

OPINION 65-2**Syllabus:**

1. Section 4121.122, Revised Code, has not been repealed by implication by the enactment of Section 143.27, Revised Code.

2. The authority vested in the Administrator of the Bureau of Workmen's Compensation in Section 4121.122, Revised Code, is not final but shall be subject to review, as provided in and under the terms of Section 4121.122 and Section 143.27, Revised Code.

3. The provision in Section 4121.122, Revised Code, that a finding of the administrator, in the instances provided, shall be accepted as a fact, does not preclude an appeal from the decision of the Administrator of the Bureau of Workmen's Compensation to the State Personnel Board of Review on the issues and within the provisions set forth in Section 4121.122 and Section 143.27, Revised Code.

4. All employees of the Bureau of Workmen's Compensation who are deputies and assistants within the meaning of Section 3.06 or Section 143.08 (A) (9), Revised Code, are within the unclassified civil service.

To: Elmer A. Keller, Administrator, Bureau of Workmen's Compensation
Columbus, Ohio
By: William B. Saxbe, Attorney General, January 7, 1965

Your request for my opinion reads in pertinent part as follows:

"1. Has section 4121.122 of the Revised Code been repealed by implication by the enactment of Section 143.27 of the Revised Code? If you rule that it has, then no further attention need be given to the following questions.

"2. If you rule that both sections are to be construed in *pari materia*, then how shall we construe the authority vested in the first sentence of Section 4121.122, *supra*, namely shall the finding and order of the administrator be final regarding, 'any employee of the bureau of workmen's compensation,' would such an employee have an appeal to the courts?

"3. The second sentence of Section 4121.122 of the Revised Code (quoted above) includes a special group of employees of the bureau, does the administrator's finding and order, subject to the proviso that it is predicated upon and 'supported by any evidence and not promoted by personal, political, racial or religious discrimination shall be accepted as a fact justifying the action taken by the administrator.', mean no further appeal?

"4. Are deputy administrators, referees, and all others who put on orders or decisions, which I consider as exercising an authority partaking in part of state sovereignty in the classified service? It must be borne in mind that such deputies have rightly or wrongly considered themselves as civil service or classified employees. (See Sec. 3.06 R.C. and also sub-section 'C' of Rev. Code Sec. 4121.121)."

The questions you pose are answered in large part by Opinion Number 347, Opinions of the Attorney General for 1959, wherein it is stated at page 196:

"* * * I believe, however, that the two sections (Section 143.27 and 4121.122, Revised Code) are in *pari materia* and should be read together to ascertain the procedure which should be followed in the discharge of an employee by the Administrator. I further believe that, in enacting the first sentence of said

Section 4121.122, the Legislature intended only to designate what officer would have authority to discharge an employee of the Bureau of Workmen's Compensation and did not intend to change the actual procedure for discharge as provided by said Section 143.27."

I agree with this opinion, and therefore, my answer to your first question is that Section 4121.122, Revised Code, has not been repealed by implication by the enactment of Section 143.27, Revised Code, effective October 27, 1961.

In response to your second question, "shall the finding and order of the administrator be final regarding 'any employee of the bureau of workmen's compensation,' would such an employee have an appeal to the courts?", I refer you to the syllabus of the same opinion which reads as follows:

"Under the provisions of Section 4121.122, Revised Code, the Administrator of the Bureau of Workmen's Compensation may discharge any employee of the bureau for misfeasance, malfeasance, or nonfeasance; provided that, if such employee is in the classified service of the State of Ohio, such discharge should be done in accordance with the procedure contained in Section 143.27, Revised Code."

Section 143.27, Revised Code, provides for appeals to the courts in certain instances, and it is obvious that in those instances an employee of the Bureau of Workmen's Compensation may exercise that right. Furthermore, as shown in State, ex rel. Kendrick v. Masheter, 120 Ohio App., 168, affirmed 176 Ohio St., 232, the law permits other appeals to the courts from personnel actions of appointing authorities, such as the Administrator of the Bureau of Workmen's Compensation, through the Personnel Board of Review to the courts.

Your third question is also answered by Opinion Number 347, supra, and I concur in the finding that there is an appeal by force of Section 143.27, Revised Code, from personnel actions of the Administrator concerning classified employees taken under Section 4121.122, Revised Code. By the terms of Section 4121.122, Revised Code, the finding of the administrator that a deputy administrator, or any employee assigned to the investigation or determination of claims, is not efficient, impartial or judicious is to be taken as a fact by the reviewing body if supported by "any evidence." I interpret "any evidence" as meaning a scintilla of evidence. If the issue in question is not the efficiency, impartiality or judiciousness of the deputy administrator or employee assigned to the investigation or determination of claims, then the normal rules of the reviewing body as to the necessary weight and sufficiency of the evidence prevail.

Your fourth question broaches another area of consideration, namely; "Are deputy administrators, referees, and all others who put on orders or decisions * * * in the classified service?"

Section 143.08, Revised Code, defines who shall be in the classified and who shall be in the unclassified service. Section 143.08 (A) defines the unclassified service by setting out 13 specific categories of employees who shall be in the unclassified service. Section 143.08 (A) (9), Revised Code, defines the following employees as being in the unclassified service:

"(9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principals and those persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials and the employees of such county officials whose fitness would be impracticable to determine by competitive examination, provided, that this subdivision shall not affect those persons in county employment in the classified service as of September 19, 1961. Nothing in this subdivision applies to any position in a county department of welfare created pursuant to sections 329.01 to 329.10, of the Revised Code."

If the individuals you refer to in your letter fit within this definition, then they would properly be in the unclassified service. If not, then under Section 143.08 (B), Revised Code, they are in the classified service. Section 143.08 (B) is as follows:

"(B) The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class."

You refer to Sections 3.06 and 4121.121 (C), Revised Code, in your request letter. Section 3.06 defines "deputy" as one who may perform any of the duties of his principal and further states that such deputy holds the appointment only during the pleasure of the officer appointing him.

It would go beyond the scope of your request to attempt to determine which of the employees you have mentioned "may perform any of the duties of the Administrator." It should be added, however, that an employee who does have the power to perform all the duties of the Administrator is a deputy, and can therefore be considered to be in the unclassified service. This definition (Section 3.06, Revised Code) is similar in wording to and, in my opinion has the same meaning, as that definition found in Section 143.08 (A) (9), supra. Those employees who do not fit this definition are, by force of Section 143.08 (B), supra, in the unclassified civil service.

I find nothing in Section 4121.121 (C), Revised Code, which would expand or change the above statements.

Therefore, it is my opinion and you are so advised that:

1. Section 4121.122, Revised Code, has not been repealed by implication by the enactment of Section 143.27, Revised Code;

2. The authority vested in the Administrator of the Bureau of Workmen's Compensation in Section 4121.122, Revised Code, is not final but shall be subject to review, as provided in and under the terms of Section 4121.122 and Section 143.27, Revised Code;

3. The provision in Section 4121.122, Revised Code, that a finding of the administrator, in the instances provided, shall be accepted as a fact, does not preclude an appeal from the decision of the Administrator of the Bureau of Workmen's Compensation to the State Personnel Board of Review on the issues and within the provisions set forth in Section 4121.122 and Section 143.27, Revised Code;

4. All employees of the Bureau of Workmen's Compensation who are deputies and assistants within the meaning of Section 3.06 or Section 143.08 (A) (9), Revised Code, are within the unclassified civil service.