

January 29, 2015

The Honorable Scott A. Haselman
Fulton County Prosecuting Attorney
152 South Fulton Street, Suite 240
Wauseon, Ohio 43567

SYLLABUS:

2015-003

Pursuant to R.C. 5126.0221(B)(3), a classified employee of a county board of developmental disabilities who was employed on or after October 31, 1980, is subject to dismissal from employment when that employee's immediate family member is elected as a county commissioner of a county that is served by the county board of developmental disabilities that employs the classified employee.



MIKE DEWINE

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OPINION NO. 2015-003

The Honorable Scott A. Haselman
Fulton County Prosecuting Attorney
152 South Fulton Street, Suite 240
Wauseon, Ohio 43567

Dear Prosecutor Haselman:

You have requested an opinion concerning interpretation of R.C. 5126.0221(B)(3) and its statutory predecessors.¹ R.C. 5126.0221(B)(3) prohibits an individual from being employed by a county board of developmental disabilities if he has an immediate family member who serves as a county commissioner of any of the counties served by the board, unless the individual was an employee of the county board of developmental disabilities before October 31, 1980. You would like to know if a classified employee of the board of developmental disabilities, who was originally hired after October 31, 1980, is subject to dismissal if an immediate family member of that employee became a county commissioner in a county served by that board of developmental disabilities after the employee was hired. Before answering your question, it is helpful to give some background on employees in the classified service and county boards of developmental disabilities.

Classified Civil Service Employees

The civil service system established in R.C. Chapter 124 is divided into the classified and unclassified service. R.C. 124.11; 2000 Op. Att’y Gen. No. 2000-017, at 2-106. Generally, employees who have positions in the classified service are required to take an examination to determine their merit and fitness for the job. 2000 Op. Att’y Gen. No. 2000-017, at 2-106. “Employees in the classified service can only be removed for good cause and only after the

¹ The provisions in R.C. 5126.0221(B)(3) have gone through a number of recodifications. In 1980, the General Assembly enacted language that limited who could be employed by county boards of developmental disabilities. 1979-1980 Ohio Laws, Part I, 499, 575 (Am. Sub. S.B. 160, eff. Oct. 31, 1980). The bill language stated that “[n]o person shall serve as a member or employee of a county board of mental retardation and developmental disabilities if a member of his immediate family serves as a county commissioner of the county served by the board.” *Id.* That language has gone through a number of changes over the years and currently appears in R.C. 5126.0221(B)(3).

procedures enumerated in R.C. 124.34 and the rules and regulations thereunder are followed.” *Yarosh v. Becane*, 63 Ohio St. 2d 5, 9, 406 N.E.2d 1355 (1980). Individuals who apply for positions in the unclassified service are not required to take such an exam. *Id.* “Employees in the unclassified service do not receive the protections afforded employees in the classified service.” *Id.* Rather, unclassified employees are appointed at the discretion of the appointing authority and are subject to dismissal without cause. 2012 Op. Att’y Gen. No. 2012-018, at 2-162.

R.C. 124.34 governs when a classified employee may be removed from service. Generally, classified employees may not be

reduced in pay or position, fined, suspended, or removed, or have the officer’s or employee’s longevity reduced or eliminated, except as provided in [R.C. 124.32²], and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer’s or employee’s appointing authority,³ violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

R.C. 124.34(A) (footnotes added). Thus, R.C. 124.34 sets forth specific reasons for which a classified employee may be removed from service.

County Boards of Developmental Disabilities

County boards of developmental disabilities were established in 1967 by the General Assembly to provide support and services to individuals with intellectual and other developmental disabilities. Ohio Association of County Boards, *About Us*, <http://www.oacbdd.org/main/about-us/> (last visited Jan. 29, 2014). More than 90,000 children and adults receive services arranged by county boards of developmental disabilities. *Id.*

² R.C. 124.32 limits transfers of classified employees from one position to another. R.C. 124.32(B) entitles classified employees to reinstatement within one year from removal unless their removal was a result of delinquency or misconduct.

³ You have informed us that there is a policy in place at your particular county board of developmental disabilities that addresses nepotism. It states that “[m]embers of the immediate families of Board members, the Board of County Commissioners, or the Superintendent may not be hired to work for the Program.” This policy, however, restricts only hiring practices and does not indicate whether a current classified employee is subject to dismissal if an immediate family member becomes a county commissioner.

Among other things, county boards of developmental disabilities are responsible for administering and operating facilities, programs, and services for qualifying individuals; coordinating, monitoring, and evaluating existing services and facilities available to qualifying individuals; and providing early childhood services, supportive home services, and adult services. R.C. 5126.05(A).

Members of county boards of developmental disabilities are appointed by county commissioners and probate judges. R.C. 5126.021. Boards consist of seven members, and as specified by statute some of these members must be either eligible for services provided by the county board or immediate family members of such individuals. R.C. 5126.021; R.C. 5126.022(B)-(C). Each county board of developmental disabilities must submit, at least annually, reports of its work and expenditures to the county commissioners. R.C. 5126.05(A)(6).

The board of county commissioners in the county served by the board of developmental disabilities ensures funding for the board of developmental disabilities. R.C. 5126.05(G). County commissioners “levy taxes and make appropriations sufficient to enable the county board of developmental disabilities to perform its functions and duties, and may utilize any available local, state, and federal funds for such purpose.” *Id.*

County boards of developmental disabilities employ individuals in several different positions, including management employees, professional employees, and service employees. R.C. 5126.20; R.C. 5126.22. Certain employees of county boards of developmental disabilities are exempt from the classified service, while others are included in the classified service. R.C. 124.11(A)(19). Professional employees and registered service employees of a county board of developmental disabilities are included in the classified service, but they may not be required (like other civil service employees) to qualify for employment based on the results of a civil service examination. R.C. 124.241; *see* R.C. 124.23(A) (professional or certified service and paraprofessionals of county boards of developmental disabilities are exempt from examination). Rather, they may be hired on the basis of their qualifications. R.C. 124.241.

R.C. 5126.0221(B) sets forth certain qualifications for individuals employed by county boards of developmental disabilities. Specifically, division (B)(3) prohibits “[a]n individual with an immediate family member who serves as a county commissioner of any of the counties served by the county board unless the individual was an employee of the county board before October 31, 1980” from being “employed by a county board of developmental disabilities.” R.C. 5126.0221(B)(3).⁴ R.C. 5126.01(N) defines “immediate family” as “parents, grandparents, brothers, sisters, spouses, sons, daughters, aunts, uncles, mothers-in-law, fathers-in-law, brothers-in-law, sisters-in-law, sons-in law, and daughters-in-law.”

⁴ R.C. 5126.0221(B) does not apply to certain direct services contracts as provided in R.C. 5126.033(C). R.C. 5126.0221(B).

A Classified Employee of a County Board of Developmental Disabilities is Subject to R.C. 5126.0221(B)(3)

You would like to know whether a classified employee of a county board of developmental disabilities hired after October 31, 1980, must be dismissed pursuant to R.C. 5126.0221(B)(3) when his immediate family member is elected to a position as a county commissioner of a county that is served by the board of developmental disabilities. You note that you believe there is a conflict between R.C. 5126.0221(B)(3), which indicates such an individual cannot be employed by the board, and R.C. 124.34, which sets forth specific reasons for removing a classified employee.⁵

In order to determine the meaning of the qualification set forth in R.C. 5126.0221(B)(3), that no individual “may be employed by a county board of developmental disabilities” if he has an “immediate family member who serves as a county commissioner of any of the counties served by the county board unless the individual was an employee of the county board before October 31, 1980,” we must discuss the meaning of the word “employ.” The word “employ” means “to make use of” or “to use or engage the services of” or “to provide with a job that pays wages or a salary.” *Merriam-Webster’s Collegiate Dictionary* 408 (11th ed. 2005). Such a definition is not limited to simply “hiring” an employee, but rather encompasses all the time that the employee is working for the employer. Thus, a county board of developmental disabilities may not “make use of” or “use or engage the services of” an individual whose immediate family member serves as a county commissioner for a county that is served by the board, unless the individual was employed before October 31, 1980.

R.C. 5126.0221(B)(3) sets forth a qualification for employment with a county board of developmental disabilities. Generally, qualifications for employment are required not only at the start of employment but throughout the term of employment. *See* 1989 Op. Att’y Gen. No. 89-057, at 2-241 (“a requirement for a public office not only applies at the commencement of a term, but also during the occupancy of the office”); *see also Fraternal Order of Police Youngstown Lodge No. 28 v. Hunter*, 49 Ohio App. 2d 185, 200, 360 N.E.2d 708 (Mahoning County 1975). Once an employee’s immediate family member becomes a county commissioner, the employee is no longer qualified to hold the position pursuant to R.C. 5126.0221(B)(3) and therefore is subject to dismissal. *See Fraternal Order of Police Youngstown Lodge No. 28 v. Hunter*, 49 Ohio App. 2d at 200 (institution

⁵ Although your letter indicates that the classified employee with whom you are concerned is also a member of the bargaining unit, that fact does not affect the outcome of this opinion. You have informed us that the collective bargaining agreement is silent on this issue. Pursuant to R.C. 4117.10(A), “[w]here no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.”

of a residency requirement and subsequent removal of police officers hired after such requirement became effective is constitutional, as long as those officers were hired after the effective date of the statute). Such an outcome is analogous to numerous cases and opinions that have held public officials who no longer meet statutory qualifications of the office are disqualified from service. *See, e.g., State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 604, 589 N.E.2d 1327 (1992) (“noncompliance with a statutory prerequisite for holding office is a disqualification by operation of law and automatically creates a vacancy”); *State ex rel. Boda v. Brown*, 157 Ohio St. 368, 373, 105 N.E.2d 643 (1952) (an officer must be qualified to hold his office not only when he is elected or appointed but also throughout his term; otherwise he is disqualified by operation of law from continuing in the office); 2005 Op. Att’y Gen. No. 2005-004, at 2-37 (“[i]t has been established, as a general rule, that a public official who has qualified for an office and has begun to serve in the office is required to continue to meet the qualifications of the office throughout the term of service”); 2002 Op. Att’y Gen. No. 2002-015, at 2-89 n.1 (“[a]n officer who fails to maintain the qualifications statutorily required for office will be deemed to have resigned”); 1998 Op. Att’y Gen. No. 98-009, at 2-50 (“[i]t is ... a fundamental rule of law that a public officer must be qualified to serve throughout her entire term of office”). We recognize that these authorities concern qualifications for office not employment. We discern no reasonable basis, however, to reject their application to employment situations, particularly where the evident intent of the General Assembly is that qualifications of employment exist throughout the employment.

1989 Op. Att’y Gen. No. 89-057 analyzed R.C. 5126.03, a provision similar to R.C. 5126.0221(B)(3), now contained in R.C. 5126.023(B). R.C. 5126.03 prohibited an individual from serving as a member of a county board of developmental disabilities where an immediate family member served as a member of that same board. The opinion determined that where two board members became immediate family members of one another subsequent to their appointment to the board, both board members were subject to removal from the board, even though the statute did not contain a removal provision. 1989 Op. Att’y Gen. No. 89-057, at 2-242. While this opinion did not discuss classified employees, it demonstrates that dismissal is appropriate when an individual is qualified to hold the position when appointed but his qualifications later change.

Thus, if an employee was hired by a county board of developmental disabilities on or after October 31, 1980, he is not qualified and cannot be employed by the board if an immediate family member is a county commissioner of a county served by the county board. Although R.C. 5126.0221(B)(3) does not require that such an employee be dismissed from employment, it does state that such an employee may not be “employed.” In order to give the words of the statute meaning, we must read it as subjecting such an employee to dismissal from his position; otherwise the statute would have no practical effect. *See D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶19 (2002) (citation omitted) (“words in a statute do not exist in a vacuum. [A court] must presume that in enacting a statute, the General Assembly intended for the entire statute to be effective. Thus, all words should have effect and no part should be disregarded”).

Other than individuals employed before October 31, 1980, the statute does not make an exception from the employment qualifications for an individual who was working for the board of developmental disabilities before his immediate family member was elected as a county commissioner. The statute also does not make an exception for classified employees from the employment qualifications. Therefore, R.C. 5126.0221(B)(3) means that an employee of the county board of developmental disabilities, including an employee in the classified service, who was hired on or after October 31, 1980, is subject to dismissal if an immediate family member of that employee becomes a county commissioner in a county served by the board.

This interpretation is supported by a prior opinion of the Attorney General. 1981 Op. Att’y Gen. No. 81-067 considered R.C. 5126.03(D), a precursor to R.C. 5126.0221(B)(3). R.C. 5126.03(D), which became effective on October 31, 1980, prohibited an individual from serving as an employee of a county board of developmental disabilities if his immediate family member was employed as a county commissioner in a county served by the board. It did not contain the language requiring an employee to be employed by the county board on or after October 31, 1980, in order for the prohibition to apply. In the 1981 opinion, a county board of developmental disabilities employed a classified individual whose spouse was serving as a county commissioner of a county served by the board. The opinion determined that where a classified employee was employed by the county board prior to October 31, 1980, the effective date of the prohibition in R.C. 5126.03(D), the employee did not have to be removed from employment. 1981 Op. Att’y Gen. No. 81-067, at 2-279. The opinion implies that the statute would prohibit a classified employee hired after the statute’s effective date from being employed by a county board of developmental disabilities if his immediate family member was a county commissioner of the county served by the board. *See id.*

Although we have determined that R.C. 5126.0221(B)(3) means that a classified employee of the county board of developmental disabilities who was hired on or after October 31, 1980, is subject to dismissal if an immediate family member of that employee becomes a county commissioner in a county served by the board, we have not considered whether that statute is to be applied despite the provisions of R.C. 124.34(A). R.C. 124.34 governs when classified employees may be removed from service and sets forth specific reasons for their removal. R.C. 124.34(A) does not provide any exception for employees of county boards of developmental disabilities. Thus, R.C. 124.34 conflicts with R.C. 5126.0221(B)(3) because R.C. 124.34 allows classified employees to be removed only for certain enumerated reasons, and R.C. 5126.0221(B)(3) subjects a classified employee to removal for a reason beyond those set forth in R.C. 124.34.

“If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both.” R.C. 1.51. If, however, the conflict is irreconcilable, “the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.” *Id.*; *State v. Conyers*, 87 Ohio St. 3d 246, 248, 719 N.E.2d 535 (1999) (“when an irreconcilable conflict exists between two statutes that address the same subject matter, one general and the other special, the special provision prevails as an exception to the general statute”).

R.C. 124.34(A) applies to all classified employees whereas R.C. 5126.0221(B)(3) applies only to those employees of a county board of developmental disabilities. In other words, R.C. 5126.0221(B)(3) is a special provision intended to cover only a subgroup of those individuals covered by R.C. 124.34. In addition, the original version of R.C. 5126.0221(B)(3), contained in R.C. 5126.03(D), was enacted in 1980. 1980 Ohio Laws, Part I, 499, 575 (Am. Sub. S. B. 160, eff. Oct. 31, 1980). R.C. 124.34, however, was first enacted in 1974 and its statutory predecessors date back to the General Code. 1974 Ohio Laws, Part II, 191, 195 (Am. Sub. S. B. 243, eff. July 23, 1974); 1955-1956 Ohio Laws, 90 (Am. S. B. 134, eff. August 16, 1955) (first instance of appearance in Revised Code). Therefore, R.C. 124.34 is a more general provision⁶ than R.C. 5126.0221(B)(3) and was enacted earlier in time, so it is R.C. 5126.0221(B)(3) that must be applied. Therefore, the employee in question is subject to dismissal from the position with the county board of developmental disabilities pursuant to R.C. 5126.0221(B)(3).

The result in this opinion is compelled by the language of R.C. 5126.0221(B)(3). The prohibition in R.C. 5126.0221(B)(3) may cause a hardship for an employee of a county board of developmental disabilities whose immediate family member becomes a county commissioner of a county served by the board. The employee is subject to the loss of his employment and the financial security it brings him. This prohibition also may curtail the aspirations of a family member of a county board of developmental disabilities employee to serve the people as a county commissioner. Given these practical consequences, the General Assembly may wish to revisit this prohibition to determine whether it advances a legitimate public policy, and if not, to amend the statute by removing the prohibition. “The General Assembly is empowered to take cognizance of the consequences of existing law and, within constitutional limits, to change the law to achieve the desired results.” 2009 Op. Att’y Gen. No. 2009-006, at 2-47; *see, e.g.*, Ohio Const. art. II, § 1; *State ex rel. Nimberger v. Bushnell*, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus).

⁶ One Ohio court has stated that “R.C. 124.34 must be considered as a special statute specifically dealing with the suspension of civil service employees and their rights of appeal therefrom.” *Ruprecht v. City of Cincinnati*, 64 Ohio App. 2d 90, 92-93, 411 N.E.2d 504 (Hamilton County 1979) (quoting *Klosterman v. Payne*, No. C-75044, 1975 WL 182156, at *2 (Hamilton County App. Oct. 27, 1975)). The *Ruprecht* court, however, was comparing R.C. 124.34 (which specifically concerns the rights of employees in the classified service) with R.C. 2506.01, which addresses appeals from various bodies in general. For purposes of this opinion, however, R.C. 124.34 is general as compared to R.C. 5126.0221(B)(3), which specifically applies only to those employees of county boards of developmental disabilities hired on or after October 31, 1980, and who have an immediate family member who is a county commissioner of a county served by the board.

Conclusion

Based on the foregoing it is my opinion and you are hereby advised, pursuant to R.C. 5126.0221(B)(3), a classified employee of a county board of developmental disabilities who was employed on or after October 31, 1980, is subject to dismissal from employment when that employee's immediate family member is elected as a county commissioner of a county that is served by the county board of developmental disabilities that employs the classified employee.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a long, sweeping underline.

MICHAEL DEWINE
Ohio Attorney General