

1337.

CIVIL SERVICE COMMISSION—PROVISIONAL APPOINTEE—APPOINTING OFFICER NOT COMPELLED TO APPOINT PERMANENTLY UNTIL COMPLETE LIST CERTIFIED—COMMISSION CANNOT REFUSE TO CERTIFY PAYROLL OF SUCH PROVISIONAL APPOINTEE.

SYLLABUS:

1. *An appointing officer cannot be required to make a permanent appointment from a list containing the names of less than three eligible persons, even though one of the persons whose name appears upon the eligible list, as certified, is serving as a provisional appointee in the position for which the eligible list is created.*

2. *Under such circumstances the civil service commission cannot refuse to certify the payroll containing the name of such provisional appointee.*

COLUMBUS, OHIO, December 8, 1927.

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

GENTLEMEN:—Acknowledgment is made of your recent request for my opinion upon the following:

“We are confronted with a situation which appears to be growing rapidly in some particular state departments and state institutions and upon which we respectfully request your opinion:

Section 486-13, G. C., provides in part that appointments to all positions in the classified service that are not filled by promotion, transfer or reduction, as provided for in this act and the rules of the commission prescribed thereunder, shall be made only from those persons whose names are certified to the appointing officer in accordance with the provisions of this act, and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof.

In a number of cases where positions for which examinations are held which are of a more or less technical nature, our class of applicants may be small, although the examination is thoroughly advertised, and the number passing such examination may prove to be less than three names, resulting in an eligible list consisting of less than three names. Subsequently following certification to the appointing officer of such list he may demand that we certify to him a list containing at least three names before making an appointment. In a number of cases of this character the appointing authority will refuse to permanently appoint the one name on such list, but will grant him provisional appointment, and in some cases the one name on the eligible list served as a provisional appointee prior to the examination. The result of such procedure on the part of an appointing authority in refusing to permanently appoint an employe who is serving on a position as a provisional appointee and who has established his eligibility and is the only name on the eligible list, is to evade the intent of the Civil Service Laws of Ohio by retaining an employe under provisional appointment with no classified civil service although he has established his eligibility by passing the examination, and so long as the appointing authority can keep his status that of a provisional appointee his services are at the pleasure of the appointing authority, and the purpose of the civil service law is defeated due to the inability of this

commission to create an eligible list of three or more names although repeatedly advertising and conducting the examination.

Does this commission have the authority to insist upon the intent of the civil service laws and require the appointing officer to appoint from certification when the man whose name appears upon the eligible list is serving as a provisional appointee in the position for which the eligible list is created, and can this commission refuse to certify the payroll even though there are less than three names on the eligible list?"

Section 486-13, General Code, referred to in your communication, provides in part:

"The head of a department, officer or institution in which a position in the classified service is to be filled shall notify the commission of the fact, and the commission shall, except as provided in Sections 486-14 and 486-15 of the General Code, certify to the appointing officer thereof the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which said position belongs. In the event that an eligible list becomes exhausted, through inadvertence or otherwise, and until a new list can be created, or when no eligible list for such position exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified. * * * Appointments to all positions in the classified service, as herein defined, that are not filled by promotion, transfer or reduction, as provided for in this act and the rules of the commission prescribed thereunder, shall be made only from those persons whose names are certified to the appointing officer in accordance with the provisions of this act, and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof. The appointing officer shall notify the commission of such position to be filled and shall fill such position by appointment of one of the three persons certified to him as provided in this act. Forthwith, upon such appointment and employment each appointing officer shall report to the proper civil service commission the name of such appointee or employe, the title and character of his office, the duties of same, the date of the commencement of same and the salary or compensation thereof, and such other information as the commission requires in order to keep the roster herein mentioned. * * *"

Provisional appointments are authorized by Section 486-14, General Code, which provides in part:

"Positions in the classified service may be filled without competition as follows:

1. Whenever there are urgent reasons for filling a vacancy in any position in the classified service and the commission is unable to certify to the appointing officer, upon requisition by the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until

regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter.

* * * "

The clear intent of the legislature, as expressed in Section 486-14, General Code, supra, is to limit provisional appointments to such period of time as is required to hold examinations and provide complete eligible lists from which permanent appointments can be made. The time within which an examination is to be held and an eligible list prepared has been fixed as ninety days after the provisional appointment has been made. It does not necessarily follow from the language of Section 486-13, above quoted, that a provisional appointment cannot be made for a period longer than ninety days. The ninety day period is the period fixed by the legislature for the holding of an examination and the preparation of an eligible list from which a permanent appointment can be made. In other words, it does not follow that a provisional appointment will automatically expire or cease ninety days after such appointment has been made.

Pursuant to the authority contained in Section 486-7, General Code, your commission has promulgated Rule VII which follows Section 486-13, General Code, in the pamphlet containing the civil service laws and rules and regulations published by the direction of your commission. Section 9 of Rule VII reads:

"In cases where there are less than three names on an eligible list appropriate for certification to any vacancy, such names shall be certified and the appointing officer may make selection from such certification, or he may reject the certification of less than three names and nominate a person for non-competitive examination for provisional appointment to fill such vacancy until a full eligible list is created."

The fourth paragraph of the syllabus in the case of *State ex rel., Chapman vs. Lesser*, 94 O. S. 387, reads:

"The appointing authority may demand that the civil service commission certify a list containing at least three names before making an appointment, but where a list is submitted containing less than three names and the appointing authority accepts the list and makes the appointment, such appointment is valid."

It seems clear that the import of the provision of Section 486-13, supra, requiring the certification of the three candidates standing highest on the eligible list is to give to the appointing officer the right of selection from three eligible persons and that unless the names and addresses of three eligible persons are certified to the appointing officer he cannot be required to make a permanent appointment. That this is the intention and has been so recognized by your commission and by the Supreme Court of Ohio is apparent in the promulgation of Section 9 of Rule VII, supra, and the decision of the Supreme Court from which the above quotation is taken. The conclusion seems inescapable that unless your commission is able to certify to an appointing officer an eligible list consisting of the names of three persons, such appointing officer cannot be compelled to make a permanent appointment, even though the person appointed provisionally has qualified by taking the examination and has been placed on the eligible list. It follows that under such circumstances your commission cannot refuse to certify a payroll containing the name of a provisional appointee.

In view of the foregoing it is my opinion :

1. That an appointing officer cannot be required to make a permanent appointment from a list containing the names of less than three eligible persons, even though one of the persons whose name appears upon the eligible list, as certified, is serving as a provisional appointee in the position for which the eligible list is created.

2. Under such circumstances, your commission cannot refuse to certify the payroll containing the name of such provisional appointee.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1338.

UNITED SPANISH WAR VETERANS MEMORIAL COMMISSION—
AUTHORITY TO ERECT MEMORIAL UNDER SECTIONS 15289-13;
ET SEQ., GENERAL CODE--SECTIONS 154-40 AND 2314, ET SEQ.,
GENERAL CODE DO NOT APPLY.

SYLLABUS:

Neither the provisions of Section 154-40, General Code, nor those of Sections 2314, et seq., General Code, are applicable in erecting a monument in honor of the memory of the soldiers and sailors of the Spanish-American War, the Philippine Insurrection and the Chinese Relief Expedition, since the legislature by the enactment of Sections 15289-13, et seq., General Code, 112 O. L. 133, has placed the entire authority and responsibility of selecting the design, securing the plans and estimates and the letting of a contract for the erection of such a memorial in the United Spanish War Veterans Memorial Commission.

COLUMBUS, OHIO, December 8, 1927.

HON. HERBERT B. BRIGGS, *State Architect and Engineer, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your recent communication, as follows :

“In re: Contract, Spanish-American War Memorial, H. B. 402, 87th General Assembly, 1927.

Does House Bill 402 of the 87th General Assembly vest in the commission created by it authority to award the contract for the sculptural service and the erection of the memorial?

The commission has decided to award the contract to Mr. F. L. J. of Cleveland. I have prepared a contract to be executed by the Director of Highways and Public Works the same as is done with other construction work. Section 154-40 (7) of House Bill 67 of the 87th General Assembly raises the above question.

The commission is particularly anxious to have the work proceeded with without delay so that the memorial may be dedicated April 21st, 1928, the 30th anniversary of the Spanish-American declaration of war. In consequence I would be pleased to have your opinion at an early date.”

House Bill No. 402, to which you refer, is now designated as Sections 15289-13 to 15289-18, both inclusive, General Code, 112 O. L. 133, and said bill provides for the