March 9, 2000

OPINION NO. 2000-017

C. Scott Johnson, Director
Department of Administrative Services
30 East Broad Street, 40th Floor
Columbus, Ohio 43215

Dear Director Johnson:

You have submitted an opinion request in which you ask the following questions:

1. Given the recent revision to section 124.27 of the Revised Code, does the State Personnel Board of Review have jurisdiction to review employee probationary removals made pursuant to section 124.27?

2. During the employee probationary period, are appointing authorities required to file [R.C.] 124.34 orders of removal with the State Personnel Board of Review?

3. Does the property interest of classified employees established in section 124.34 of the Revised Code extend to a probationary employee whose promotion or appointment to a classified civil service position is not yet final?

In order to answer your questions, let us begin with a brief review of Ohio's civil service scheme.[1] In order to carry out the mandate of Ohio Const. art. XV, § 10,[2] the General Assembly has

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[1] The state's civil service scheme includes all "offices and positions in the service of the state, the counties, and general health districts thereof, except the cities, city health districts, and city school districts." R.C. 124.01(B). The terms and conditions of certain public employees' employment may, however, be governed by a collective bargaining agreement entered into pursuant to R.C. Chapter 4117. Because your opinion request does not mention the possible application of such an agreement, however, this opinion will not discuss that possibility. *See generally Bashford v. City of Portsmouth*, 52 Ohio St. 3d 195, 556 N.E.2d 477 (1990) (application of collective bargaining agreement to termination of probationary civil service employees); *Biddle v. City of*

enacted R.C. Chapter 124, which "provides a civil service system which is designed to fill positions based on merit and fitness ascertained, as far as practicable, by examination." *Yarosh v. Becane*, 63 Ohio St. 2d 5, 9, 406 N.E.2d 1355, 1358 (1980). As summarized in *Yarosh v. Becane*:

> R. C. 124.11 divides the civil service into the classified and unclassified service. Positions in the classified service are those for which merit and fitness can be determined by examination. *Employees in the classified service can only be removed for good cause and only after the procedures enumerated in R. C. 124.34 and the rules and regulations thereunder are followed.*[3] Positions in the unclassified service require qualities that the General Assembly has deemed are not determinable by examination. Employees in the unclassified service do not receive the protections afforded employees in the classified service.

63 Ohio St. 2d at 9, 406 N.E.2d at 1359 (emphasis and footnote added).

The manner of appointment to a position in the classified civil service is provided for in R.C. 124.27, pursuant to which each original or promotional appointment, except those of certain public safety personnel, "shall be for a probationary period." R.C. 124.27 further provides that, "no appointment or promotion is final until the appointee has satisfactorily served the probationary period." R.C. 124.27. It is the probationary period served by classified civil service employees that is the focus of your concerns.

Dayton, 48 Ohio App. 3d 116, 548 N.E.2d 329 (Montgomery County 1988) (employee probationary periods are appropriate matters for collective bargaining under R.C. Chapter 4117).

[2] *See generally* Ohio Const. art. XV, § 10 ("[a]ppointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision").

[3] Among the protections afforded permanent classified employees is the procedure for removals found in R.C. 124.34(B). *See Hill v. Gatz*, 63 Ohio App. 2d 170, 177, 410 N.E.2d 1268, 1273 (Cuyahoga County 1979). Pursuant to this provision, an appointing authority must serve an employee with a copy of an order of removal, which must set forth the reasons therefor. The order of removal must also be filed with the Director of Administrative Services and with the State Personnel Board of Review or the civil service commission, as may be appropriate. R.C. 124.34(B) also allows for an appeal in writing to the State Personnel Board of Review or civil service commission from an order of removal. "If such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority." R.C. 124.34(B). In the case of a removal for disciplinary reasons, the appointing authority or employee may appeal the decision of the State Personnel Board of Review to the common pleas court of the county "in which the employee resides in accordance with the procedure provided by [R.C. 119.12]." *Id.*

Let us now turn to your first question which asks, given the amendment of R.C. 124.27 in Am. Sub. S.B. 144, 122nd Gen. A. (1998) (eff. March 30, 1999), whether the State Personnel Board of Review has jurisdiction to hear appeals of actions in which a probationary employee is removed during the probationary period. As a creature of statute, the State Personnel Board of Review possesses only those duties and functions that have been assigned it by statute. *See Ketron v. Ohio Dept. of Transportation*, 61 Ohio App. 3d 657, 573 N.E.2d 743 (Franklin County 1991). We must, therefore, determine whether the State Personnel Board of Review has been granted statutory authority to hear such appeals.

Prior to its amendment in Am. Sub. S.B. 144, R.C. 124.27[4] provided for the probationary period of classified employees, in pertinent part, as follows:

> If the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period *after completion of sixty days or one-half of his probationary period*, whichever is greater. If the appointing authority's decision is to remove the appointee, his communication to the director shall indicate the reason for such decision. Dismissal or reduction may be made under the provisions of [R.C. 124.34] during the first sixty days or first half of the probationary period, whichever is greater. (Emphasis added.)

It is this portion of former R.C. 124.27 that has long provided the State Personnel Board of Review jurisdiction to hear appeals of dismissed probationary employees, but only of those removals that occurred during the first half of their probationary period; the statute conferred no jurisdiction upon the State Personnel Board of Review to hear appeals in the case of removals that occurred during the second half of the probationary period. *See, e.g., Walton v. Montgomery County Welfare Dept.*, 69 Ohio St. 2d 58, 430 N.E.2d 930 (1982); *Clark v. Ohio Dept. of Transp.*, 89 Ohio App. 3d 96, 99, 623 N.E.2d 631, 633 (Fayette County 1993) (affirming the decision of the State Personnel Board of Review that it had no jurisdiction to hear an appeal of a probationary employee's reduction during the second half of the probationary period, and stating, "[a]n appointing authority may reduce the rank of a probationary employee after the completion of the first half of the employee's probationary period, and, by law, that demotion is not subject to any additional judicial review"); *Chapman v. Ohio Bur. of Emp. Serv.*, 69 Ohio App. 3d 390, 590 N.E.2d 1288 (Franklin County 1990) (affirming the State Personnel Board of Review's finding that it had no jurisdiction over an appeal from a probationary employee's removal during the second half of his probationary period); *Hill v. Gatz*, 63 Ohio App. 2d 170, 410 N.E.2d 1268 (Cuyahoga County 1979) (syllabus, paragraph one) ("[t]he continued employment of a probationary civil servant is at the discretion of the appointing authority after completion of sixty days or after the first half of the probationary period, whichever is greater. The decision of the appointing authority made during such period to terminate a probationary civil servant's employment is final and not subject to administrative or judicial review").

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[4] *See* 1995-1996 Ohio Laws, Part I, 900, 1002-03 (Am. Sub. H.B. 117, eff, in pertinent part, Sept. 29, 1995).

The operation of former R.C. 124.27 was addressed in *Walton v. Montgomery County Welfare Dept.*, which concluded in the syllabus that, "[t]he removal of a probationary employee who has completed 60 days or one-half of her probationary period, whichever is greater, may not be appealed to the State Personnel Board of Review." In explaining its conclusion, the *Walton* court began by noting that probationary periods had been included in the civil service scheme "for the benefit of the appointing authority to aid in the determination of merit and fitness for civil service employment," and that, as a result, "the General Assembly historically has provided for a degree of leeway in the dismissal of probationary employees." 69 Ohio St. 2d at 59, 430 N.E.2d at 932.

While recognizing that former R.C. 124.27 provided that no appointment was final until the satisfactory completion of the probationary period, the *Walton* court explained that the "two-stage probationary process" embodied in then R.C. 124.27[5] was the result of the General Assembly's balancing of different policy interests:

> This policy affords a probationary employee the criteria for his removal and the full appeal rights of a tenured employee at the earlier stages of public employment. Thus, probationary employees may receive a fair trial on the job and have "an opportunity to demonstrate their ability and competence in their job positions. *Hill v. Gatz* (1979), 63 Ohio App. 2d 170, 173-174. On the other hand, at the later stages of probationary employment, the interest of the appointing authority in maintaining a satisfactory and competent work force comes into play, and discretionary removal is allowed.

69 Ohio St. 2d at 61-62, 430 N.E.2d at 933 (footnote omitted); *see also Bashford v. City of Portsmouth*, 52 Ohio St. 3d 195, 556 N.E.2d 477 (1990).

In other words, the General Assembly's failure to provide a right of appeal to a probationary employee removed for unsatisfactory service during the second half of the probation period permitted the appointing authority a degree of discretion in determining the merit and fitness of the probationary employee and was consistent with the purpose of requiring employees to serve a probationary period. At the same time, however, in the interest of giving probationary employees a limited period in which to demonstrate their merit and fitness, the General Assembly included in former R.C. 124.27 a restriction upon the appointing authority's discretion to remove probationary employees for unsatisfactory service by authorizing the removal of probationary employees during the first half of the probationary period only in accordance with R.C. 124.34.

The basis for the *Walton* court's holding was that R.C. 124.27, as then in effect, created a comprehensive scheme governing the appointment, removal, and appeal rights of probationary employees. The rights of probationary employees, including their rights with respect to removal, were dictated solely by the terms of R.C. 124.27. Although R.C. 124.27 authorized removals of employees during the first half of probation only in accordance with R.C. 124.34, *see generally* note

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[5] *See* 1979-1980 Ohio Laws, Part II, 4380 (Sub. H.B. 1017, eff. Jan. 15, 1981) (amending R.C. 124.27, but retaining the above-quoted portion of that statute).

three, *supra*, it did not impose that limitation upon the removal of employees during the second half of their probationary period.[6] *See Hill v. Gatz*, 63 Ohio App. 2d at 173, 410 N.E.2d at 1271 (finding that pursuant to former R.C. 124.27, "no provision is made for a hearing if the appointing authority terminates the employment of a probationary employee during the second half of his probationary period…. The only time a probationary employee is entitled to a hearing is if his employment is terminated during the … first half of his probationary period"). It is in light of this judicial interpretation of former R.C. 124.27 that we must consider the effect of the changes made to R.C. 124.27 by Am. Sub. S. B. 144.

As amended by Am. Sub. S.B. 144, R.C. 124.27 currently states in pertinent part:

> All original and promotional appointments, including provisional appointments made pursuant to [R.C. 124.30], *shall be for a probationary period*, not less than sixty days nor more than one year, to be fixed by the rules of the director, except as provided in [R.C. 124.231], or except original appointments to a police department as a police officer, or to a fire department as a firefighter which shall be for a probationary period of one year, and *no appointment or promotion is final until the appointee has satisfactorily served the probationary period*. Service as a provisional employee in the same or similar class shall be included in the probationary period. If the service of the probationary employee is unsatisfactory, the employee *may be removed or reduced at any time during the probationary period*. If the appointing authority's decision is to remove the appointee, the appointing authority's communication to the director shall indicate the reason for such decision. Any person appointed to a position in the classified service under [R.C. 124.01-.64], except temporary and exceptional appointments, shall be or become forthwith a resident of the state. (Emphasis added.)

Am. Sub. S.B. 144 has thus made two significant changes to R.C. 124.27. First, although R.C. 124.27 continues to condition the finality of an original or promotional appointment upon successful completion of a probationary period, it no longer provides separate bases and procedures for the removal of an employee during the probationary period depending upon the portion of the probationary period in which the removal occurs. Rather, R.C. 124.27 expands to the entire probationary period the power of appointing authorities to remove probationary employees for unsatisfactory service.

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[6] In *Walton v. Montgomery County Welfare Dept.*, 69 Ohio St. 2d 58, 430 N.E.2d 930 (1982), the court also noted that its decision was in accord with the administrative rules concerning the State Personnel Board of Review's authority over appeals from probationary removals. *See* 2 Ohio Admin. Code 124-1-05 (eff. March 1, 1993) ("[t]he board has no jurisdiction over removals or reductions in the second half of a probationary period"). We note, however, that rule 124-1-05 was adopted prior to the amendment of R.C. 124.27 in Am. Sub. S.B. 144, 122nd Gen. A. (1998) (eff. March 30, 1999).

The other significant change that Am. Sub. S.B. 144 has made to R.C. 124.27 is the deletion of the following language: "Dismissal or reduction may be made under provisions of [R.C. 124.34] during the first sixty days or first half of the probationary period, whichever is greater." The removal of this language, long recognized as the basis of the State Personnel Board of Review's jurisdiction to hear an appeal under R.C. 124.34 from the removal of a probationary employee during the first half of the probationary period,[7] coupled with the expansion of an appointing authority's power to remove a probationary employee for unsatisfactory service at any time during the probationary period, clearly indicates that the General Assembly intends that the State Personnel Board of Review no longer have jurisdiction over probationary removals, regardless of when such removals occur.

We also note that, at the same time the General Assembly amended R.C. 124.27, it also amended R.C. 124.34. Am. Sub. S.B. 144. Although making other changes in R.C. 124.34, the General Assembly has not included any language in R.C. 124.34, or elsewhere in R.C. Chapter 124, that either addresses the removal of probationary employees or expands the jurisdiction of the State Personnel Board of Review to hear appeals from probationary removals.

Given the specific changes made to R.C. 124.27 by Am. Sub. S.B. 144 and the interpretation of former R.C. 124.27 by the Ohio courts, we conclude that the amendment to R.C. 124.27 in Am. Sub. S.B. 144 eliminates the jurisdiction previously vested in the State Personnel Board of Review to hear appeals under R.C. 124.34 of those probationary employees who are removed during the first half of their probationary periods. In addition, because R.C. 124.27 now authorizes an appointing authority to remove a probationary employee for unsatisfactory service at any time during the probationary period, and because no provision of law confers upon the State Personnel Board of Review jurisdiction to hear appeals of removals occurring during any part of an employee's probationary period, we conclude that the State Personnel Board of Review has no such jurisdiction. In answer to your first question, it is our opinion that the State Personnel Board of Review does not have jurisdiction to hear an appeal from the removal of a probationary employee for unsatisfactory service.

In your second question you specifically ask whether appointing authorities, during an employee's probationary period, are required to file R.C. 124.34 orders of removal with the State Personnel Board of Review. Because we have concluded in answer to your first question that R.C.

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[7] *See generally State ex rel. County Bd. of Educ. v. Howard*, 167 Ohio St. 93, 96, 146 N.E.2d 604, 607 (1957) ("a legislative body in enacting amendments is presumed to have in mind prior judicial constructions of the section"); *Spitzer v. Stillings*, 109 Ohio St. 297, 142 N.E. 365 (1924) (syllabus, paragraph four) ("[w]here a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars, but remains unchanged so far as the same has been construed and defined by the court, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as a part of the law, unless express provision is made for a different construction").

124.27 no longer makes the provisions of R.C. 124.34 applicable to removals of probationary employees for unsatisfactory service, it follows that none of the procedures dictated by R.C. 124.34, including the requirement of filing an order of removal with the State Personnel Board of Review, apply to any such removals. *See generally*, note three, *supra*. Rather, pursuant to R.C. 124.27:

> If the service of the probationary employee is unsatisfactory, the employee may be removed or reduced at any time during the probationary period. If the appointing authority's decision is to remove the appointee, the appointing authority's communication to the [Director of Administrative Services] shall indicate the reason for such decision.

Thus, R.C. 124.27 requires only that, if an appointing authority removes a probationary employee, the appointing authority shall communicate the reasons therefor to the Director of Administrative Services. In answer to your second question, we conclude, therefore, that, pursuant to R.C. 124.27, an appointing authority who removes a probationary employee for unsatisfactory service is not required by R.C. 124.34 to file an order of removal with the State Personnel Board of Review.

Let us now consider your third question, which asks whether the property interests of classified employees established in R.C. 124.34 extend to a probationary employee whose promotion or appointment to a classified civil service position is not yet final. The Ohio courts have ruled repeatedly that a probationary or non-tenured employee, whose promotion or appointment to a classified civil service position is not yet final, does not have a property interest in continued employment. *Walton v. Montgomery County Welfare Dept.*; *Clark v. Ohio Dept. of Transp.*; *Taylor v. City of Middletown*, 58 Ohio App. 3d 88, 568 N.E.2d 745 (Butler County 1989); *Hill v. Gatz.*

In *Walton v. Montgomery County Welfare Dept.*, the Ohio Supreme Court held that "probationary civil service employment does not constitute a legitimate claim of entitlement to be accorded procedural due process under the Fourteenth Amendment [to the United States Constitution]." 69 Ohio St. 2d at 65, 430 N.E.2d at 935. In arriving at this holding the court, citing to *Board of Regents v. Roth*, 408 U.S. 564 (1972), explained that state law is determinative of whether a person has acquired a property interest that is entitled to Fourteenth Amendment due process protection. On this point the court specifically determined that R.C. 124.27 does not confer upon a probationary employee a legitimate claim to continued public employment, and noted instead that R.C. 124.27 "explicitly provides that 'no appointment or promotion is final until the appointee has satisfactorily served his probationary period.'" 69 Ohio St. 2d at 64, 430 N.E. 2d at 935. *Accord Clark v. Ohio Dept. of Transp.*, 89 Ohio App. 3d at 99, 623 N.E.2d at 633 ("a probationary civil servant is precluded from claiming a property interest in continued government employment that is sufficient to warrant Fourteenth Amendment protection"); *Taylor v. City of Middletown*, 58 Ohio App. 3d at 92, 568 N.E.2d at 749 ("a probationary employee is not entitled to a hearing before reduction or removal since such an employee does not have a constitutionally protected property interest which would require the safeguards of procedural due process"); *Hill v. Gatz*, 63 Ohio App. 2d at 177, 410 N.E.2d at 1273 (during his probationary period an employee "cannot claim a property interest in his continued government employment sufficient to be protected by the Fourteenth Amendment to the United States Constitution," and stating that only

after an employee has attained permanent employment status do the rights enumerated in R.C. 124.34 attach). *See also Kennard v. Wray*, No. 93-3138, 1994 U.S. App. LEXIS 3472 (6th Cir. Feb. 24, 1994) (state probationary employee does not have a legitimate claim of entitlement to continued employment).

We are of the opinion that the General Assembly's recent amendments to R.C. 124.27 have not altered the prevailing jurisprudence on this issue. The General Assembly amended R.C. 124.27 in Am. Sub. S.B. 144 for the purpose of permitting an appointing authority to remove or reduce a probationary employee for unsatisfactory service at any time during the employee's probationary period. Am. Sub. S.B. 144 also eliminated from R.C. 124.27 the distinction between removals or reductions that occur within the first half of an employee's probationary period and those that occur within the second half of an employee's probationary period, and the requirement that removals or reductions that occur within the first half of an employee's probationary period be made under the provisions of R.C. 124.34.

Nothing in the foregoing amendments reasonably suggests that the General Assembly intended thereby to grant probationary employees rights and privileges that they had not enjoyed prior to these amendments. In particular, the amendments to R.C. 124.27 by Am. Sub. S.B. 144 have added no language that would grant a probationary employee an entitlement to continued public employment, and thus a property interest that is subject to the due process safeguards of R.C. 124.34. To the contrary, these amendments have constricted the rights and privileges of probationary employees generally by authorizing an appointing authority to remove or reduce a probationary employee for unsatisfactory service at any time during his probationary period, and eliminated the entitlement of probationary employees serving the first half of their probationary period to be removed only in accordance with R.C. 124.34. It follows, therefore, that the property interests conferred by R.C. 124.34 upon permanent employees in the classified civil service do not extend to a probationary employee whose promotion or appointment to a position has not become final. In answer to your third question, therefore, we conclude that a probationary employee serves pursuant to R.C. 124.27 and has no constitutionally protected property interest in the continuation of his employment.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. The State Personnel Board of Review does not have jurisdiction to hear an appeal from the removal of a probationary employee for unsatisfactory service.

2. Pursuant to R.C. 124.27, an appointing authority who removes a probationary employee for unsatisfactory service is not required by R.C. 124.34 to file an order of removal with the State Personnel Board of Review.

3. A probationary employee serves pursuant to R.C. 124.27 and has no constitutionally protected property interest in the continuation of his employment.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 9, 2000

C. Scott Johnson, Director
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Columbus, Ohio 43215

SYLLABUS: 2000-017

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