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(1) PROVISIONAL APPOINTMENT IS CLASSIFIED CIVIL SERVICE IS VALID ONLY UNTIL A REGULAR APPOINTMENT CAN BE MADE FROM A LIST PREPARED BY DEPT. OF STATE PERSONNEL—

(2) IN “LAYING OFF” EMPLOYEES, HIRING AUTHORITY SHOULD GIVE PREFERENCE TO THOSE REGULARLY HIRED OVER PROVISIONAL EMPLOYEES—

(3) PERSON HOLDING CLASSIFIED CIVIL SERVICE POSITION WITH DEPT. OF MENTAL HYGIENE AND CORRECTION IS “LAID OFF”, SUCH PERSON HAS PREFERENTIAL RIGHT TO SIMILAR POSITION HELD BY PROVISIONAL APPOINTEE AT ANOTHER INSTITUTION WITHIN THE DEPARTMENT. §143.23, R.C.

SYLLABUS:

1. Pursuant to Section 143.23, Revised Code, a provisional appointment in the classified civil service continues in force only until a regular appointment can be made from an eligible list prepared by the department of state personnel.

2. Where in a department of state government it is necessary to “lay off” a number of employees holding similar positions, the hiring authority should give preference to those employees who have been regularly appointed from such an eligible list over employees who have only been provisionally appointed.

3. Where a person in the classified civil service holds a position at an institution within the department of mental hygiene and correction and is “laid off” for lack of funds, such person has a preferential right to a similar position held by a provisional appointee at another institution within the department.

Columbus, Ohio, November 21, 1961

Hon. Robert A. Haines, M.D.,
Director, Department of Mental Hygiene and Correction
Ohio Departments Building, Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Under Section 5119.49, Revised Code, the requirements and duties of a Superintendent of an institution under the control of

the Department of Mental Hygiene and Correction are defined as follows:

'Each superintendent of an institution, under the control of the Department of Mental Hygiene and Correction, shall be of good moral character and have skill, ability, and experience in his profession. He shall have control of the institution, and be responsible for the management thereof and for the service of all its employees. *He shall appoint necessary teachers, attendants, nurses, servants, and other persons, assign their places and duties, and may discharge them, keeping a record thereof and reasons therefor.*'

"It is our understanding that this section designates the Superintendent at each institution as the Appointing Authority for that specific institution. This organizational structure is different than other department of state in that the Division of Mental Hygiene is composed of twenty-five autonomous organizations each serving under a specific appointing authority. For this reason, we have assumed that statutes dealing with the 'lay off' of employees would apply only within the institutional organizations in which the employee is appointed.

"As a result of the present lay-off of employees for lack of funds within the Division of Mental Hygiene, several questions have arisen. They are as follows:

"1. In the event of a lay-off for lack of funds, does an employee who has been certified to an institution from a state-wide eligible list as prepared by the Department of State Personnel, have preferential right to a position of the same classification held by a provisional appointee at another institution and under a different appointing authority?

"2. Can an Appointing Authority at a specific institution be directed by a higher authority to separate a provisional appointee in a given classification at his institution, to make available a position for a certified employee in the same classification who has been laid off for lack of funds at another institution and by another appointing authority?"

Regarding your understanding that Section 5119.49, Revised Code, designates the superintendent at each institution as the appointing authority for that specific institution, your attention is directed to Opinion No. 5065, Opinions of the Attorney General for 1955, page 161, which reads in part as follows:

"In giving consideration to the action taken by the superintendents of the mental hospitals, you apparently are assuming that each superintendent is the head of a department, as set forth in your Rule XI, paragraph 1 (b).

“Prior to 1911 each state benevolent or correctional institution was a separate principality, controlled by an individual board of trustees, Section 1832, General Code of Ohio for 1910. In 1911, House Bill No. 146, 102 Ohio Laws 211 was enacted, creating the Ohio board of administration. To this board was given the full power to manage and govern certain named institutions, among which were the mental hospitals. Both prior to and after the enactment of House Bill No. 146, as is the case today, each institution had as its executive head a superintendent. However, the institutions were not within any specific department as such, and may well have been looked upon as separate departments. In 1921 a law was enacted (109 Ohio Laws, 105) which created various administrative departments, one being the Department of Public Welfare. In that particular act, all the power and duties of the Ohio board of administration, with certain exceptions, were given over to the Department of Public Welfare, including the control and government of the mental institutions previously under the board’s jurisdiction. Here then, for the first time, the mental institutions ceased to be separate entities or principalities, and became parts of a definite department of the State of Ohio.

“The Civil Service law was enacted in 1913, at which time Section 486-16, General Code, now Section 143.25, Revised Code, pertaining to transfers of classified employees, was enacted. It is important to note that this section is the same today as enacted then. I am advised by your office that Rule XI, paragraph 1 of the rules and regulations of the Civil Service Commission was put into force on January 27, 1916, and was substantially the same as the present paragraph 1 of Rule XI.

“It therefore follows that in 1913, when former Section 486-16, General Code, was enacted, and in 1916, when paragraph 1 of Rule XI was put into force, the mental institutions may have been considered as separate departments, and each superintendent considered as the head of a department. However, with the change in the law in 1921 in regard to these mental institutions, they ceased to be departments as such and became parts of a department. Today, under Chapter 5119 of the Revised Code, though still headed by superintendents, the mental institutions are but subdivisions of the Division of Mental Hygiene of the Department of Mental Hygiene and Correction, which department is under the executive control of the director. Under the provisions of Section 5119.48, Revised Code, a superintendent, referred to as the managing officer, has the entire executive charge of the institution for which he is appointed; but he is under the supervision of the director of the department as well as the chief of the division of which such institution is a part. The director of the Department of Mental Hygiene and Correction, on the other hand, under the provisions of Section 5119.01, Revised Code, is the

executive head of the entire department, and has control over each mental institution even to the extent of having the authority, with the approval of the Governor, to change the purpose for which any institution under his control is being used. Section 5119.03, Revised Code."

Section 5119.48, Revised Code, referred to in Opinion No. 5065, *supra*, provides in part as follows:

"Subject to the rules and regulations of the department of mental hygiene and correction, each institution under the jurisdiction of the department shall be under the control of a managing officer to be known as a superintendent or by other appropriate title. * * *

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"The managing officer, under the director, and the chief of the division shall have entire executive charge of the institution for which such managing officer is appointed. Subject to civil service rules and regulations, the managing officer shall appoint the necessary employees and he or the director or the chief of the division may remove such employees for cause. A report of all appointments, resignations, and discharges shall be filed with the appropriate division at the close of each month."

Since the director of the department of mental hygiene and correction, or the chief of the division of mental hygiene may themselves remove employees of a specific institution within such division of the department, it will not be necessary to further consider your second question as to whether the superintendent at a specific institution may be directed by a higher authority (i.e. the director or the chief of the division) to remove such employees.

In regard to your first question, Section 143.23, Revised Code, provides *inter alia* that "*** such provisional appointment shall continue in force only until a regular appointment can be made from eligible lists ***." In *The State ex rel. Slovinsky v. Taylor*, 135 Ohio St., 601 (1939), the court held that a provisional appointee is "entitled to retain his position during good behavior and efficient service until the establishment of an eligible list, or until his services are terminated by arriving at the mandatory retirement age, or until the abolishment of the position, or a layoff."

Thus, it appears that as between a regular appointee and a provisional appointee for a given position in the classified service, the regular appointee

has a preferential right to be appointed to the position. Where there are several positions of the same classification, however, and there are not enough regular appointees to fill such positions, then the positions which are not filled by regulars may be filled by provisional appointees. Assuming that there are several positions of the same classification which are filled by both regular and provisional appointees, and it is necessary to lay off some of the appointees, then the question is whether the regular appointees have a preferential right to be retained in such a situation.

Since a regular appointee has a preferential right to be appointed in the first instance, it must follow that he would have a preferential right to be retained in this situation. To hold otherwise would defeat the manifest purpose of the civil service laws.

I might note that even if each institution to which you refer were an "autonomous organization," each such organization would be required to comply with the state civil service laws, and provisional appointees would have to be replaced by appointees from the eligible list, provided an eligible list existed.

Accordingly, it is my opinion and you are advised:

1. Pursuant to Section 143.23, Revised Code, a provisional appointment in the classified civil service continues in force only until a regular appointment can be made from an eligible list prepared by the department of state personnel.
2. Where in a department of state government it is necessary to "lay off" a number of employees holding similar positions, the hiring authority should give preference to those employees who have been regularly appointed from such an eligible list over employees who have only been provisionally appointed.
3. Where a person in the classified civil service holds a position at an institution within the department of mental hygiene and correction and is "laid off" for lack of funds, such person has a preferential right to a similar position held by a provisional appointee at another institution within the department.

Respectfully,

MARK McELROY
Attorney General