OPINION NO. 83-095

Syllabus:

1. R.C. 124.57 may not constitutionally be enforced to prohibit classified employees from engaging in nonpartisan political activity.

2. An appointing authority has the authority to take action pursuant to R.C. 124.34 to remove or otherwise discipline a classified employee who is engaged in partisan political activity in violation of R.C. 124.57, but such authority is discretionary not mandatory in nature. (1962 Op. Att'y Gen. No. 3005, p. 361, overruled in part.)

3. A classified employee who engages in partisan political activity may be prosecuted pursuant to R.C. 124.62. The position of an employee convicted under R.C. 124.62 is rendered vacant by virtue of such conviction.

To: J. Walter Dragelevich, Trumbull County Prosecuting Attorney, Warren, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 21, 1983

I have before me your request for my opinion on the following questions which I have phrased as follows:

1. Does an appointing authority have a mandatory duty to take action against an employee in the classified service who engages in political activity?

2. If an appointing authority does have a mandatory duty to take action against an employee in the classified service who engages in political activity, what specific action must be taken?

3. What limitations, if any, are imposed upon the enforcement of R.C. 124.57 by Constitutional provisions including the First Amendment of the Constitution of the United States which prohibits the passage of any law abridging the freedom of speech?

For ease of discussion, I will answer your third question first. R.C. 124.57 reads:

> No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions.

In Heidtman v. City of Shaker Heights, 163 Ohio St. 109, 126 N.E.2d 138 (1955), the court interpreted the word "politics" as used in R.C. 124.57 as "politics in its narrower partisan sense" (syllabus, paragraph 2) and thus concluded that the circulation of an initiative petition seeking the enactment of an ordinance relating to employment with a fire department was not political activity for purposes of R.C. 124.57. In Gray v. City of Toledo, 323 F.Supp. 1281 (N.D. Ohio 1971), the court directly confronted the First Amendment implications of the enforcement of R.C. 124.57. The court found that the government has a compelling interest in protecting a civil service system based on merit and free from political influence, and that interest was sufficient to justify an encroachment upon a public employee's First Amendment rights. The court went on to state:

> However, any restriction imposed by the government upon its employees' political activity must be directly related to the goal of prohibiting partisan political activity, the effect of which interferes with the efficiency and integrity of the public service. If no such relationship exists, the regulation must be struck down as violative of the first amendment rights of the employees. The more remote the relationship between a particular activity and the performance of official duty, the more difficult it is for the government to justify the

> restriction on the grounds that there is a compelling public need to protect the efficiency and integrity of the public service. . . . In addition, a government's right to infringe upon first amendment rights must be so circumscribed as not, in attaining a legitimate end, to unduly infringe upon protected rights. . . . (Citations omitted.)

323 F.Supp. at 1285. Adopting the Heidtman court's narrow interpretation of "politics," the court in Gray upheld the constitutionality of R.C. 124.57, indicating that if "politics" were read more broadly as referring to "the science of government and civil polity," R.C. 124.57 could be held unconstitutional. 323 F.Supp. at 1286.

In accordance with this judicial interpretation of "politics," [1981-1982 Monthly Record] Ohio Admin. Code 123:1-46-02 at 396-397 sets forth guidelines concerning political activity under R.C. 124.57. Rule 123:1-46-02 reads in part:

> (A)
> . . .
>
> (2) "Political activity" and "politics" refer to partisan activities, campaigns, and elections involving primaries, partisan ballots or partisan candidates.
> (B) The following are examples of permissible activities for employees in the classified service:
> (1) Registration and voting;
> (2) Expression of opinions, either oral or written;
> (3) Voluntary financial contributions to political candidates or organizations;
> (4) Circulation of nonpartisan petitions or petitions stating views on legislation;
> (5) Attendance at political rallies;
> (6) Signing nominating petitions in support of individuals;
> (7) Display of political materials in the employee's home or on the employee's property;
> (8) Wearing political badges or buttons, or the display of political stickers on private vehicles.
> (C) The following activities are prohibited to employees in the classified service:
> (1) Candidacy for public office in a partisan election;
> (2) Candidacy for public office in a nonpartisan general election if the nomination to candidacy was obtained in a partisan primary or through the circulation of nominating petitions identified with a political party;
> (3) Filing of petitions meeting statutory requirements for partisan candidacy to elective office;
> (4) Circulation of official nominating petitions for any candidate participating in a partisan election;
> (5) Service in an elected or appointed office in any partisan political organization;
> (6) Acceptance of a party-sponsored appointment to any office normally filled by partisan election;
> (7) Campaigning by writing for publications, by distributing political material, or by writing or making speeches on behalf of a candidate for partisan elective office, when such activities are directed toward party success;
> (8) Solicitation, either directly or indirectly, of any assessment, contribution or subscription either monetary or in-kind, for any political party or political candidate;
> (9) Solicitation of the sale, or actual sale, of political party tickets;
> (10) Partisan activities at the election polls, such as solicitation of votes for other than nonpartisan candidates and nonpartisan issues;
> (11) Service as recorder, checker, watcher, challenger, judge or board of election pollworker for any party or partisan committee;
> (12) Participation in political caucuses of a partisan nature;

(13) Participation in a political action committee which supports partisan activity.

This office, in reliance on Heidtman and Gray, has held that classified employees may run for elective office in nonpartisan elections, and hold such office, as long as the two positions are not otherwise incompatible. See, e.g., 1983 Op. Att'y Gen. No. 83-033; 1982 Op. Att'y Gen. No. 82-085. See also R.C. 3505.04; R.C. 3513.01; R.C. 3513.251; R.C. 3513.253; R.C. 3513.254; R.C. 3513.255.

In sum, R.C. 124.57 may not constitutionally be enforced to prohibit classified employees from engaging in nonpartisan political activity.

I turn now to your first question, whether an appointing authority has a mandatory duty to take action against an employee in the classified service who engages in partisan political activity. As you note in your request, R.C. 124.57 "does not refer to any other Ohio Revised Code provision, and does not set forth what action, if any, shall be taken if there is a violation thereof." In your letter of request you have also drawn my attention to R.C. 124.34 and the case of Jackson v. Coffey, 52 Ohio St. 2d 43, 368 N.E.2d 1259 (1977). R.C. 124.34 reads in part:

> 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 nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal. (Emphasis added.)

In Jackson v. Coffey, the court held that partisan political activity, which is proscribed for classified employees by R.C. 124.57, constitutes a failure of good behavior for purposes of R.C. 124.34, and thus serves as a ground for removal or other disciplinary measure under that provision. See State ex rel. Hein v. Cull, 135 Ohio St. 602, 21 N.E.2d 991 (1939).

There is no indication in Jackson v. Coffey, or any other authority of which I am aware, that an appointing authority, see R.C. 124.01(D), has a mandatory duty, as opposed to discretionary authority, to remove or otherwise discipline a classified employee for engaging in political activity or other activity constituting failure of good behavior, including those activities specifically proscribed under R.C. 124.34. Employees in the classified service may only be removed for good cause, i.e., one of the causes specified in R.C. 124.34, and only after the procedures for removal set forth in R.C. 124.34 are followed.[1] See R.C. 124.06; Yarosh v. Becane, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980); State ex rel. Bay v. Witter, 110 Ohio St. 216, 143 N.E. 556 (1924); Jackson v. Kurtz, 65 Ohio App. 2d 152, 416 N.E.2d 1064 (Hamilton County 1979). The fact that R.C. 124.34 provides the exclusive method whereby classified employees may be removed from their positions does not, however, impose any type of mandatory duty upon an appointing authority to utilize the

[1] There are limited exceptions to this statement, none of which are relevant to this discussion. See, e.g., R.C. 117.08 (removal of employee who refuses to properly keep the records of his office); R.C. 145.32 (compulsory retirement).

provisions of R.C. 124.34 in the first instance, once the appointing authority has become aware of employee misconduct. The decision whether to institute removal procedures lies within the appointing authority's good faith exercise of his discretion and sound judgment. See generally State ex rel. Gerspacher v. Coffinberry, 157 Ohio St. 32, 104 N.E.2d 1 (1952); State ex rel. Copeland v. State Medical Board, 107 Ohio St. 20, 140 N.E. 660 (1923); State ex rel. Kahle v. Rupert, 99 Ohio St. 17, 122 N.E. 39 (1918). R.C. 124.34 merely provides the grounds for removing a classified employee and the procedures for removing such an employee, which the appointing authority must follow once he believes that an employee has engaged in a prohibited activity, and decides that such employee should be disciplined.[2]

This conclusion is supported by rule 123:1-46-02(D) which reads:

> An employee in the classified service who engages in any of the activities listed in paragraphs (C)(1) to (C)(13) of this rule [set forth above] is subject to removal from his position in the classified service. The appointing authority may initiate such removal action in accordance with the procedures in section 124.34 of the Revised Code. The director may also institute an investigation or action in case of a violation. (Emphasis added.)

This provision indicates that an employee in the classified service who engages in prohibited political activity is merely subject to removal. An appointing authority "may" initiate a removal action in accordance with R.C. 124.34. The use of the word "may" indicates a provision is discretionary or optional rather than mandatory. Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). This again, indicates that an appointing authority does not have a mandatory duty to remove employees who have violated R.C. 124.57.

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[2] R.C. 124.34 sets forth the procedures which must be followed in removing or otherwise disciplining an employee as follows:

> In any case of reduction, suspension of more than three 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.
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> Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.
>
> In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officers or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

See 1 Ohio Admin. Code Chapter 123:1-31. In certain circumstances, additional constitutional safeguards must be given to a classified employee before disciplinary action is taken. See Loudermill v. Cleveland Board of Education, Nos. 82-3227, 82-3226 (6th Cir. Nov. 17, 1983) (classified employees are entitled to an opportunity to respond to the charges against them prior to the termination of their employment); Boals v. Gray, No. C76-250 (N.D. Ohio Nov. 9, 1983) (setting forth the due process protections, including a presuspension hearing, to which a classified employee is entitled before he may be suspended for three days or less).

As noted above, I am aware of no other authority which would compel an appointing authority to take action to discipline an employee engaged in political activity or other proscribed activity. I draw your attention to R.C. 124.62 which reads:

> After a rule has been duly established and published by the director of administrative services or by any municipal or civil service township civil service commission according to this chapter, no person shall make an appointment to office or select a person for employment contrary to such rule, or willfully refuse or neglect to comply with or to conform to the sections of this chapter, or willfully violate any of the sections. If any person who is convicted of violating this section holds any public office or place of public employment, such office or position shall by virtue of such conviction be rendered vacant. (Emphasis added.)

"Whoever violates section 124.62 of the Revised Code shall be fined not less than fifty nor more than five thousand dollars or be imprisoned not more than six months, or both." R.C. 124.99. See 1954 Op. Att'y Gen. No. 4058, p. 367 (violation of R.C. 124.57 provides a ground for the imposition of criminal liability under R.C. 124.62). Again, however, a prosecuting attorney or city law director has no mandatory duty to utilize the provisions of R.C. 124.62. Any decision to prosecute must be left to his discretion as prosecutor. See R.C. 309.08; R.C. 1901.34; Knepper v. French, 125 Ohio St. 613, 183 N.E. 869 (1932).

I note that there is authority for the proposition that the acceptance by a public officer of a second incompatible office[3] is an automatic vacation of the original office and amounts to an implied resignation or abandonment of the first position. See State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963); State ex rel. Witten v. Ferguson, 148 Ohio St. 702, 76 N.E.2d 886 (1947). While this propositon may be true when the first position is in the unclassified service, but see Ohio Const. art. II, §38; 1954 Op. Att'y Gen. No. 4058, p. 367 (even assuming that the holding of a classified position is a ground for removing an elected officer, the incumbent is entitled to remain in office until removal proceedings are instituted against him), I do not believe that this proposition excuses an appointing authority from following the provisions of R.C. 124.34 in order to remove a classified employee. In 1954 Op. Att'y Gen. No. 4058, it was held that a classified employee in violation of R.C. 124.57 does not automatically lose his classified position, but becomes subject to removal under R.C. 124.34 and criminal proceedings under R.C. 124.62.[4] I concur in that conclusion. This result may well be compelled for constitutional reasons. It is now well established that a classified employee has an expectancy in his continued employment, so that he may not be disciplined without the benefit of certain due process protections, such as those procedural protections found in R.C. 124.34. See Jackson v. Kurtz; 1981 Op. Att'y Gen. No. 81-100.[5]

I am aware of the case of State ex rel. Neffner v. Hummel, 142 Ohio St. 324, 51 N.E.2d 900 (1943), wherein the court held that, "an employee in the classified service upon acceptance of an appointment to an elective office in the unclassified service thereby terminates his status as an employee in the classified service. If such employee at some future date desires to re-enter the classified service he must submit himself to a competitive examination in accordance with the

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3 In determining whether two public positions are compatible, one factor is whether R.C. 124.57 would prohibit a classified employee from holding the second position. See 1979 Op. Att'y Gen. No. 79-111. But see 1954 Op. Att'y Gen. No. 4058, p. 367, 370, the operation of R.C. 124.57 does not create "an incompatibility in positions where it otherwise does not exist").

4 Once an employee is convicted of violating R.C. 124.62, however, his position is rendered vacant. R.C. 124.62; rule 123:1-46-02(G).

5 Of course, the due process protections surrounding a criminal trial are adequate to justify an employee's loss of employment upon conviction of violating R.C. 124.62.

provisions of the code." 142 Ohio St. at 332, 51 N.E.2d at 903-904. The court in Neffner did not explicitly address the question whether statutory provisions had to be followed in order to remove a classified employee in violation of R.C. 124.57. This point, along with the persuasive authority, including due process considerations, which indicate that the statutory removal procedures must be followed, lead me to the conclusion that Neffner is not compelling authority for the proposition that a classified employee's employment is automatically terminated by his involvement in political activities.

I am also aware of 1962 Op. Att'y Gen. No. 3005, p. 361, which concluded that an employee who violated R.C. 124.57 was subject to removal under R.C. 124.34, but went on to state that a classified employee who accepted a second, incompatible position, automatically vacated his first position. To the extent that 1962 Op. No. 3005 concludes that an employee may be deemed to have vacated his classified position by the acceptance of a second position, it is overruled.

Because I have answered your first question in the negative, I need not respond to your second question. You may wish to examine the removal provisions of R.C. 124.34, set forth above, the rules promulgated thereunder, see 1 Ohio Admin. Code Chapters 123:1-31; 124-3; 124-5; 124-11; 124-13; 124-15, and the constitutional requirements surrounding the discipline of classified employees, see footnote 2, with regard to the specific action which must be taken by an appointing authority in order to remove a classified employee.

In conclusion, it is my opinion, and you are advised, that:

1. R.C. 124.57 may not constitutionally be enforced to prohibit classified employees from engaging in nonpartisan political activity.

2. An appointing authority has the authority to take action pursuant to R.C. 124.34 to remove or otherwise discipline a classified employee who is engaged in partisan political activity in violation of R.C. 124.57, but such authority is discretionary not mandatory in nature. (1962 Op. Att'y Gen. No. 3005, p. 361, overruled in part.)

3. A classified employee who engages in partisan political activity may be prosecuted pursuant to R.C. 124.62. The position of an employee convicted under R.C. 124.62 is rendered vacant by virtue of such conviction.