July 29, 1996

OPINION NO. 96-040

The Honorable J.B. Collier, Jr.
Lawrence County Prosecuting Attorney
Lawrence County Courthouse
Ironton, Ohio 45638

Dear Prosecutor Collier:

I am in receipt of your request for an opinion on the question whether a county veterans service commission may employ an executive director for a definite period of time. Your representative has indicated that the county veterans service commission proposes to employ an executive director pursuant to R.C. 5901.06, which states that the commission "may employ an executive director, who...shall be employed in the unclassified service."[1] *See* R.C. 124.01(A), .11. At the time of employment, the commission would like to indicate to the executive director — by resolution or contract — its intention that the executive director serve for a specified period of time. The terms of the employment of the county veterans service commission's executive director are not the subject of a collective bargaining agreement under R.C. Chapter 4117.

Under Ohio law, civil service is divided into the classified service and the unclassified service. R.C. 124.11; *see* Ohio Const. art. XV, § 10. Classified civil servants attain their positions through a merit system based primarily on competitive examinations and are afforded procedural protection from arbitrary removal. R.C. 124.23, .34. In contrast, unclassified civil servants are appointed at the discretion of the appointing authority and serve at the pleasure of the appointing authority. Unclassified employees may be dismissed at any time without cause, provided that dismissal is not made for discriminatory or other unlawful reasons. *See Yarosh v. Becane*, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980); *Suso v. Ohio Dep't of Dev.*, 93 Ohio App. 3d 493, 639 N.E.2d 117 (Franklin County 1993), *motion to certify overruled*, 69 Ohio St. 3d 1449, 633 N.E.2d 543 (1994); *Eudela v. Ohio Dep't of Mental Health & Mental Retardation*, 30 Ohio App. 3d 113, 506 N.E.2d 947 (Franklin County 1986). Thus, a classified employee has a statutory claim of entitlement to

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[1] R.C. 5901.07 authorizes a veterans service commission to employ one or more county veterans service officers in the classified service and permits one of these officers to act as executive director. This, however, is not the arrangement at issue in your opinion request.

continued employment and an unclassified employee has no such claim of entitlement. *See State ex rel. Trimble v. State Bd. of Cosmetology*, 50 Ohio St. 2d 283, 364 N.E.2d 247 (1977); *Seltzer v. Cuyahoga County Dep't of Human Services*, 38 Ohio App. 3d 121, 528 N.E.2d 573 (Cuyahoga County 1987); 1993 Op. Att'y Gen. No. 93-008.

Your request indicates that the county veterans service commission desires, at the time of employing an executive director, to indicate by resolution or contract that it intends to have the executive director serve for a specified period of time. To the extent that a statement of present intention to retain an appointee for a period of time merely reflects the current hope of the commission, it does not appear to be prohibited by the civil service provisions. *See generally Mackin v. City of Avon Lake*, 12 Ohio App. 3d 70, 465 N.E.2d 1355 (Lorain County 1983) (where city charter provides that the appointee holds office at the pleasure of the appointing authority but in no event longer than the specified term, it gives rise to an indefinite term). If such a statement, however, is intended to vary the terms of employment that by statute govern unclassified employees, or to have any other legal effect upon the executive director's unclassified employment, it is inconsistent with applicable statutory provisions and cannot be allowed.

The question whether an unclassified civil servant may, by contract, be granted a specific term of employment was addressed in detail by my predecessor in 1991 Op. Att'y Gen. No. 91-011. That opinion concludes that a contract granting an unclassified employee a specific term of employment "would clearly frustrate the General Assembly's intent to vest appointing authorities with the discretion to appoint and remove individuals in the unclassified service." *Id.* at 2-59. I concur in the conclusion reached in 1991 Op. Att'y Gen. No. 91-011 and find that the analysis set forth in that opinion applies also to the question you have presented. When a county veterans service commission employs an executive director pursuant to R.C. 5901.06 and there is no collective bargaining agreement under R.C. Chapter 4117 governing such employment, the executive director is in the unclassified service and serves at the pleasure of the commission. The commission may indicate the period for which it currently intends to have the executive director serve, but the commission cannot by contract or resolution alter its legal right under civil service law to dismiss the executive director without cause at any time, subject to restraints governing unlawful dismissals. *See* R.C. 124.06.

In general, positions are placed in the unclassified service when they involve policy-making or fiduciary responsibilities, and the intent is that the appointing authority should be able to choose the individuals who hold those positions. *See* R.C. 124.11(A); *State ex rel. Charlton v. Corrigan*, 36 Ohio St. 3d 68, 521 N.E.2d 804 (1988). By specifying that an executive director employed under R.C. 5901.06 is in the unclassified service, the General Assembly has indicated that the executive director serves at the pleasure of the commission and may be removed at any time without cause, provided that the removal is not made for discriminatory or other unlawful reasons. The General Assembly thus has preserved to the commission the right at any time to select the executive director who will best serve its purposes. *See generally In re Osborn*, No. CA-1009 (Ct. App. Ashland County Aug. 20, 1992).

The commission, as a creature of statute, has only those powers that it has been expressly given by statute and those that are necessarily implied from the express powers. The commission has no express authority to vary the statutory provisions governing the employment of its executive director, and no such authority may be implied. The General Assembly has not granted a county veterans service commission authority to grant an unclassified employee, by contract or resolution, rights to continued employment that exceed those granted by statute. *Cf. Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, 3 Ohio App. Unrep. 252 (Ct. App. Lorain County May 23, 1990) (No. 89CA004624) (board of education); *Hart v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89CA004708 (Ct. App. Lorain County Nov. 7, 1990) (board of education); 1991 Op. Att'y Gen. No. 91-011 (board of county commissioners). In particular, the General Assembly has not provided for the executive director of a county veterans service commission to have a right to continued employment while serving in the unclassified service, and the commission has no authority to grant the executive director any such right. *See generally Beery v. Ohio Bd. of Chiropractic Examiners*, 66 Ohio App. 3d 206, 583 N.E.2d 1083 (Franklin County 1990).[2]

If a county veterans service commission were to grant an executive director the right to employment for a specified period, the commission would be forfeiting its right, or the right of a successor commission, to terminate the employment relationship at will. Placement of the executive director in the unclassified service indicates that the commission has discretion to take action at any time on the employment of the executive director. The commission lacks authority to restrict its future actions, or those of a successor board, in this regard. *See, e.g., State ex rel. Hubbard v. Hilty*, 31 Ohio L. Abs. 538, 540 (Ct. App. Allen County 1940) (board of county commissioners "is inhibited by law from making any agreement which has the effect of restraining it or its successors in office from exercising any of the discretionary powers vested in it, or performing any of the duties imposed upon it by law"); 1991 Op. Att'y Gen. No. 91-011.

Therefore, it is my opinion, and you are advised, that when a county veterans service commission employs an executive director pursuant to R.C. 5901.06 and there is no collective bargaining agreement under R.C. Chapter 4117 governing such employment, the executive director is in the unclassified service and serves at the pleasure of the commission. The commission may indicate the period for which it currently intends to have the executive director serve, but the commission cannot by contract or resolution alter its legal right under civil service law to dismiss the executive director without cause at any time, subject to restraints governing unlawful dismissals. (1991 Op. Att'y Gen. No. 91-011, followed.)

Respectfully,

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[2] Various statutes grant to individuals who are appointed from classified positions to unclassified positions the right to return to the classified service. *See* R.C. 124.312 (Department of Administrative Services); R.C. 329.02 (county human services director); R.C. 5123.08 (Department of Mental Retardation and Developmental Disabilities). No statute grants such rights to the executive director of a county veterans service commission.

BETTY D. MONTGOMERY
Attorney General

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SYLLABUS: 96-040

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