OPINION NO. 86-015

Syllabus:

Notwithstanding the language of R.C. 124.11(A)(21) and R.C. 1513.03, as amended by Am. Sub. H.B. 238, 116th Gen. A. 1985 (eff. July 1, 1985), an individual who was initially employed in the position of inspection officer of coal and surface mining operations as a member of the classified service retains the protections afforded to classified employees. (1937 Op. Att'y Gen. No. 1190, vol. II, p. 2065, questioned.)

To: Joseph J. Sommer, Director, Department of Natural Resources, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 21, 1986

You have requested an opinion concerning the interpretation of certain provisions enacted by Am. Sub. H.B. 238, 116th Gen. A. (1985) (eff. July 1, 1985). R.C. 124.11, as amended by Am. Sub. H.B. 238, includes within the unclassified service, "[i]nspection officers of coal and surface mining operations designated under section 1513.03 of the Revised Code." R.C. 124.11(A)(21). R.C. 1513.03, also amended by Am. Sub. H.B. 238, states that inspection officers of coal and surface mining operations designated by the Chief of the Division of Reclamation under R.C. 1513.03 "shall hold office at the pleasure of

the chief." Prior to the enactment of Am. Sub. H.B. 238, such inspection officers were in the classified service and, as a result, they were governed by certain statutory provisions which protected their tenure. See R.C. 124.34;[1] 1979-1980 Ohio Laws, Part II, 4459, 4474-75 (Am. Sub. H.B. 1051, eff. Sept. 1, 1981) (prior version of R.C. 1513.03). See also R.C. 124.31; R.C. 124.311; R.C. 124.32; R.C. 124.321; R.C. 124.33. You have asked what effect the enactment of Am. Sub. H.B. 238 has had upon the status of the inspection officers employed prior to its enactment and, in particular, whether they continue to enjoy the protection afforded classified employees.

The civil service system of Ohio has been established pursuant to Ohio Const. art. XV, §10, which states: "Appointments 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, by competitive examinations. Laws shall be passed providing for the enforcement of this provision." It is clear that the General Assembly may, by the enactment of appropriate legislation, change the laws governing the civil service system. It has, however, been firmly established that individuals who hold positions in the classified service "are entitled to remain in their positions...until removed as provided by [relevant statutory provisions] or until such positions are abolished as provided by law." 1916 Op. Att'y Gen. No. 1649, vol. I, p. 968 at 969. See 1933 Op. Att'y Gen. No. 203, vol. I, p. 281 at 285 ("[t]he fact that a person is in the classified service does not mean that he will forever continue in that status, since there is no provision in the law which prevents the abolishment of a position in the classified service either by the operation of law, by an act of law or by the appointing authority when done in good faith"). When a position which is held by a classified employee is abolished, the employee who has held that position, like a laid-off employee, has statutory rights with respect to reinstatement or retention. R.C. 124.321; Howie v. Stackhouse, 59 Ohio App. 2d 98, 329 N.E.2d 1081 (Franklin County 1977). If the position is not abolished, the classified employee who holds it has a right to retain it, unless he is removed as provided by statute. See State ex rel. Townsend v. Berning, 135 Ohio St. 31, 19 N.E.2d 155 (1939).

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[1] R.C. 124.34 contains the general provisions governing the reasons for which a classified employee may be removed from his position. It states, 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 [concerning transfers and reinstatements], 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

It has been established that the act of changing a position from the classified service to the unclassified service does not constitute the abolishment of the position, where the position continues to be filled and the duties remain substantially the same. See In re Appeal of Moreo, 13 Ohio App. 3d 22, 24, 468 N.E.2d 85, 88 (Montgomery County 1983) (job abolishment "contemplates a permanent elimination of a particular position"). See generally Weston v. Ferguson, 8 Ohio St. 3d 52, 54, 457 N.E.2d 818, 819-20 (1983) ("[a] civil service employee may not be removed under the guise of abolishing his office when in fact the transaction amounts to no more than a change in the name of the position and the appointment of another person, the duties remaining substantially the same....The theory is that a position may be abolished, but not the person") (citations omitted).

Griffith v. Department of Youth Services, No. 85AP-488 (Ct. App. Franklin County Dec. 5, 1985), involved a situation which is similar to the one with which you are concerned. R.C. 5139.19 was amended by 1983-1984 Ohio Laws, Part II, 2872, 3162 (Am. Sub. H.B. 291, eff. July 1, 1983) to bring deputy managing officers of the Department of Youth Services within the unclassified civil service. As a result, two individuals were informed that their jobs were being changed from classified positions to the unclassified service and were given the option of being placed in the unclassified service and retaining their jobs. They refused to do so and were subsequently informed that, under 1 Ohio Admin. Code 123:1-5-08,[2] their jobs had

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> 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.)

See also R.C. 124.36. Persons who are in the unclassified service are exempt from the examinations required of classified employees, see R.C. 124.11; R.C. 124.23, and are generally subject to summary dismissal by their respective appointing authorities, rather than being protected by the provisions of R.C. 124.34. See Yarosh v. Becane, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980); State ex rel. Slovensky v. Taylor, 135 Ohio St. 601, 21 N.E.2d 990 (1939); 1983 Op. Att'y Gen. No. 83-095; 1981 Op. Att'y Gen. No. 81-100.

2 1 Ohio Admin. Code 123:1-5-08 states:

> Whenever a position is for any reason changed from the classifed to the unclassified service, if the position is occupied by a classified employee, and if as a result of such change that employee is displaced, such employee shall be treated as if his position were abolished, and the layoff rules and regulations shall be followed as directed in Chapter 123:1-41 of these rules.

been abolished. The Franklin County Court of Appeals held that there was no statutory authorization for the abolishment of the positions, stating, slip op. at 3-4:

> R.C. 124.321(D), in pertinent part, provides:
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> "(D) Employees may be laid off as a result of abolishment of positions. Abolishment means the permanent deletion of a position or positions from the organization or structure of an appointing authority due to lack of continued need for the position. An appointing authority may abolish positions as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or for lack of work. The determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing authority.****"
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> Clearly, R.C. 124.321(D) only contemplates the actual abolishment--the complete eradication--of a position. As noted in the case of In re Appeal of Moreo (1983), 13 Ohio App. 3d 22, job "abolishment" means a permanent elimination of a particular position. Here, the appellants' positions were not abolished. Rather, the positions remain and it was the appellants who were effectively terminated from those positions.
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> R.C. 124.321(D) does not allow a particular person to be fired or laid off from a position while leaving that position intact for another person to fill. Nothing in the statutory scheme allows this result.
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> In Esselburne v. Dept. of Agriculture (May 7, 1985), No. 84AP-791, unreported (1985 Opinions 1316), this court held that Ohio Adm. Code 123:1-5-08 could not be used to accomplish something which the statutory scheme does not allow. To the extent that this occurs, the administrative rule is inconsistent with R.C. 124.321(D). Therefore, to the extent that it allows appellants to be terminated while not actually abolishing their positions, Ohio Adm. Code 123:1-5-08 is inconsistent with R.C. 123.321(D).

Esselburne v. Ohio Department of Agriculture, No. 84AP-791 (Ct. App. Franklin County May 7, 1985), motion to certify denied (Aug. 23, 1985), which is cited in the Griffith case, involved an attempt by an administrative body to abolish a classified position by changing the position from the classified to the unclassified service.

It is clear under the principles discussed above that, in changing the position of inspection officer of coal and surface mining operations from the classified to the unclassified service, the General Assembly did not abolish any positions. Further, Am. Sub. H.B. 238 contains no indication that the civil service protections enjoyed by the classified employees then serving as inspection officers were to be modified. It must be assumed, therefore, that the intention of the General Assembly was consistent with the principle set forth in R.C. 1.48: "A statute is presumed to be prospective in its operation unless expressly made retrospective." It follows from this

presumption that, notwithstanding the fact that Am. Sub. H.B. 238 provides that inspection officers are in the unclassified service, persons who were employed as inspection officers prior to the effective date of Am. Sub. H.B. 238 retain their status as classified employees.[3] See generally Jackson v. Kurtz, 65 Ohio App. 2d 152, 157-58, 416 N.E.2d 1064, 1068 (Hamilton County 1979) (holding that R.C. 124.34 "gives employees in the classified service a right to tenure during good behavior and efficient service (claim of entitlement) that cannot be reduced, suspended or removed except for the certain specific causes therein listed"); 1981 Op. Att'y Gen. No. 81-067 at 2-278 ("classified employees are deemed to have a property right in, or claim of entitlement to, continued employment for due process purposes") (citations omitted).

I conclude, therefore, that the provisions of Am. Sub. H.B. 238 which changed the position of inspection officer from the classified to the unclassified service apply only to persons hired after the amendments became effective.[4] To reach a contrary conclusion--that the civil service protections afforded to classified inspection officers were abrogated by the designation of their positions as unclassified positions--would raise serious questions concerning the constitutional validity of the action of the General Assembly. See Ohio Const. art. II, §28 ("[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligations of contracts..."); Fraternal Order of Police v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (Mahoning County 1975), cert. denied, 424 U.S. 977 (1976); 1981 Op. Att'y Gen.

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[3] A related principle of construction appears in R.C. 1.58, as follows:

> (A) The...amendment...of a statute does not, except as provided in division (B) of this section [concerning the penalty, forfeiture, or punishment for an offense]:
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> ...
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> (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;
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> ....

Pursuant to this provision, the rights accorded to inspection officers who were initially employed in the classified service were not affected by the amendments enacted by Am. Sub. H.B. 238, 116th Gen. A. (1985) (eff. July 1, 1985).

[4] I am aware that a contrary conclusion was reached in 1937 Op. Att'y Gen. No. 1190, vol. II, p. 2065. That opinion concluded that, under legislation changing the positions of appointees of juvenile court judges from the classified service to the unclassified service, persons holding such positions at the time of enactment of such legislation, "unless appointed for a definite term, otherwise fixed by statute or by contract, hold their positions only at the pleasure of the appointing power." Id. at 2069-70. I respectfully question the continuing validity of the conclusion reached by my predecessor in that opinion.

No. 81-100; Op. No. 81-067 (concluding that a statutory enactment which restricted persons who could serve in a particular position applied only to persons hired after the effective date of the enactment). See also R.C. 1.47 ("[i]n enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended...").

Based upon the foregoing, it is my opinion, and you are hereby advised, that, notwithstanding the language of R.C. 124.11(A)(21) and R.C. 1513.03, as amended by Am. Sub. H.B. 238, 116th Gen. A. 1985 (eff. July 1, 1985), an individual who was initially employed in the position of inspection officer of coal and surface mining operations as a member of the classified service retains the protections afforded to classified employees. (1937 Op. Att'y Gen. No. 1190, vol. II, p. 2065, questioned.)