

## OPINION NO. 75-029

## Syllabus:

Highway workers employed by a county engineer for work being done by force account pursuant to R.C. 5543.19 are in the civil service under R.C. 124.01. Unless specifically assigned to the unclassified service pursuant to R.C. 124.11(A)(12), such employees are in the classified civil service under R.C. 124.11(B) and are protected by the tenure provisions of R.C. 124.34.

To: Warren S. Earhart, Chairman, State Personnel Board of Review, Columbus, Ohio

By: William J. Brown, Attorney General, May 5, 1975

I have your request for my opinion which reads as follows:

"On several occasions during the past few months the State Personnel Board of Review has received appeals from job terminations and suspensions from employees of the county engineer's office of several counties in Ohio. Since the Board is concerned primarily with the provisions of Chapter 124 of the Revised Code, if no removal or suspension order has been filed with us in accordance with Section 124.34 of the Revised Code we immediately inquire of the county engineer of the county concerned as to whether or not a termination has been effectuated pursuant to Section 124.34.

"On several recent occasions the position of the county engineer has been that the employee in question is a "force account" employee employed under the provisions of Section 5543.19 of the Revised Code. Apparently some county engineers interpret that section as placing "force account" employees in a different category from regular county employees in the county engineer's office who would be in the classified civil service.

"We are therefore requesting your formal opinion as to whether "force account" employees employed under the provisions of Section 5543.19 are subject to the tenure provisions of Section 124.34 of the Revised Code, and as to whether a county engineer must meet the procedural requirements of that section."

County engineers are authorized to proceed with construction or repair by "force account" under R.C. 5543.19, which provides in pertinent part as follows:

"(A) The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding,

employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads by force account.

\* \* \* \* \*

"(B) The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding, employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of bridges and culverts by force account.

\* \* \* \* \*

"(C) 'Force account,' as used in this section means that the county engineer will act as contractor, using labor employed by him using material and equipment either owned by the county or leased or purchased in compliance with sections 307.86 to 307.92, inclusive, of the Revised Code and excludes subcontracting any part of such work unless done pursuant to sections 307.86 to 307.92, inclusive, of the Revised Code."

\* \* \* \* \*

The civil service tenure provisions of R.C. 124.34 read, in pertinent part, as follows:

"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 non-feasance in office. \* \* \*"

"In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

\* \* \* \* \*

(Emphasis added.)

The above language is a composite of R.C. 124.34 as amended by H.B. No. 513, effective August 9, 1974, and S.B. No. 243, effective July 23, 1974, and is an attempt to harmonize the inconsistent, but not irreconcilable, language found in those Bills. The language in brackets was an amendment in the earlier Act, but was, apparently by inadvertence, omitted from the later one. Under R.C. 1.52(B), such an omission does not render the amendments irreconcilable and they are to be harmonized if possible.

Since R.C. 124.34 specifically applies to officers and employees in the classified civil service of the state and the counties, it is necessary to determine whether "force account" employees can properly be characterized as in the classified civil service. Chapter 124 of the Revised Code starts off with the following definitions in R.C. 124.01:

"(A) 'Civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof.

"(B) 'State service' includes all such 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.

"(C) 'Classified service' means the competitive classified civil service of the state, the several counties, cities, city health districts, general health districts, city school districts thereof, and civil service townships.

"(D) 'Appointing authority' means the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board or institution.

" \* \* \* \* \*"

"(F) 'Employee' means any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer.

" \* \* \* \* \*"

There is nothing in R.C. 5543.19 which exempts "force account" highway workers, employed by a county engineer, from the applicable provisions of the civil service laws. On the contrary the nature of such employment indicates that "force account" employees do hold positions in the "civil service", as that term is defined by R.C. 124.01(A), since these laborers are employed in the service of the county.

Similarly the county engineer, who is empowered by R.C. 5543.19 to employ highway workers, acts on behalf of the county at the direction of the board of county commissioners. 1939 Op. Att'y Gen. No. 1494, p. 2208. Therefore, as the officer charged with the employment of certain employees of the county, the county engineer is the "appointing authority" as defined in R.C. 124.01(D) and must act in accordance with the following mandate of the civil service law in R.C. 124.06:

"No 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 or the municipal or civil service township civil service commission within their respective jurisdictions."

Furthermore, it should be noted that in practice boards of county commissioners may regularly authorize the county engineer to perform any road work which becomes necessary during a particular period of time. See, for example, the resolution passed by the county commissioners and considered by the court in Pincelli v. Ohio Bridge Co., 26 Ohio Op. 2d 460 (Athens Co. C.P.Ct. 1964). In that case the commissioners had authorized the county engineer to "construct, reconstruct, improve, maintain or repair roads, bridges and culverts by Force Account for the year 1963." To characterize employees used by the county engineer pursuant to such a resolution as anything other than county employees in the civil service would result in a whole area of public employment which is not subject to the state civil service laws. As noted above, there is nothing to indicate that the General Assembly intended such a result. I, therefore, conclude that highway workers employed by the county engineer pursuant to R.C. 5543.19 are in the civil service and their employment and discharge must be consistent with the provisions of R.C. Chapter 124.

Under R.C. 124.11 the civil service is divided into the classified and the unclassified service. While R.C. 124.01(C) defines the classified service as the competitive classified service, R.C. 124.11(B) construes the term to include both the competitive class and the unskilled labor class:

\* \* \* \* \*

"(B) The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof, not specifically included in the unclassified service, and upon the creation by the board of trustees of a civil service township civil service commission all persons in the employ of civil service township police or fire departments having ten or more full-time paid employees, to be designated as the competitive class and the unskilled labor class.

"(1) The competitive class shall include all positions and employments in the state and the counties, \* \* \* for which it is practicable to determine the merit and fitness of applicants by competitive examinations.\* \* \*

"(2) The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the director. The director or the commission shall in his rules require an applicant for registration in the labor class to furnish such evidence or take such tests as the director deems proper with respect to age, residence, physical condition, ability to labor, honesty, sobriety, industry, capacity, and experience in the work or employment for which he applies. Laborers

who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought, and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. Upon the request of an appointing officer, stating the kind of labor needed, the pay and probable length of employment, and the number to be employed, the director shall certify from the highest on the list, double the number to be employed, from which the appointing officer shall appoint the number actually needed for the particular work. In the event of more than one applicant receiving the same rating, priority in time of application shall determine the order in which their names shall be certified for appointment."

(Emphasis added.)

The term "laborers" as used in R.C. 5543.19, has been construed broadly to include skilled as well as unskilled workers. See 1927 Op. Att'y Gen. No. 271; 1961 Op. Att'y Gen. No. 1976. Employees hired pursuant to that section are not specifically included in the unclassified service by R.C. 124.11(A), although under subsection (12) of that Section the director of administrative services may transfer certain unskilled laborer positions to the unclassified service. That subsection provides that the unclassified service shall include "\* \* \* such unskilled labor positions as the director of administrative services \* \* \* may find it impractical to include in the competitive classified service; \* \* \*."

In Appeal of Crabtree, 11 Ohio App. 2d 114 (1966), the court said that, except where individual unskilled laborer positions are transferred to the unclassified service pursuant to R.C. 124.01(A)(12), they should be treated as in the classified civil service. See also 1915 Op. Att'y Gen. No. 1024, p. 2227. It follows that the laborers in question are in the classified civil service and are entitled to the protection afforded by R.C. 124.34.

The protection against dismissal for reasons other than those enumerated in R.C. 124.34 does not, of course, guarantee the continued existence of such positions. See State, ex rel. Stine v. McCaw, 137 Ohio St. 13, 16 (1940), and State, ex rel. Stoer v. Roschig, 141 Ohio St. 477 (1943). In the second case the court said, at p. 486:

"In determining this question it should be observed at the outset that the statutes relating to civil service have for their primary purpose economy and efficiency in the public service. The secondary purpose is permanent tenure in office for those employed in such service. The power to create a position in the classified civil service includes the power to abolish such position. Therefore any position in the classified civil service may be abolished by the employing officer if such act is done in good faith solely for purposes of economy and more efficient public service. In State, ex rel. Stine v. McCaw, Chief of Div. of Aid for Aged, 137 Ohio St., 13, 27 N.E. 2d 488, Matthias, J., states the law as follows:

"An order abolishing a civil service position is ineffective where a new appointee is named to perform the same duties; but where there is a substantial merger of two positions for the purpose of economy with no proof

of ulterior motive or purpose on the part of the employing officer, or discrimination upon political, religious or other improper grounds, a writ of mandamus will not be granted to require reinstatement of an employee discharged as a result of such merger.'"

Where positions subject to the tenure provisions of R.C. 124.34 are abolished, R.C. 124.32 outlines the procedure to be followed.

In specific answer to your question, it is my opinion and you are so advised, that highway workers employed by a county engineer for work being done by force account pursuant to R.C. 5543.19 are in the civil service under R.C. 124.01. Unless specifically assigned to the unclassified service pursuant to R.C. 124.11(A)(12), such employees are in the classified civil service under R.C. 124.11(B) and are protected by the tenure provisions of R.C. 124.34.