

OPINION NO. 2004-034**Syllabus:**

1. In determining whether a qualified veteran is available for employment as an investigator or clerk of the county veterans service commission pursuant to R.C. 5901.06 or as a clerk, stenographer, or other personnel to assist the county veterans service officers pursuant to R.C. 5901.07, the county veterans service commission must comply with relevant provisions of R.C. Chapter 124 and rules adopted under it, including the minimum qualifications established by 16 Ohio Admin. Code 5902-1-03, and may follow any reasonable procedure for determining whether a qualified veteran is available for employment, including the use of appropriate advertising.
2. An individual who is employed in the classified service pursuant to R.C. 5901.06 or R.C. 5901.07 has the job protections granted by R.C. 124.34 and is not subject to removal on the grounds that a veteran has become available to fill the position.

To: David Kelley, Adams County Prosecuting Attorney, West Union, Ohio
By: Jim Petro, Attorney General, October 19, 2004

We have received your request for an opinion concerning the manner in which a county veterans service commission selects its employees. You have presented your question as follows:

R.C. 5901.07 provides that a Veterans Service Commission must employ veterans as employees, unless a "qualified veteran is not available," in which case a spouse, surviving spouse, child or parent of a veteran is to be employed. What is the proper procedure to be followed in order to determine whether a "qualified veteran" is available before hiring someone who is not a veteran?

On the basis of the analysis set forth below, we conclude that, in determining whether a qualified veteran is available for employment as an investigator or clerk of the county veterans service commission pursuant to R.C. 5901.06 or as a clerk, stenographer, or other personnel to assist the county veterans service officers pursuant to R.C. 5901.07, the county veterans service commission must comply with relevant provisions of R.C. Chapter 124 and rules adopted under it, including the minimum qualifications established by 16 Ohio Admin. Code. 5902-1-03, and may follow any reasonable procedure for determining whether a qualified veteran is available for employment, including the use of appropriate advertising. An individual who is employed in the classified service pursuant to R.C. 5901.06

or R.C. 5901.07 has the job protections granted by R.C. 124.34 and is not subject to removal on the grounds that a veteran has become available to fill the position.¹

Employment authority of county veterans service commission

Each county has a veterans service commission (formerly known as a soldiers' relief commission²), established for the purpose of providing benefits and services to veterans and their families. R.C. 5901.02. The veterans service commission has general authority to employ "such staff as are necessary to carry out the commission's duties," and to fix their compensation. R.C. 5901.03(A). The commission has specific authority to employ an executive director and one or more county veterans service officers, all of whom must be veterans. R.C. 5901.06; R.C. 5901.07.

With respect to the selection of other employees—namely, investigators and clerks to perform the duties of the commission, *see* R.C. 5901.06, and clerks, stenographers, and other personnel to assist the service officers in the performance of duties, *see* R.C. 5901.07—the commission is restricted by the requirement that each employee "shall be a veteran or, if a qualified veteran is not available, the spouse, surviving spouse, child, or parent of a veteran." R.C. 5901.06; R.C. 5901.07; *see* 1934 Op. Att'y Gen. No. 3052, vol. II, p.1219 at 1223 (use of the word "shall" indicates that directives of this nature are mandatory).³ In

¹The word "veteran" is given two statutory definitions. The definition set forth in R.C. 5901.01(B) is to be used with regard to applications for financial assistance under R.C. 5901.02 to 5901.15. The definition set forth in R.C. 5901.01(A) is to be used for other purposes and, accordingly, is the definition to be applied to the employment provisions of R.C. 5901.06 and 5901.07. The applicable definition thus reads:

(A) Except as otherwise provided in division (B) of this section, "veteran" means either of the following:

(1) A former member of the armed forces of the United States who served on active military duty and received an honorable discharge or honorable separation, a member of the armed forces of the United States who died on active military duty, or a member of the armed forces of the United States missing in action more than ninety days;

(2) A member of the United States merchant marine to whom either of the following applies:

(a) The member has an honorable report of separation from the active duty military service, form DD214 or DD215.

(b) The member served in the United States merchant marine between December 7, 1941, and December 31, 1946, and died on active duty while serving in a war zone during that period of service.

R.C. 5901.01(A). *See generally* 1998 Op. Att'y Gen. No. 98-030.

²*See* 1987-1988 Ohio Laws, Part III, 4685, 4686 (Am. Sub. H.B. 626, eff. Sept. 14, 1988).

³The language requiring that each of the employees in question be "a veteran or, if a qualified veteran is not available, the spouse, surviving spouse, child, or parent of a veteran" was initially enacted in 1993-1994 Ohio Laws, Part IV, 6089, 6093 (Am. Sub. H.B. 448, eff. July 22, 1994) (amending *inter alia*, R.C. 5901.06 and 5901.07). *See* 1998 Op. Att'y Gen. No. 98-020. Earlier versions of R.C. 5901.06 and R.C. 5901.07 used somewhat different language. *See, e.g.*, 1987-1988 Ohio Laws, Part III, 4685, 4687 (Am. Sub. H.B. 626, eff. Sept. 14, 1988) (amending R.C. 5901.06 to read in part: "[e]ach investigator and clerk shall be a

each case, the person “shall be employed in the classified service and is exempt from civil service examination.” R.C. 5901.06; R.C. 5901.07; *see* R.C. 124.11(B). In each case, the commission is authorized to fix the compensation of the employee. R.C. 5901.06; R.C. 5901.07.

A veterans service commission is funded by the county and provides benefits for residents of the county. R.C. 5901.04; R.C. 5901.08; R.C. 5901.11. It is considered to be an entity of county government, and its employees are included as county employees, subject to applicable provisions of R.C. Chapter 124 and rules adopted under it. *See, e.g., Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969); R.C. 124.14; 2 Ohio Admin. Code 123:1-47-01(A)(26) (including veterans service commission as a county office); 1993 Op. Att’y Gen. No. 93-065 at 2-308 to 2-309; 1993 Op. Att’y Gen. No. 93-027 at 2-137.⁴ As a creature of statute, a county veterans service commission has both those powers that are expressly granted by statute and those that are necessarily implied from the express powers. 2001 Op. Att’y Gen. No. 2001-033 at 2-196; 1998 Op. Att’y Gen. No. 98-020 at 2-105; 1996 Op. Att’y Gen. No. 96-040 at 2-155.

Employment of a qualified veteran in the classified service

Under Ohio law, the civil service is divided into classified and unclassified service. R.C. 124.11. In general, unclassified civil servants are appointed at the discretion of the appointing authority and may be dismissed at any time without cause, provided that the dismissal is not made for reasons that are discriminatory or otherwise unlawful. In contrast, classified civil servants are selected through a merit system and are afforded protection from arbitrary removal. *See* 1996 Op. Att’y Gen. No. 96-040; *see also Yarosh v. Becane*, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980); 2003 Op. Att’y Gen. No. 2003-033; 1991 Op. Att’y Gen. No. 91-011.

In general, applicants for positions in the classified service are required to take examinations, and appointments are made from among the applicants certified to the appointing authority as ranking highest on the eligible list. 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,

veteran or the spouse, child, or parent of a veteran,” and amending R.C. 5901.07 to read in part: “[e]ach of these employees shall, whenever possible, be a veteran or the spouse, child, or parent of a veteran”); G.C. 2933-1 (predecessor to R.C. 5901.06) (“[t]hese investigators and clerks shall be honorably discharged veterans of the civil war, the war with Spain, or the world war, or the wife, widow, son, or daughter of such a veteran”).

As discussed in 1998 Op. Att’y Gen. No. 98-020 at 2-103, prior to the enactment of 1993-1994 Ohio Laws, Part IV, 6089 (Am. Sub. H.B. 448, eff. July 22, 1994), R.C. 5901.06 and R.C. 5901.07 did not specify that employees of a veterans service commission were in the classified service. The 1998 opinion addresses various issues raised by that statutory amendment. For purposes of this opinion, we are not considering the status of persons employed by a veterans service commission prior to the effective date of Am. Sub. H.B. 448.

⁴Pursuant to R.C. Chapter 4117, employees of a county veterans service commission may also be covered by provisions of a collective bargaining agreement. 1996 Op. Att’y Gen. No. 96-040; 1993 Op. Att’y Gen. No. 93-027 at 2-137 n.1; *see also* 2004 Op. Att’y Gen. No. 2004-004 at 2-34 to 2-36. For purposes of this opinion, we assume that there is no applicable collective bargaining agreement addressing the matters at issue.

by competitive examinations”); R.C. 124.11; R.C. 124.20; R.C. 124.23; R.C. 124.26; R.C. 124.27; 2 Ohio Admin. Code Chapter 123:1-8. Veterans are eligible for additional credit in examinations in which they receive a passing grade. R.C. 124.23(B); R.C. 124.26. *See generally State ex rel. King v. Emmons*, 128 Ohio St. 216, 190 N.E. 468 (1934) (upholding constitutionality of statutory scheme granting veterans preferences in civil service ratings), *aff’g* 47 Ohio App. 348, 191 N.E. 880 (Franklin County 1933). The classified service includes the unskilled labor class, in which positions are filled by appointment from lists of registered applicants. R.C. 124.11(B)(2). In addition, there are various circumstances in which appointments to the classified service may be made without competitive examinations. *See* R.C. 124.23; R.C. 124.30; 2 Ohio Admin. Code Chapter 123:1- 21; *see also Moore v. Agin*, 12 Ohio St. 3d 173, 465 N.E. 2d 1293 (1984).⁵

R.C. 5901.06 and R.C. 5901.07 specify that the employees of a county veterans service commission are in the classified service and are exempt from civil service examination. Therefore, as the appointing authority of these employees, the veterans service commission is not required to make appointments from an eligible list of persons who have scored well on a particular examination. *See* R.C. 124.26. However, the veterans service commission remains subject to applicable provisions of R.C. Chapter 124 and rules adopted under it. *See* R.C. 124.01(C) and (D); R.C. 124.06 (“[n]o person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted, or reduced as an officer or employee in the civil service, in any manner or by any means other than those prescribed in this chapter, and the rules of the director of administrative services ...”); R.C. 124.09(A); R.C. 124.14; *see also Moore v. Agin; Yarosh v. Becane*; 1993 Op. Att’y Gen. No. 93-027; 1934 Op. Att’y Gen. No. 3052, vol. II, p. 1219 at 1222 to 1223 (specific statutory provisions establishing the civil service status of particular employees of a soldiers’ relief commission prevail over general civil service provisions).

Persons employed under R.C. 5901.06 and R.C. 5901.07 are not required to take examinations to qualify for their jobs, but are otherwise subject to the provisions of R.C. Chapter 124 that govern county employees in the classified service. In particular, these employees are entitled to continue their employment during good behavior and efficient service. R.C. 124.34. They may be reduced in pay or position, fined, suspended, or removed only as provided by statute—that is, for such reasons as incompetency, inefficiency, dishonesty, discourteous treatment of the public, and neglect of duty. *Id.*⁶

⁵*See generally Hile v. City of Cleveland*, 118 Ohio St. 99, 102, 160 N.E. 621 (1928) (Ohio Const. art. XV, § 10 requires that appointments be made according to civil service competitive examinations only as far as practicable, “clearly indicating ... that the framers of the Constitution fully appreciated that cases might easily arise wherein it would not be practicable to determine the qualifications of an applicant for appointment by a civil service examination, and that they understood, as well, the danger and embarrassment which would probably attend any attempt to fix, by a provision in the Constitution, any hard and fast method of determining so important a matter, and hence the method of making the selection, in such cases, was wisely left to the sound discretion of those who should be invested with the duty and power of making such appointment”).

⁶All appointments in the classified service are made initially for a probationary period and are not final until the appointee has satisfactorily completed the probationary period. A classified employee may be removed at any time during the probationary period for “unsatisfactory” service, with a reason given for removal, and is not entitled under R.C. 124.34 to appeal that removal. R.C. 124.27(C); 2 Ohio Admin. Code 123:1-19-01.

Although the statutes require that various employees of a county veterans service commission “be a veteran or, if a qualified veteran is not available, the spouse, surviving spouse, child, or parent of a veteran,” *see* R.C. 5901.06; R.C. 5901.07, they do not contain specific instructions as to how this is to be accomplished. *Cf.* R.C. 345.16 (requiring the board of trustees for a soldiers’ memorial to “employ only honorably discharged soldiers, sailors, and marines, both men and women, of the armed forces of the United States, if available, as caretakers, janitors, or employees” and providing that employment of any other person “without a showing on the journal of the board” that no veterans were available “shall be void, and it shall be unlawful to pay any money out of any fund to such person”). Where no specific requirements are imposed by statute, the veterans service commission has discretion to carry out its responsibilities in any reasonable manner that is consistent with applicable statutes. As was stated by a prior Attorney General in discussing the employment authority of a soldiers’ relief commission (now a veterans service commission):

Statutes granting broad and general powers do not usually contain an explicit enumeration of the precise steps by which the powers are to be carried out and I consider that we are justified in construing such statutes in a reasonable manner so long as our construction is not inconsistent with the statute or foreign to its manifest purpose.

1946 Op. Att’y Gen. No. 1447, p. 840 at 845; *see* 1998 Op. Att’y Gen. No. 98-029; 1970 Op. Att’y Gen. No. 70-039 at 2-64 (as a creature of statute, a soldiers’ relief commission has only the authority provided by law; however, “except for certain expressed eligibility requirements, [it] has been granted a great deal of discretionary power”); *see also State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) (“[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty”); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 2, 112 N.E. 138 (1915) (syllabus, paragraph 4) (“[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed”), *aff’d sub nom. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) (“[w]here authority is given to do a specific thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner”). *See generally State ex rel. Foster v. Miller*, 136 Ohio St. 295, 25 N.E.2d 686 (1940) (syllabus, paragraph 3) (“[i]n an action in mandamus, a court will not substitute its discretion for that of an administrative officer or commission in the exercise of his or its authority”).

Particular concerns regarding employees of veterans service commission

You have asked us to consider whether, in order to determine if a qualified veteran is available, the veterans service commission should make use of advertising in newspapers or postings in public places or in veterans organizations’ buildings. No statute or rule expressly requires this kind of advertising or posting, but these seem to be reasonable ways of determining whether veterans are available for employment. *Cf.* R.C. 124.23(B) (notice of competitive examinations for appointment to positions in the civil service); R.C. 307.87 (notice of competitive bidding). The appropriate use of advertising and postings can be part of the process of carrying out the commission’s power to employ the staff needed to perform the duties of the commission and the county veterans service officers. *See* R.C. 5901.03(A); R.C.

5901.06; R.C. 5901.07; *see also* 1998 Op. Att'y Gen. No. 98-029; 1946 Op. Att'y Gen. No. 1447, p. 840.

You have also asked us to consider what constitutes a "qualified" veteran, and whether this must be identified before the position is filled. The word "qualified" may be used in two senses in connection with employment. First, to satisfy the statute regarding the employment of a veteran, a person must come within the applicable definition of a veteran. *See* note 1, *supra*. Once a person is properly identified as a veteran, that person must be qualified to perform the job. To fill a position in the classified service, it is necessary to identify the functions of the position and the qualifications required to perform the applicable duties. Because the county veterans service commission is authorized to set the compensation of the employees in question, the commission is not bound by the job classification plan established for the county in general, but may establish its own job qualifications and compensation. R.C. 124.14(B)(4); *cf.* 1998 Op. Att'y Gen. No. 98-020.

The Director of the Governor's Office of Veterans Affairs, pursuant to authority under R.C. 5902.02, has promulgated a rule setting forth minimum qualifications for hiring veterans service officers and staff, as follows:

- (A) Shall be a veteran with an honorable discharge/separation
- (B) Shall be a high school graduate or equivalent
- (C) Shall satisfactorily complete a background investigation by a local law enforcement agency
- (D) Service connected disabled veterans shall be given special consideration[.]

16 Ohio Admin. Code. 5902-1-03. The county veterans service commission must abide by these requirements for minimum qualifications and may impose such additional qualifications as it deems appropriate to satisfy the responsibilities of a particular job.

You have also asked how often it is necessary for the veterans service commission to review the availability of a qualified veteran. R.C. 5901.06 and R.C. 5901.07 require that the availability of a qualified veteran be determined each time an employee is hired to fill one of the positions to which the qualified veteran requirement applies. Once the position is filled, however, there is no requirement that the hiring of a particular person be reexamined or that any effort be made to replace an employee who is not a veteran. Instead, R.C. 5901.06 and R.C. 5901.07 state plainly that the employees in question are in the classified service. Accordingly, they are granted tenure during good behavior and efficient service, as provided in R.C. 124.34. *See generally Yarosh v. Becane*; 2 Ohio Admin. Code 124-1-04(A) (in an appeal before the State Personnel Board of Review, "[a]n appointing authority is estopped to raise the illegal appointment of an employee to defeat the tenure rights which would have been due that employee had he been lawfully appointed"); note 6, *supra*. They may be removed for various reasons pursuant to procedures established by statute. *See* R.C. 124.34; *see also* R.C. 124.27(C). However, existing statutes do not authorize removal from a classified position on the grounds that a veteran has become available to fill the position.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. In determining whether a qualified veteran is eligible for employment as an investigator or clerk of the county veterans service commission pursuant to R.C. 5901.06 or as a clerk, stenographer, or other personnel to assist the county veterans service officers pursuant to R.C. 5901.07, the county veterans service commission must comply with relevant provisions of R.C. Chapter 124 and rules adopted under it, including the minimum qualifications established by 16 Ohio Admin. Code 5902-1-03, and may follow any reasonable procedure for determining whether a qualified veteran is available for employment, including the use of appropriate advertising.
2. An individual who is employed in the classified service pursuant to R.C. 5901.06 or R.C. 5901.07 has the job protections granted by R.C. 124.34 and is not subject to removal on the grounds that a veteran has become available to fill the position.