OPINION NO. 81-067

Syllabus:

Pursuant to R.C. 1.48, R.C. 5126.03(D), which prohibits a person from serving as an employee of a county board of mental retardation and developmental disabilities if a member of his immediate family is a county commissioner of the county served by the board, applies only to those classified employees hired after the effective date of R.C. 5126.03(D).

To: Rudy Magnone, Ph.D., Director, Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio

By: William J. Brown, Attorney General, November 3, 1981

I have before me your request for my opinion concerning the interpretation of R.C. 5126.03(D). This statute, which was enacted by Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), provides: "No person shall serve as a member or employee of a county board of mental retardation and developmental disabilities if a member of his immediate family serves as a county commissioner of the county served by the board."

You state in your letter that at least one county board in the state employs a person whose spouse is serving as a county commissioner.[1] You feel that R.C. 5126.03(D) mandates the immediate dismissal of this employee, who has served with the board for many years, because Am. Sub. S.B. 160 contains no "grandfather clause," which would permit those people who were employed by the board prior to the effective date of the act and who do not meet the new qualifications to remain employed. I assume that your concern is with the employees in the classified civil service, since you indicate that dismissal pursuant to R.C. 5126.03(D) would apparently conflict with R.C. 124.34, which governs the removal of classified civil service employees; therefore, I limit my discussion to employees who are in the classified civil service. You pose the question whether county boards of mental retardation and developmental disabilities may retain those individuals hired prior to the effective date of Am. Sub. S.B. 160 whose immediate family members are serving as county commissioners.

Your request necessarily raises the question of whether R.C. 5126.03, if applied to board employees hired before the effective date of Am. Sub. S.B. 160, would be a retroactive law. A retroactive law has been defined as follows: " '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.' " Weil v. Taxicabs of Cincinnati, Inc., 139 Ohio St. 198, 203, 39 N.E.2d 148, 151 (1942) (citations omitted; emphasis added).

An example of a retroactive law may be found in Fraternal Order of Police v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (Mahoning County 1975), cert. denied, 424 U.S. 977 (1976). In Hunter, the court addressed a situation analogous to the one presented by your request. The Youngstown Civil Service Commission had promulgated a rule stating that any city officer or employee not living within the Youngstown city limits was subject to dismissal. The court held that this residency requirement, as applied to those employees who had entered the classified service prior to the adoption of the rule, was a retroactive law.

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[1] R.C. 5126.03 defines "immediate family" to mean "parents, brothers, sisters, spouses, sons, daughters, mothers-in-law, fathers-in-law, brothers-in-law, sisters-in-law, sons-in-law, and daughters-in-law."

The issue raised by your letter is similar to the question facing the court in Hunter: whether classified employees can be dismissed because they fail to meet requirements for employment which were imposed after the employees had been hired. By examining the analysis in Hunter, it is readily apparent that the application of R.C. 5126.03 to employees hired before the effective date of Am. Sub. S.B. 160 would render R.C. 5126.03 a retroactive law, as applied to such employees. An individual employed by a board of mental retardation and developmental disabilities in the classified service prior to the effective date of Am. Sub. S.B. 160 could be removed from his position only for the reasons specified by statute. These reasons were found primarily in R.C. 124.34,[2] although various other statutes also specified grounds for removal. See, e.g., R.C. 124.36; R.C. 4117.05. The imposition of the conflict of interest requirement of R.C. 5126.03(D) upon those classified employees hired before such requirement existed would be similar to the imposition of the residency requirement in Hunter, which, when applied to those employees hired before its promulgation, was deemed retroactive by the court.

R.C. 1.48 states: "A statute is presumed to be prospective in its operation unless expressly made retrospective." This rule of statutory construction has also been independently recognized by the courts. See, e.g., Smith v. Ohio Valley Insurance Co., 27 Ohio St. 2d 268, 276-77, 272 N.E.2d 131, 136 (1971) ("[a] statute, employing operative language in the present tense, does not purport to cover past events of a similar nature. As a general rule, a statute is prospective in its operation 'unless its terms show clearly an intention that it should operate retrospectively' " (footnote and citations omitted)); Joseph Schonthal Co. v. Village of Sylvania, 60 Ohio App. 407, 416, 21 N.E.2d 1008, 1012 (Lucas County 1938) ("[w]hen the intention of the Legislature is to give a statute a retroactive effect, such intention must not be left to inference or construction, but must be manifested by express and unequivocal expression. If it is doubtful. . . , the doubt should be resolved against such operation" (citations omitted)). Thus, in responding to your question, it must be determined whether the General Assembly expressly indicated an intent that R.C. 5126.03(D) operate retroactively. Although section three (uncodified) of Am. Sub. S.B. 160[3] does provide for the removal of county board

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[2]R.C. 124.34 provides in part:

> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal. (Emphasis added.)

[3]Section three (uncodified) of Am. Sub. S.B. 160 reads in part: "Except as otherwise provided in this section, members appointed to a county board of mental retardation or a community mental health and retardation board prior to the effective day of this act shall complete the terms for which they were appointed, unless a member voluntarily relinquishes the office or is removed from office in accordance with Section 340.02 or 5126.04 of the Revised Code."

members appointed prior to the effective date of the act for violation of the conflict of interest provisions found in R.C. 5126.03, see R.C. 5126.04, there is no indication that R.C. 5126.03 was meant to have such retroactive effect upon board employees employed prior to the effective day of the act. Certainly, there is no express or unequivocal indication that the General Assembly intended for R.C. 5126.03 to apply to persons employed by a board of mental retardation and developmental disabilities prior to the effective day of the act. Thus, I conclude that R.C. 5126.03 must be presumed to operate prospectively, and that employees of a county board hired before the effective date of Am. Sub. S.B. 160 who do not meet the new qualifications imposed by this section cannot be dismissed on the basis of this provision.

If a presumption of prospective application is employed, potential questions concerning the constitutional validity of R.C. 5126.03 are avoided.[4] Ohio Const. art. II, §28 provides in part: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligations of contracts. . . ."[5] In Fraternal Order of Police v. Hunter, the appellate court adopted the trial court's contention that the application of the rule requiring city employees to live within the city limits to those classified employees hired before the effective date of the rule would be a violation of Ohio Const. art. II, §28, as well as U.S. Const. art. I, §10 (prohibiting a state from passing a law impairing the obligation of contracts), and U.S. Const. amend. XIV, §1 (prohibiting the deprivation of property by a state without due process of law).

The facts in the instant situation are similar enough to the facts considered by the court in Hunter to raise constitutional doubts about the application of R.C. 5126.03(D) to employees hired prior to October 31, 1980. Because of the limited grounds for dismissal of a classified employee, and because of the procedural safeguards surrounding such dismissal (see R.C. 124.34) classified employees are deemed to have a property right in, or claim of entitlement to, continued employment for due process purposes. Jackson v. Kurtz, 65 Ohio App. 2d 152, 416 N.E.2d 1064 (Hamilton County 1979); see Board of Regents v. Roth, 408 U.S. 564 (1972); Frumkin v. Board of Trustees, 626 F.2d 19 (6th Cir. 1980); Dorian v. Board of Education, 62 Ohio St. 2d 182, 404 N.E.2d 155 (1980). But cf. State ex rel. Trimble v. State Board of Cosmetology, 50 Ohio St. 2d 283, 364 N.E.2d 247 (1977) (holding that an employee in the unclassified service has no such property interest in his continued employment). The imposition of additional specifications for continued employment upon a classified employee hired prior to the time such specifications were in effect arguably operates as a retroactive law jeopardizing the classified employee's accrued right to continued employment, in violation of Ohio Const. art. II, §28 and due process of law.

In Buckley v. City of Cincinnati, 63 Ohio St. 2d 42, 406 N.E.2d 1106 (1980), the court, in discussing the residency requirement at issue in Hunter, stated at 63 Ohio St. 2d 44, 406 N.E.2d 1108: "The effect of such a rule was to attach a punitive measure to the act of establishing a residence outside the city prior to the rule's passage." In the instant situation, the employee has even less control over the circumstances which could lead to his or her dismissal under R.C. 5126.03(D). Taking the example used in your letter, if the long-time employee were to be dismissed under R.C. 5126.03(D), she would have been, in the language of the Buckley court, "punished" because her spouse had been elected county

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[4]R.C. 1.47 provides in part: "In enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended." See Brotherhoods v. P.U.C., 177 Ohio St. 101, 202 N.E.2d 699 (1964). See also State v. Sinito, 43 Ohio St. 2d 89, 212 N.E.2d 801 (1965).

[5]It has been concluded that, generally, the prohibition of Ohio Const. art. II, §28 against retroactive laws does not apply to purely procedural or remedial statutes. See Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972); Kacian v. Illes Construction Co., 24 Ohio App. 2d 43, 263 N.E.2d 680 (Cuyahoga County 1970).

commissioner—a circumstance over which she had virtually no control. (In other cases, an employee could be removed because a more distant relative, such as a brother-in-law, had been elected commissioner.) It is instructive to compare the grounds for dismissal found in R.C. 124.34, to which all classified employees are subject. The grounds for dismissal under R.C. 124.34 all relate to misconduct or nonfeasance on the part of the classified employee. There is no cause for removal not based on some overt action or nonfeasance by the employee. There is no cause for removal based merely on the employee's "status" (e.g., as the relative of a county commissioner). Certainly, if the retroactive application of the Youngstown residency requirement was "punitive," the retroactive application of R.C. 5126.03(D) would be even more so.

This office has no power to opine upon the constitutionality of state statutes, as that is a function of the judiciary. See 1980 Op. Att'y Gen. No. 80-002. Consequently, I cannot advise you that R.C. 5126.03(D) would be unconstitutional as applied to employees hired before the effective date of Am. Sub. S.B. 160. However, by applying R.C. 5126.03(D) only to those employees hired after the act was effective, in accordance with the presumption of prospective application stated in R.C. 1.48, I find that the constitutional doubts surrounding a retroactive application (as raised in Fraternal Order of Police v. Hunter) are avoided.

In conclusion, it is my opinion, and you are advised, that pursuant to R.C. 1.48, R.C. 5126.03(D), which prohibits a person from serving as an employee of a county board of mental retardation and developmental disabilities if a member of his immediate family is a county commissioner of the county served by the board, applies only to those classified employees hired after the effective date of R.C. 5126.03(D).