassified employe in a similar position be discharged by the Public Utilities Commission to make place for him.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*