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PROVISIONAL EMPLOYE — CLASSIFIED SERVICE, STATE — NO PREFERENTIAL RIGHT TO BE RE-ESTABLISHED IN POSITION FROM WHICH HE WAS LAID OFF IN GOOD FAITH — EVENT, NECESSARY TO REFILL POSITION WITHIN YEAR FROM DATE OF LAY-OFF AND PRIOR TO ESTABLISHED ELIGIBLE LIST.

SYLLABUS:

A provisional employe has no preferential right to be re-established in a position from which he was laid off in good faith if it becomes necessary to refill such position within a year from the date of the lay-off and before the establishment of an eligible list.

Columbus, Ohio, June 29, 1942.

Miss Gertrude Jones, Chairman, State Civil Service Commission,  
Columbus, Ohio.

Dear Miss Jones:

I have your letter wherein, after a recital of facts raising the question, you ask:

“ \* \* \* does a provisional appointee who has been laid off for an indefinite period for lack of work or funds, or for other cause, and which lay-off has not extended for a period beyond one year, retain his eligibility for re-assignment of his duties at

such time as there is work to be done, such re-assignment of duties to be made only in case no eligible list for said position has been established during the period of the lay-off?"

To answer your question it is necessary first to examine the statutory provisions which authorize the employment of the so-called provisional employe in the classified service. Such authorization is found in Section 486-14, General Code, which, in so far as pertinent, is as follows:

"Positions in the classified service may be filled without competition as follows:

1. Whenever there are urgent reasons for filling a vacancy in any position in the classified service and the commission is unable to certify to the appointing officer, upon requisition by the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter. \* \* \*

By the wording of the above, it can be seen that a provisional employe is a mere interim employe who is to serve in the absence of an eligible list and until the establishment of an eligible list, which the law contemplates shall be established within ninety days after a provisional appointment. It should be noticed, too, that such employe qualifies for appointment by the taking of a non-competitive examination only and not after competitive examination whereby the relative merits of applicants for employment are determined.

It can be said, after the above analysis and because Section 486-1, General Code, defines the classified service as the "competitive classified civil service," that a provisional employe is not, in the full meaning of the term, an employe within the classified civil service although he may, while serving provisionally, be occupying a position which, in itself, is in the classified civil service. If Section 486-17, General Code, which limits the right of appointing officers to remove civil service employes, be examined the above conclusion is confirmed. That section, deleting portions not necessary for our purpose, reads:

“No person shall be reduced in pay or position, *laid off*, suspended, discharged or otherwise discriminated against by an appointing officer for religious or political reasons or affiliations. \* \* \* and provided further that the provisions of this section shall not apply to temporary and exceptional appointments made under the authority of section 486-14 of the General Code.”  
(Emphasis mine.)

It was formerly considered that provisional employes were wholly without the protection of the civil service laws provided for employes in the classified civil service and that provisional employes might be removed from their positions at the will of the appointing officer, free of the restrictions imposed by the civil service laws. This belief was based upon long continued administrative interpretation of the applicable law and upon the case of *State, ex rel. Hart v. Board of Commissioners*, 101 O.S. 336, decided in 1920. That case contained this statement:

“ \* \* \* This being so, his appointment by the board of county commissioners must have been provisional only, subject to be terminated upon an eligible list being certified by the state civil service commission and his successor being appointed from that list, or subject to the will of the appointing power, \* \* \* .”

In 1939, however, the case of *State, ex rel. Slovensky v. Taylor*, 135 O.S. 601, dissolved the belief that a provisional employe might be summarily dismissed. The court in that case said:

“ \* \* \* a majority of the court is of the opinion that one receiving a provisional appointment under Section 486-14, General Code, in the absence of an eligible list, becomes an appointee in the classified service within the contemplation of Section 486-8(b), General Code, 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 *lay-off*.”  
(Emphasis mine.)

Because of the specific use of the word “lay-off” in the quotation above and because of its manner of use in context with the other words of the quotation, the court must have considered also that, although in its opinion a provisional might not be summarily dismissed, such employe had no right of tenure that would enable him to re-claim his position once he had been properly separated from the service by lay-off, or otherwise.

This conclusion seems properly to follow a consideration of the nature of provisional employment and I consider that the Slovensky case specifically says that a lay-off terminates a provisional employe's tenure.

Based upon the above, it is my opinion that a provisional employe has no preferential right to be reestablished in a position from which he was laid off in good faith if it becomes necessary to refill such position within a year from the date of the lay-off and before the establishment of an eligible list.

Respectfully,

THOMAS J. HERBERT  
Attorney General.