

## OPINION NO. 77-071

## Syllabus:

1. An employee of the Ohio Commission on Aging, appointed to an unclassified position by the executive director of the Commission from the classified service and later relieved of his duties prior to August 27, 1976 (the effective date of Am. Sub. S.B. No. 351) is not entitled to the rights enumerated in R.C. 173.05, as amended by Am. Sub. S.B. No. 351.
2. An employee of the Ohio Commission on Aging, appointed to an unclassified position by the executive director of the Commission from the classified service prior to August 27, 1976 and relieved of his duties subsequent to that date is entitled to the rights enumerated in R.C. 173.05, as amended by Am. Sub. S.B. No. 351.
3. An employee of the Ohio Commission on Aging, appointed to an unclassified position by the executive director of the Commission from the classified service and relieved of his duties subsequent to August 27, 1976 is entitled to the rights enumerated in R.C. 173.05, as amended by Am. Sub. S.B. No. 351.

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To: Martin A. Janis, Director, Ohio Commission on Aging, Columbus, Ohio  
By: William J. Brown, Attorney General, November 15, 1977

Your request for my opinion reads in part as follows:

This letter is to request your formal opinion of Section 173.05 of amended Substitute Senate Bill #351. The primary questions relevant to this section are:

What rights does an employee have if:

- (1) he is appointed to the unclassified service and relieved of his duties prior to August 27, 1976?
- (2) he is appointed to the unclassified service prior to August 27, 1976, and relieved of his duties subsequent thereto?
- (3) he is appointed and relieved subsequent to August 27, 1976?
- (4) he is placed in the unclassified service from the classified service by amended Substitute House Bill #155 and not by the appointing authority, but retains his certification?

Also, does being placed in the schedule "C" by amended Sub. H.B. #155 have the effect of placing a previously classified employees in the unclassified service?

In general, unclassified employees do not possess a number of the rights given by various provisions of R.C. Chapter 124 to employees in the classified service. Your questions, however, relate to a previously classified employee who is later appointed by the executive director of the Commission on Aging to a position in the unclassified service in that agency. For such an employee, R.C. 173.05, as amended by Am. Sub. S.B. No. 351 (eff. September 1, 1976), provides as follows:

Any person whom the executive director has appointed to a position in the unclassified service from a position in the classified service and who, subsequently, is relieved of his duties in the unclassified service is entitled to return to the classified service either by reinstatement to the classified service position that he held immediately prior to his appointment to the unclassified service or by appointment to a classified service position that the director certifies, with the approval of the department of administrative services, as being substantially equal to the previously held classified service position. Upon reinstatement or appointment to a position in the classified service pursuant to this section, the person is entitled to all rights and emoluments accruing to that position during the time of his service in the classified service.

Your first three questions relate to its applicability to persons appointed by the executive director of the Commission on Aging and later removed. The first fact pattern posed concerns a situation in which a person is both appointed from a position in the classified service to a position in the unclassified service with the Commission and relieved of his duties in the unclassified service prior to August 27, 1976. The Ohio Constitution, in Art. II, §28 prohibits the General Assembly from passing retroactive laws. This provision has been judicially limited to forbid retroactive laws which operate to destroy an accrued substantive right. Gregory v. Flowers, 32 Ohio St.2d 48 (1972). Corresponding with this constitutional directive is R.C. 1.48 which creates a presumption that the effect of a statute is prospective unless expressly made retrospective. Since R.C. 173.05 does not contain an express provision requiring retrospective application, it must be presumed to be prospective. Accordingly, it is my opinion that R.C. 173.05, as amended by Am. Sub. S.B. No. 351, does not confer any rights upon an employee appointed to the unclassified service and relieved of his duties prior to August 27, 1976.

Your second question raises the issue of whether an employee appointed prior to August 27, 1976 to the unclassified service from the classified service and relieved of his position subsequent to that date has the rights enumerated in R.C. 173.05, as amended. R.C. 173.05 creates several conditions precedent to the receipt of the "back-up" rights enumerated therein. The first is that the employee must have been appointed to a position in the unclassified service from the classified service. The second is that the appointment must have been made by the Director of the Commission on Aging. Am. Sub. S.B. No. 351 does not require that these conditions occur after the effective date of the act. The employee, having met these conditions, must merely be relieved of duty in the unclassified position subsequent to the effective date of the act to obtain such "back-up" rights. Accordingly, it is my opinion that an employee who is appointed to the unclassified service from the classified service by the director of the commission prior to August 27, 1976 and relieved of his duties after that date has all rights enumerated in R.C. 173.05.

The third question presents a fact pattern in which the employee is appointed and relieved subsequent to the effective date of Am. Sub. S.B. No. 351. Since the effect of that legislation is prospective, an employee in the above described situation would have all rights set forth in R.C. 174.05.

Your fourth and last questions address the same issue and will be considered together. It is first necessary to discuss the effect of the reclassification

provisions of Am. Sub. H.B. No. 155. That bill did not, by itself, place employees previously in the classified service into the unclassified service. Rather, it established, in §43, a procedure whereby the Director of the Department of Administrative Services is required to group jobs within the several classifications set forth in §46 of the Act. Further, in determining whether an employee is in the classified or unclassified service, one must look to R.C. 124.11. Unclassified positions are specifically described in R.C. 124.11 (A). That section does not state that a position assigned to a classification which has a pay range found in schedule "C" automatically transforms the position from one in the classified to one in the unclassified service. Since neither Am. Sub. H.B. No. 155 nor placement in schedule "C" have the effect of placing a previously classified employee in the unclassified service, it is not necessary to further answer your last two questions.

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

1. An employee of the Ohio Commission on Aging, appointed to an unclassified position by the executive director of the Commission from the classified service and later relieved of his duties prior to August 27, 1976 (the effective date of Am. Sub. S.B. No. 351) is not entitled to the rights enumerated in R.C. 173.05, as amended by Am. Sub. S.B. No. 351.
2. An employee of the Ohio Commission on Aging, appointed to an unclassified position by the executive director of the Commission from the classified service prior to August 27, 1976 and relieved of his duties subsequent to that date is entitled to the rights enumerated in R.C. 173.05, as amended by Am. Sub. S.B. No. 351.
3. An employee of the Ohio Commission on Aging, appointed to an unclassified position by the executive director of the Commission from the classified service and relieved of his duties subsequent to August 27, 1976 is entitled to the rights enumerated in R.C. 173.05, as amended by Am. Sub. S.B. No. 351.