

June 16, 1998

OPINION NO. 98-020

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

We are in receipt of your letter requesting an opinion regarding the application of R.C. 5901.06 and R.C. 5901.07 for purposes of determining the civil service status of an employee of a veterans service commission. Specifically you ask:

If a veterans service commission appoints an employee to a position that requires performance of administrative and managerial duties of an executive director, and also requires performance of duties of a veterans service officer, may the veterans service commission designate the position as that of executive director in the unclassified civil service pursuant to R.C. 5901.06, or must the position be placed in the classified civil service pursuant to R.C. 5901.07?

Based on documents and information provided by a member of your staff, we understand the facts surrounding this request to be as follows. The job description governing the position in question was adopted in 1991. See Erie County Veterans Service Commission Job Description, Apr. 7, 1991. The assigned duties of the position include administrative and management duties, but also include direct services to clients such as: "advises and assists with counseling veterans and/or their families; assists in completing applications, forms, claims; interviews and investigates applications, when necessary." *Id.* The employee currently holding the position governed by this job description was appointed to it in 1995. Previous employees appointed to the position had been placed in the unclassified civil service, and their designation as unclassified was never challenged. The proper status of the current employee has come into question, however, because of certain legislative changes that were enacted in 1994, after the date the job description was

adopted but before the date the current employee was appointed to the position.¹

In 1994, the General Assembly amended R.C. 5901.06 and R.C. 5901.07 by adding to both statutes provisions concerning an executive director of a veterans service commission. See 1993-1994 Ohio Laws, Part IV, 6089, 6093 (Am. Sub. H.B. 448, eff. July 22, 1994). In this same legislation, the General Assembly also expressly specified the civil service status of each of the various positions authorized in R.C. 5901.06 and R.C. 5901.07. *Id.* R.C. 5901.06 now provides, in pertinent part, that “[t]he veterans service commission may employ an executive director, who shall be a veteran and shall be employed in the unclassified service.” The pertinent provisions of R.C. 5901.07 provide:

The veterans service commission shall employ one or more county veterans service officers, *one of whom may act as executive director*. Each officer shall be a veteran. *Each shall be employed in the classified service and is exempt from civil service examination*. The duties of these officers are to advise and assist present and former members of the armed forces of the United States, veterans, and their spouses, surviving spouses, children, parents, and dependents in presenting claims or obtaining rights or benefits under any law of the United States or of this state. (Emphasis added.)

Prior to the enactment of Am. Sub. H.B. 448, no statutory provisions expressly authorized a veterans service commission to employ an executive director. Antecedents of the current R.C. 5901.06 and R.C. 5901.07 merely authorized the employment of investigators, veterans service officers, clerks, stenographers, and “other personnel.” See 1933 Ohio Laws 397, 398 (H.B. 556, approved June 28, 1933) (enacting G.C. 2933-1, now

¹ In responding to your question, this opinion does not constitute a determination of the status of the particular employee who is the subject of your request. See 1983 Op. Att’y Gen. No. 83-087 at 2-342 (“[t]he determination of particular parties’ rights is a matter which falls within the jurisdiction of the judiciary”); 1983 Op. Att’y Gen. No. 83-057 at 2-232 (“[t]his office is not equipped to serve as a fact-finding body; that function may be served by your office or, ultimately, by the judiciary”); *accord* 1990 Op. Att’y Gen. No. 90-063 at 2-267. Rather, this opinion identifies the principles of Ohio law that govern determination of civil service status with respect to a position such as you have described.

R.C. 5901.06); 1945-1946 Ohio Laws 673, 674 (Am. S.B. 26, approved July 13, 1945) (enacting G.C. 2933-3, now R.C. 5901.07). None of the antecedent statutes specified the civil service status of these positions. Accordingly, prior to Am. Sub. H.B. 448, the civil service status of the position you have described was controlled by the general provisions of R.C. 124.11. See *generally State ex rel. Adams v. Wallace*, 92 Ohio App. 3d 462, 465, 636 N.E.2d 329, 331 (Franklin County 1993) ("R.C. Chapter 124 in general governs which positions shall be in the classified and unclassified service").

However, "where there is language elsewhere in the Revised Code, expressly designating a certain position as being in either the classified or unclassified service or where there is language wherein the court can imply such legislative designation, then that language controls as to the classified or unclassified nature of the position." *Suso v. Ohio Dep't of Dev.*, 93 Ohio App. 3d 493, 499, 639 N.E.2d 117, 121 (Franklin County 1993) (quoting *Johnson v. State*, 54 Ohio Misc. 7, 11, 375 N.E.2d 1268, 1271 (C.P. Montgomery County 1977)), *juris. motion overruled*, 69 Ohio St. 3d 1449, 633 N.E.2d 543 (1994); see also *State ex rel. Adams v. Wallace*, 92 Ohio App. 3d at 465-66, 636 N.E.2d at 330-31; *Malloy v. Stark County Bd. of Comm'rs*, No. CA 9308, 1993 Ohio App. LEXIS 6391 (Stark County Dec. 20, 1993). Further, when the General Assembly alters the civil service status of a position by a statutory amendment or enactment, all persons serving in that position on or after the effective date of the legislation are subject to the change. See, e.g., *Karb v. State ex rel. Carter*, 87 Ohio St. 197, 100 N.E.2d 346 (1912) (syllabus, paragraph three) (statutory change from unclassified to classified); *Shearer v. Cuyahoga County Hosp.*, 34 Ohio App. 3d 59, 516 N.E.2d 1287 (Cuyahoga County 1986) (statutory change from classified to unclassified); *Lawrence v. Edwin Shaw Hosp.*, 34 Ohio App. 3d 137, 517 N.E.2d 984 (Franklin County 1986) (same); accord 1990 Op. Att'y Gen. No. 90-013. Thus, regardless of the civil service status accorded to an employee in a position such as you have described prior to 1994, the status of an employee currently in such a position is governed by the provisions of R.C. 5901.06 and R.C. 5901.07, as amended by Am. Sub. H.B. 448. If the position is that of executive director, it is unclassified under R.C. 5901.06. If the position is that of veterans service officer acting as executive director, it is classified under R.C. 5901.07.

It is axiomatic, however, that classified or unclassified status is not established simply by accepting the title or characterization assigned to an employee's position by the appointing authority. *Yarosh v. Becane*, 63 Ohio St. 2d 5, 10, 406 N.E.2d 1355, 1359 (1980); *In re Termination of Employment*, 40 Ohio St. 2d 107, 113, 321 N.E.2d 603, 607-08 (1974); *State ex rel. Emmons v. Guckenberger*, 131 Ohio St. 466, 469-70, 3 N.E.2d 502, 503 (1936). Rather, the determination of classified or unclassified status requires that "all duties, both assigned and performed, respecting the position must be evaluated." *Rarick v. Board of County Comm'rs*, 63 Ohio St. 2d 34, 37, 406 N.E.2d 1101, 1103 (1980) (determining by analysis of duties whether an employee held an unclassified fiduciary administrative position under R.C. 124.11(A)(9)); accord *In re Termination of Employment*, 40 Ohio St. 2d at 113-14, 321 N.E.2d at 608; 1975 Op. Att'y Gen. No. 75-023 at 2-94.

Although these Ohio Supreme Court cases dealt only with determining whether positions were unclassified under the fiduciary exception of R.C. 124.11(A), it follows that if an appointing authority asserts that another statute governs, it is also necessary to examine the duties of the employee in order to determine whether the position held is in fact the position governed by that statute. See *Suso v. Ohio Dep't of Dev.*, 93 Ohio App. 3d at 502-04, 639 N.E.2d at 123-24 (determining by analysis of duties whether an employee held an unclassified professional or technical position pursuant to R.C. 122.11); *Westfall v. Department of Commerce*, No. 93AP-1067, 1994 Ohio App. LEXIS 225 (Franklin County Jan. 25, 1994) (determining by analysis of duties whether an employee held the unclassified position of chief deputy fire marshal pursuant to R.C. 3737.22(B)); *Kohls v. Perry County Bd. of Mental Retardation*, No. 92APE01-122, 1994 Ohio App. LEXIS 4388 (Franklin County Sept. 29, 1994) (determining by analysis of duties whether an employee was an unclassified management employee pursuant to R.C. 124.11 and R.C. 5126.20). Accordingly, a veterans service commission cannot control the civil service status of the position described in your request simply by according it the title of executive director. Rather, the proper title of the position and its corresponding civil service status must be determined by an examination of the job duties assigned to and performed by an employee in that position.

Pursuant to longstanding language in R.C. 5901.07,² the duties of a county veterans service officer are to “advise and assist” veterans and their eligible dependents “in presenting claims or obtaining rights or benefits.” R.C. 5901.07 further provides that these duties may be performed “on a part- or full-time basis.” The term “executive director,” as used in R.C. 5901.06 and R.C. 5901.07, is not defined or described by R.C. 5901.06, R.C. 5901.07, or any other provision of R.C. Chapter 5901. An executive director, however, is generally understood as one whose duties relate to administration and management, including supervision of subordinates. See *Black's Law Dictionary* 569 (6th ed. 1990) (defining “executive employees” and “executive officer”); *Webster's Third New International Dictionary* 794 (unabridged ed. 1993) (defining “executive”). See generally R.C. 1.42 (providing that terms undefined by statute should be understood in accordance with their common usage); *Suso*, 93 Ohio App. 3d at 501-02, 639 N.E.2d at 122-23 (applying R.C. 1.42 in the context of a civil service status determination).

In order to determine which status applies when duties of a veterans service officer and executive director are combined, we note first that R.C. 5901.07 expressly provides that a county veterans service officer may act as an executive director. There is, however, no corresponding provision in R.C. 5901.06 that an executive director may act as a county veterans service officer. Thus, when R.C. 5901.06 is read in context with R.C. 5901.07, the

² The duties of a county veterans service officer were not altered substantially by 1993-1994 Ohio Laws, Part IV, 6089, 6093 (Am. Sub. H.B. 448, eff. July 22, 1994). These duties are essentially the same as when the position was first established in 1945. See 1945-1946 Ohio Laws 673, 674 (Am. S.B. 26, approved July 13, 1945).

inference is that the term “executive director” in R.C. 5901.06 is intended to describe a position that is separate and distinct from that of county veterans service officer. See generally *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995, 998 (1995) (“[a]ll statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes”).

A veterans service commission, established pursuant to R.C. 5901.02, is a creature of statute, whose authority to appoint employees is limited to that expressly conferred or necessarily implied by R.C. 5901.06 and R.C. 5901.07. 1996 Op. Att’y Gen. No. 96-040 at 2-155. See generally *Dayton Communications Corp. v. Public Utilities Comm’n*, 64 Ohio St. 2d 302, 307, 414 N.E.2d 1051, 1054 (1980). Accordingly, if a veterans service commission chooses to establish a position that combines the duties of county veterans service officer and executive director, such position is governed by the provisions of R.C. 5901.07, and is in the classified service. The veterans service commission cannot alter the classified status of such a position simply by assigning it the title of executive director and purporting to act under a different statute. See, e.g., *State ex rel. Adams v. Wallace*, 92 Ohio App. 3d at 466, 636 N.E.2d at 331 (concluding that the Department of Human Services could not avoid the requirement of R.C. 5101.07 that division chiefs be in the classified service by purporting to appoint them as “deputies and assistants” pursuant to R.C. 124.11(A)(9)). See generally *Yarosh; Rarick; In re Termination of Employment, State ex rel. Emmons v. Guckenberger*.

This conclusion is further reinforced by examination of the civil service status accorded positions with a veterans service commission prior to the enactment of Am. Sub. H.B. 448. In the absence of specific statutory provisions, the status of a county veterans service officer and of positions involving administrative, managerial duties of an executive nature were governed by the general provisions of R.C. 124.11.³ It had long been recognized that the position of county veterans service officer was classified pursuant to R.C. 124.11(B). See 1989 Op. Att’y Gen. No. 89-056 at 2-238; 1958 Op. Att’y Gen. No. 1648, p. 54; 1948 Op. Att’y Gen. No. 4130, p. 594, 595. A purely executive position would have been unclassified pursuant to the provisions of R.C. 124.11(A)(8), which permit commissions to designate up to three clerical and administrative support employees as

³ Pursuant to R.C. 124.11(B), the classified service is comprised of all positions “not specifically included in the unclassified service.” Positions specifically included in the unclassified service are enumerated in R.C. 124.11(A). Some of these positions are identified by title; others are identified more generally by specifying particular characteristics that will render a position unclassified. Compare R.C. 124.11(A)(4) (“the members of county or district licensing boards”) with R.C. 124.11(A)(9) (“the deputies and assistants of state agencies authorized to act for and on behalf of the agency, or holding a fiduciary or administrative relation to that agency”).

unclassified. A single position combining the duties of these two classified and unclassified positions would have been governed by the general rule that such a hybrid position is placed in the unclassified service, regardless of which duties are primary. See *Rarick v. Board of County Comm'rs*, 63 Ohio St. 2d at 38-39, 406 N.E.2d at 104 (employees placed in unclassified service because of the unclassified character of two out of six assigned and performed duties); *Honaker v. Scioto County Common Pleas Court*, Nos. 92-CA-2087, 92-CA-2088, 1993 Ohio App. LEXIS 5964 (Scioto County Dec. 6, 1993) (holding that an employer need only prove that some of employee's duties are unclassified, not that the unclassified duties are the employee's primary responsibilities), *quoted in Smith v. Sushka*, 103 Ohio App. 3d 465, 472, 659 N.E.2d 875, 880 (Washington County 1995); *Miller v. Ohio Dep't of Transp.*, No. 9-CA-82, 1984 Ohio App. LEXIS 11099 (Fairfield County Sept. 5, 1984) (rejecting argument that unclassified status requires that majority of a position's duties be unclassified). Consistent with this rule, you have indicated that, prior to the enactment of Am. Sub. H.B. 448, the position you have described was considered to be in the unclassified service.

As the above discussion indicates, there was no need for a legislative amendment to establish that a county veterans service officer is in the classified service or that an individual whose duties are limited to those of an executive director is in the unclassified service. By designating the hybrid position of veterans service officer and executive director as classified, however, Am. Sub. H.B. 448 reversed the effect of the general rule that hybrid positions are unclassified. Amendments to a statute are presumed to have a substantive effect. *Dennison v. Dennison*, 165 Ohio St. 146, 134 N.E.2d 574 (1956). Thus, the purpose of Am. Sub. H.B. 448 was to extend the protection of classified service to persons who perform both types of duties. Accordingly, when a veterans service commission appoints an employee to a position that requires performance of the administrative and managerial duties of an executive director, and also requires the performance of duties of a county veterans service officer, the position is that of county veterans service officer acting as executive director and is in the classified civil service pursuant to R.C. 5901.07, regardless of the title the veterans service commission assigns to the position.

Notwithstanding this conclusion, you should be aware that it is possible for a factual dispute to exist as to whether a particular employee in such a classified position is entitled to claim the benefits of classified employment. In a recent case, the Ohio Supreme Court held as follows:

In an appeal pursuant to R.C. 124.34 by a terminated public employee who claims classified status, the state may assert defenses of waiver and estoppel if the employee has accepted appointment to a position designated as unclassified and also has accepted the benefits of that unclassified position, regardless of whether the employee's actual job duties fall within the classified status.

Chubb v. Ohio Bureau of Workers' Compensation, 81 Ohio St. 3d 275, 690 N.E.2d 1267 (1998) (syllabus). In general, the availability of the waiver or estoppel defense in a particular case will depend on actions occurring at the time of appointment and the understanding existing between the employee and the appointing authority at that time. The court in *Chubb* has cited with approval a number of Ohio appellate court decisions that serve to illustrate the types of factual situations that support a defense of waiver or estoppel. *Id.* at 279, 690 N.E.2d at 1270. Whether an employee in a particular case is subject to estoppel or waiver must be determined by the facts of that case, and cannot be determined by an opinion of the Attorney General. See also note one, *supra*.

It is, therefore, my opinion, and you are hereby advised that when a veterans service commission appoints an employee to a position that requires performance of administrative and managerial duties of an executive director, and also requires performance of duties of a county veterans service officer, the position is that of county veterans service officer acting as executive director and is in the classified civil service pursuant to R.C. 5901.07, regardless of the title the veterans service commission assigns to the position.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

June 16, 1998

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

SYLLABUS:

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When a veterans service commission appoints an employee to a position that requires performance of administrative and managerial duties of an executive director, and also requires performance of duties of a county veterans service officer, the position is that of county veterans service officer acting as executive director and is in the classified civil service pursuant to R.C. 5901.07, regardless of the title the veterans service commission assigns to the position.