

OPINION NO. 93-008**Syllabus:**

R.C. 4755.03, as amended by Sub. S.B. 5, 120th Gen. A. (1993) (eff. March 16, 1993), prohibits a person who is a physical therapist, an occupational therapist, or an athletic trainer who has been licensed to practice physical therapy, occupational therapy, or as an athletic trainer within three years immediately preceding appointment from serving as executive director of the Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board.

To: Martha S. Cameron, President, Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board, Columbus, Ohio
By: Lee Fisher, Attorney General, April 14, 1993

You have asked for an opinion concerning the amendment of R.C. 4755.03 in both Am. Sub. S.B. 124, 119th Gen. A. (1992) (eff. April 16, 1993) and Sub. S.B. 5, 120th Gen. A. (1993) (eff. March 16, 1993). These amendments impose new limitations on a person's eligibility to serve as executive director of the Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board (hereinafter the Board).

Background

Prior to its recent amendments, R.C. 4755.03 read in pertinent part:

The executive director of the board, appointed by the board, shall be a physical therapist who is licensed to practice physical therapy and who has been engaged in or actively associated with the practice of physical therapy in this state for at least five years immediately preceding appointment, or an occupational therapist who is licensed to practice occupational therapy and who has been engaged in or actively associated with the practice of occupational therapy in this state for at least five years immediately preceding appointment, or a licensed athletic trainer who has been engaged in athletic training in this state for at least five years immediately preceding appointment.

1989-1990 Ohio Laws, Part IV, 6307, 6319 (Am. Sub. H.B. 677, eff., in part, July 24, 1990). As amended by Sub. S.B. 5,¹ R.C. 4755.03 states, in pertinent part:

The executive director of the board appointed by the board *shall not be* a physical therapist, an occupational therapist, or an athletic trainer who has been licensed to practice physical therapy, occupational therapy, or as an athletic trainer in this state within three years immediately preceding appointment. The executive director shall serve at the pleasure of the board. (Emphasis added.)

According to your letter, the person currently serving as executive director was appointed to that position on October 15, 1985, and is currently licensed to practice occupational therapy

¹ Although R.C. 4755.03 was amended in Am. Sub. S.B. 124, to become effective on April 16, 1993, Sub. S.B. 5 subsequently amended R.C. 4755.03, as amended by Am. Sub. S.B. 124, and became effective as emergency legislation on March 16, 1993.

in this state, having been so licensed since 1978. Based upon these facts, you specifically ask: "1) can this statute be applied retroactively to the current executive director, and 2) can the Board legally retain the services of the current executive director or must it terminate her employment?"

Amendments to R.C. 4755.03 Concerning Executive Director

In order to address your questions, it is first necessary to examine the pertinent language of R.C. 4755.03 to determine its present requirements. R.C. 4755.03 states that, "[t]he executive director of the board appointed by the board *shall not be* [one of the named professionals] who has been licensed to practice [any of those professions] in this state within three years immediately preceding appointment" (emphasis added). Thus, R.C. 4755.03 now prohibits anyone who is one of the named professionals and has been licensed in one of those professions within three years of appointment from serving as the Board's executive director.

Legislative Power with Respect to Qualification for Public Employment

In the situation you describe, it appears that the General Assembly has determined that the interests of the Board will be better served by having an independent person, who is not licensed by, and, therefore, has no special interest in, any one of the three professions regulated by the Board, to serve as its executive director. Concerning the General Assembly's authority to change the qualifications for a specified governmental position, 1988 Op. Att'y Gen. No. 88-059 at 2-299 states:

Legislative enactments dealing with the status of governmental employees are generally considered to be matters of policy that are subject to change at the discretion of the legislature. *See, e.g., Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("[t]he principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy").... It has, thus, been recognized that the General Assembly may, by legislative action, remove certain governmental employees from the classified civil service without violating constitutional prohibitions against the taking of property, the impairment of contractual rights, or the enactment of retroactive laws, and without violating due process or equal protection guarantees.... *See generally... Jackson v. Kurtz*, 65 Ohio App. 2d 152, 154, 416 N.E.2d 1064, 1066 (Hamilton County 1979) ("[a] public employee holds his position as a matter of law and not of contract")....

Thus, as a general rule, it is within the prerogative of the General Assembly to determine qualifications for public employment. Of course, in establishing such qualifications, the General Assembly may not violate any provisions of the United States or Ohio Constitutions.

Constitutional Prohibition Against Retroactive Laws

Your underlying concern is whether the qualifications established by the recent amendments to R.C. 4755.03 apply to the person currently serving as executive director, and, if so, whether such application violates the portion of Ohio Const. art. II, §28 prohibiting the passage of retroactive laws. Ohio Const. art. II, §28 states, in pertinent part: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts...." The prohibition against the General Assembly's passage of retroactive laws was summarized in *Rairden v. Holden*, 15 Ohio St. 207, 210 (1864), stating: "Upon principle,

every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'" (Citation omitted.) Thus, so long as the above-quoted portion of R.C. 4755.03 does not impair or take away some vested right, nor impose a new obligation, duty or disability with respect to a past transaction, it does not violate the prohibition of Ohio Const. art. II, §28 against the passage of retroactive laws.

Operation of Amendments to R.C. 4755.03 by Sub. S.B. 5

According to R.C. 1.48, it is presumed that all laws are prospective in their operation, unless expressly made retrospective. Nothing in the language of Sub. S.B. 5 indicates the General Assembly's intent that the amendment to R.C. 4755.03 have retrospective operation.

In the situation you describe, the General Assembly has altered the qualifications for serving in the position of executive director of the Board. Application of the new qualifications to the person currently serving as the executive director will disqualify her from continuing to serve in that position. Such application does not, however, constitute a retroactive application of the law. Rather, the new qualifications are being applied prospectively to limit only future service in the position of executive director of the Board, without any effect on the present executive director's past service in that position prior to the effective date of the amendment to R.C. 4755.03 that established the new qualifications.

As stated in *State ex rel. Bouse v. Cickelli*, 165 Ohio St. 191, 192, 134 N.E.2d 834, 835 (1956), a statute "is not retroactive simply because the test involves a time factor extending prior to the effective date of the amendment. The test is to be applied to future cases, *i.e.*, cases after its effective date." Accordingly, application of the new qualifications for service as executive director of the Board to the person currently serving in that position is a prospective application, applying only to her ability to serve after the new qualifications become effective, even though the new qualifications relate to periods of time prior to the effective date of the statutory amendments creating the new qualifications.

Finally, R.C. 4755.03 states in pertinent part: "The executive director of the board shall serve at the pleasure of the board." The position of executive director of the Board is, therefore, clearly included in the unclassified civil service. *See Johnson v. State*, 54 Ohio Misc. 7, 14, 375 N.E.2d 1268, 1271 (C. P. Montgomery County 1977) ("R.C. 124.11 is not the final arbiter of whether a given position is in the classified or unclassified civil service....[W]here 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 therein from which the court can imply such legislative designation, then that language controls as to the classified or unclassified status of the position"). A person serving in an unclassified position has no expectation of continuing in that position. *See* 1991 Op. Att'y Gen. No. 91-011 at 2-58 ("one of the distinguishing characteristics between individuals in the classified service and the unclassified service is that individuals in the classified service have been granted, pursuant to R.C. 124.11 and R.C. 124.34, a statutory claim of entitlement to continued employment, to which individuals in the unclassified service are not entitled"). *See generally Lawrence v. Edwin Shaw Hospital*, 34 Ohio App. 3d 137, 517 N.E.2d 984 (Franklin County 1986); *Shearer v. Cuyahoga County Hospital*, 34 Ohio App. 3d 59, 60, 516 N.E.2d 1287, 1288 (Cuyahoga County 1986) (discussing permissibility of terminating employment of unclassified employee).

Since the position of executive director is in the unclassified service, the person currently holding that position is entitled to serve only at the pleasure of the Board. Consequently, the person serving as executive director has no vested right to continue in that position. *See Lee v.*

Cuyahoga County Court of Common Pleas, 76 Ohio App. 3d 620, 602 N.E.2d 761 (Cuyahoga County 1991) (concluding that an unclassified civil service employee has no vested right or private right of property in his employment). Application of the new qualifications to the current executive director, resulting in her inability to continue in that position, does not, therefore, impair any vested right of the current executive director in violation of the constitutional prohibition against the passage of retroactive laws. *See Shearer v. Cuyahoga County Hospital*, *supra*.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, R.C. 4755.03, as amended by Sub. S.B. 5, 120th Gen. A. (1993) (eff. March 16, 1993), prohibits a person who is a physical therapist, an occupational therapist, or an athletic trainer who has been licensed to practice physical therapy, occupational therapy, or as an athletic trainer within three years immediately preceding appointment from serving as executive director of the Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board.