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CIVIL SERVICE—PROVISIONAL APPOINTEE WHO HOLDS POSITION UNTIL REPLACED BY APPOINTEE FROM ELIGIBLE LIST—NOT REQUIRED TO SERVE PROBATIONARY PERIOD OF THREE MONTHS AS DO ELIGIBLES—SHOULD SUCH PROVISIONAL APPOINTEE LATER QUALIFY AS AN ELIGIBLE BY COMPETITIVE EXAMINATION HE IS SUBJECT TO PROBATIONARY PERIOD.

SYLLABUS:

A provisional appointee holds his position until replaced by an appointee from an eligible list, and as such is not required to serve the probationary period of three months prescribed for eligibles; but should such provisional appointee later qualify as an eligible by competitive examination he is subject to the probationary period even though he satisfactorily served as a provisional for a time longer than the probationary period.

Columbus, Ohio, May 28, 1954

State Civil Service Commission of Ohio  
Columbus, Ohio

Gentlemen :

Your request for my opinion reads as follows :

"The decision of the court in *State ex rel. Slovensky v. Taylor*, 135 O. S. 601, was the basis for formulating a policy of this Commission whereby it has consistently ruled that employees who are appointed after non-competitive examinations under the provisions of Section 143.23 (A) Revised Code, are not subject to a probationary period and the risk of removal at the end of such probationary period, which are provided for *original* and *promotional appointments* under Section 143.20 Revised Code and Rule VIII-19 of this Commission.

"Your opinion is requested as to whether an employee appointed, or promoted, after non-competitive examination is subject to the same probationary period and risk of removal that applies to an employee appointed under Section 143.20 Revised Code."

The Civil Service Act, Sections 143.20 and 143.23, Revised Code, provides for several different kinds of appointments: (1) those appointed from an eligible list after competitive examination; (2) provisional appointments in the absence of such eligible list; (3) appointments involving exceptional qualifications of a scientific, managerial, professional or educational character; (4) temporary appointments for a period not to exceed one month. As to appointments from an eligible list Section 143.20 provides :

"All original and promotional appointments shall be for a probationary period, not to exceed three months, to be fixed by the rules of the commission, and no appointment or promotion is final until the appointee has satisfactorily served his probationary period. At the end of the probationary period, the appointing officer shall transmit to the commission a record of the employee's service, and if such service is unsatisfactory, the employee may, with the approval of the commission, be removed or reduced without restriction; but dismissal or reduction may be made during such period as is provided for in sections 143.26 and 143.27 of the Revised Code. \* \* \*"

As to provisional appointments Section 143.23 (A) provides:

“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 noncompetitive examination, and if such nominee is certified by the commission as qualified after such noncompetitive 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 a regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days. \* \* \*”

Construing this section in *State ex rel. Slovinsky v. Taylor*, 135 Ohio St., 601, it was held that one receiving a provisional appointment in the absence of an eligible list becomes an appointee in the classified service, and as such 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.”

The statute thus fixes the tenure of provisionals until a regular appointment can be made from an eligible list, but contains no provision subjecting such appointees to the probationary period required of those appointed from an eligible list; nor are they subject to removal while serving as provisionals except for cause under the statute. Simple reason negates the applicability of probation to emergency cases which call for immediate action.

The situation, however, is different should a provisional appointee later qualify by competitive examination and be certified to the position from a duly established eligible list. His tenure would no longer be provisional and he would be required by mandate of statute to serve the probationary period of three months with the attendant risk of removal should his services prove unsatisfactory at the end of such period.

Thus it has been held that a provisional appointment made without a competitive examination will not ripen into a permanent one merely by reason of an extended duration of occupancy of the position by the provisional appointee or because the commission failed or neglected,

within the ninety days required by statute, to hold a competitive examination and establish an eligible list from which a permanent appointment for the position could be made. State ex rel. Jake v. Emmons (App.), 40 O.L.R. 241. Or, as stated by the Supreme Court, the fact that a provisional appointee held his position longer than the probationary period will not ipso facto gain him a permanent status in the classified service. State ex rel. Higgins v. George, 147 Ohio St., 165. "The period of 90 days is wholly unlike the probationary period of not exceeding three months, and is not probationary itself in any sense of the word," the court said.

The language of the statute is manifestly mandatory; it requires that the appointment "*shall be* for a probationary period not to exceed three months" and thus sets up an indispensable prerequisite to make the appointment final. To attain full status as a member of the classified service such appointee is required, notwithstanding his previous service as a provisional, to qualify for the position by competitive examination and to hold it under probation status for the period required by statute. His position is no different from that of one who has separated himself from the service without reinstatement and later attempts to reenter it. In the language of the Supreme Court, "no appointment to a civil service position shall be deemed finally made until the appointee has satisfactorily served his probationary period." Artman v. McDonough, 132 Ohio St., 47.

In the light of the specific statutory provisions and the construction placed upon them by the Supreme Court, it is my opinion that a provisional appointee holds his position until replaced by an appointee from an eligible list, and as such is not required to serve the probationary period of three months prescribed for eligibles; but should such provisional appointee later qualify as an eligible by competitive examination he is subject to the probationary period even though he satisfactorily served as a provisional for a time longer than the probationary period.

Respectfully,

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