4113.

SUPERINTENDENT OF SUBSISTENCE—MUST BE APPOINTED AT SALARY FIXED BY SECTION 2180, G. C.—NO AUTHORITY TO ABOLISH SUCH POSITION.

SYLLABUS:

1. *Section 2180, General Code, was not repealed by implication by the enactment of the Administrative Code (102 O. L., 215 and 109 O. L., 105).*

2. *The language of Section 2180, General Code, is mandatory, and a superintendent of subsistence must be appointed at the salary therein provided.*

3. *The position of superintendent of subsistence and the salary therefor being made and determined by the legislature, they can only be abolished by the legislature, and neither the warden nor the Director of Public Welfare can directly or indirectly abolish such position or increase or decrease the compensation therefor, as fixed by Section 2180, General Code.*

COLUMBUS, OHIO, February 27, 1932.

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

GENTLEMEN:—Your request for opinion is:

> "Section 2180 of the General Code of Ohio, relative to certain employes of the Ohio Penitentiary, reads as follows:
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> 'There shall be appointed an assistant clerk at an annual salary not to exceed one thousand and eighty dollars, a chaplain who shall act as librarian, at a salary not to exceed fifteen hundred dollars a year, a physician, a superintendent of schools, who shall be accredited as a guard, a superintendent of construction at a salary not to exceed thirteen hundred and twenty dollars a year, a superintendent of gas and electric light at a salary not to exceed thirteen hundred and twenty dollars a year, a captain of night watch at a salary not to exceed twelve hundred dollars a year, a superintendent of subsistence at a salary not to exceed eleven hundred and twenty dollars a year, and a stenographer at a salary not to exceed sixty dollars per month.'
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> This Commission desires your opinion as to whether in view of the mandatory language of the above quoted statute, the Warden of the Ohio Penitentiary, as the appointing authority, could abolish the position of Superintendent of subsistence without a change in the statute by the legislature.
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> In addition, could the Warden lay off the Superintendent of Subsistence, who is a classified employe, and distribute the duties of the position to prisoners of the institution and to other employes, such as a Guard-Lieutenant and a Guard, when the legislature specifically provides by statute that 'there shall be appointed a Superintendent of Subsistence?'"

Your request calls for a construction of Section 2180 of the General Code. It might be profitable to trace the history of the legislation in connection with this section in order to determine its meaning.

By the enactment of "An Act to create a board of administration for institu-

tions of the state", (102 O. L., 215) original Section 2180, General Code, which, in so far as it concerned "a superintendent of subsistence" and was identical with the present Section 2180 was expressly repealed. The entire right to appoint employes and the executive powers was vested in the superintendent of the institution or warden in the case of the penitentiary and he was given the right to fix all salaries with the written approval of the Governor. (Section 1842, General Code.) Later, however, during the same session of the legislature Section 2180, General Code was enacted in its present form (102 O. L., 474) and as stated by Minshall, J., in *City of Cincinnati* vs. *Holmes,* 56 O. S., 104, 115:

> "I know of no rule of construction of statutes of more uniform application than that later or more specific statutes do, as a general rule, supersede former and more general statutes, so far as the new and specific provisions go."

It must therefore be concluded that Section 2180, General Code, was, at that time, intended to be a limitation upon the powers of the warden as to the hiring of officers and employes therein named, and fixing their salaries.

On April 19, 1921, the legislature enacted a new administrative code, entitled:

> "An Act To establish an administrative code for the state, to abolish certain offices, to create new administrative departments and redistribute among them existing administrative functions * *" (109 O. L., 105).

Said act does not expressly repeal Section 2180, General Code, although it is in some respects inconsistent with it. The first paragraph of Section 4 of such act, reads as follows:

> "Every officer and employe in the classified civil service of the state civil service at the time this act takes effect shall be assigned to a position in the proper department created by this act, and, so far as possible, to duties equivalent to his former office or employment; and such officers and employes shall be employes of the state in the classified civil service of the state of the same standing, grade and privileges which they respectively had in the office, board, department, commission or institution from which they were transferred, subject, however, to existing and future civil service laws. This section shall not be construed to require the retention of more employes than are necessary to the proper performance of the functions of such departments."

Section 1857, General Code, provides that the board may employ such mechanical engineers, superintendents and supervisors as it may deem necessary and fix their titles and compensation which, with all necessary expenses when itemized and approved, shall be paid like other expenses of the board.

The superintendent of subsistence was a classified employe or officer at the time of this enactment. He is also a superintendent or carries such title, whatever may be his duties.

The question arises as to whether there is a repeal by implication. An examination of other provisions of the statute discloses that the word "superintendent" as used in this act, means head or chief officer of all institutions. The rule on

repeals by implication is well stated in the first branch of the syllabus of *State* vs. *Hollenbacker,* 101 O. S., 478, as follows:

> "A statute which revises the whole subject-matter of a former enactment, and which is evidently intended as a substitute for it, operates to repeal the former, although it contains no express words to that effect. But repeals by implication are not favored, and where two affirmative statutes exist, one will not be construed to repeal the other by implication, if they can be fairly reconciled. The fact that a later act is different from a former one is not sufficient to effect a repeal. It must further appear that the later act is contrary to, or inconsistent with, the former."

While there is some inconsistency between the act in 109 O. L., 105 and Section 2180, General Code, is such inconsistency so irreconcilable as to amount to a repeal by implication?

Section 1857, General Code, as so enacted, while it authorizes the employment by the board of such mechanical engineers, superintendents and supervisors as it may deem necessary, to fix their titles and compensation is permissive in its terms; it is therefore not unreasonable to presume that the legislature intended to authorize the board to employ such additional employes of such classes as were already required by the legislature and fix the compensation of such additional employes. Especially is this to be presumed in view of the language of Section 154-19, General Code, as follows:

> "Each department is empowered to employ, subject to the civil servlaws in force at the time the employment is made, the necessary employes, and, if the rate of compensation is not otherwise fixed by law, to fix their compensation. Nothing in this chapter shall be construed to amend, modify or repeal the civil service laws of the states, except as herein expressly provided. * *"

Section 4, of such act, quoted above, is not irreconcilable with this interpretation in view of the language of the Supreme Court in construing this act (109 O. L., 105). "The effect thereof was not to change the method of procedure in relation to matters involved, but only to transfer the rights, powers and duties to another department therein designated." (*State ex rel.* vs. *Commission,* 123 O. S., 70, 75).

If this be the effect of such act, the modification of Section 2180, General Code, by such enactment would therefore be to make a change merely in the appointing offices.

Since there is a very strong presumption in the law against repeals by implication, I must therefore conclude that Section 2180, General Code, is not repealed by implication by the enactment of the "Administrative Code."

The next legal question is whether the position of "superintendent of subsistence" is mandatory. In 2 Lewis' Sutherland Statutory Construction, paragraph 1146, it is stated:

> "The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions."

And in paragraph 1155:

> "The word 'shall' in its ordinary sense is imperative. When the word 'shall' is used in a statute, and a right or benefit to anyone depends upon giving it an imperative construction, then that word is to be regarded as peremptory."
>
> In Lessee of *Swazey's Heirs* vs. *Blackman,* 8 Oh., 5, 18, the court said:
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> "'May' means 'must,' in all those cases where the public are interested, or where a matter of public policy, and not merely of private right, is involved."
>
> This language is quoted with approval, in 117 O. S., 345, at page 355.

I am unable to conclude that the legislature did not have in mind the welfare of the prisoners confined in the penitentiary by virtue of convictions of the infraction of certain rules laid down by the legislature. This view is given greater weight by the fact that in the enactment of the administrative Code (102 O. L., 215) which repealed Section 2180, the same legislature subsequently at the same time reenacted it (102 O. L., 474) although they had given the warden the permissive authority to employ suitable employes for the purpose of operating the penitentiary. See Section 1842, General Code.

I am therefore of the opinion that the language of this section is mandatory. This section being mandatory, can it be avoided by the warden or by the Director of Public Welfare? I am unable to find any ruling of the courts or of this office interpreting this section. However, in the case of *People* vs. *Hayes,* 190 N. Y. Supp., 30, the New York court in construing a similar provision in the laws of such state held in the second branch of the syllabus:

> "A civil service position can be abolished only by the agency creating it, unless there is direct statutory authority to the contrary."

In this case a job and the salary therefor were created by the Board of Aldermen. The court, at page 32, says:

> "I think it is a fair inference, in the absence of any direct statutory provision to the contrary, that a position can be abolished only by the same agencies that created it, and that therefore, from a technical point of view, a position, as distinguished from the incumbent or the salary attached thereto, is not abolished until appropriate action to that effect is taken by the commission and board of aldermen."
>
> See also *Calihan* vs. *Miller,* 131 N. Y. Supp., 99.

If, therefore, the legislature has handed down a mandate creating a position and a salary thereto, which it commands to be filled, such position can not be abolished except by the legislature itself. Does the fact that the legislature has failed to specifically appropriate a sum for the payment of the salary specifically set by the legislature, but instead makes a blanket appropriation for employes of all state institutions under the direction of the Department of Public Welfare, abolish or suspend the office?

This method of appropriation has been adopted and practiced by the legislature for a long period of time. The administration of the appropriation is left to the Department of Finance, created by Section 154-3. It would be a strained

construction of the statute to hold that the executive powers could thwart an express direction of the legislature indirectly when it can not be done directly. I am informed that the purpose of the proposed combination of jobs is in order to retrench on expenditures made necessary by reason of the decreased income of the state and while the purpose is commendable and perhaps even necessary, I do not believe such retrenchment may be made in this manner. Since the legislature has neither laid down nor defined the duties of "a superintendent of subsistence" it evidently was the intention of the legislature to delegate the fixation of these duties to the executive or administrative department. Such duty having been delegated by the legislature to the administrative department it might well have been the intent of the legislature to authorize the administrative departmnt to increase, decrease, change or alter the duties of a "superintendent of subsistence" from time to time as changing conditions warrant. If this be true, the administrative officer might distribute additional duties of other nature than those now performed by such employe upon the superintendent of subsistence without increasing his salary above the $1120.00 fixed by statute and accomplish the necessary retrenchment of expenditures, and thus decrease the number of necessary jobs other than those credited by the legislature. So if the intent of the administrative officer is to retrench expenditures, rather than to abolish a particular job in preference to another job, there is no impediment in the statutes.

I am therefore of the opinion that:

1. Section 2180, General Code, was not repealed by implication by the enactment of the Administrative Code (102 O. L., 215 and 109 O. L., 105).

2. The language of Section 2180, General Code, is mandatory and a superintendent of subsistence must be appointed at the salary therein provided.

3. The position of superintendent of subsistence and the salary therefor being made and determined by the legislature they can only be abolished by the legislature and neither the warden nor the Director of Public Welfare can directly or indirectly abolish such position or increase or decrease the compensation therefor as fixed by Section 2180, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4114.

APPROVAL, NOTES OF BELOIT VILLAGE SCHOOL DISTRICT, MAHONING COUNTY, OHIO—$3,250.00.

COLUMBUS, OHIO, February 27, 1932.

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

4115.

APPROVAL, BONDS OF VILLAGE OF UNIVERSITY HEIGHTS, CUYAHOGA COUNTY, OHIO—$11,000.00.

COLUMBUS, OHIO, March 1, 1932.

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