

OPINION NO. 91-011

Syllabus:

Absent a collective bargaining agreement, a board of county commissioners does not have the authority to enter into an employment contract which contains a specific term of employment with an individual serving in a position determined, pursuant to R.C. 124.11, to be in the unclassified service.

To: Frank Pierce, Belmont County Prosecuting Attorney, St. Clairsville, Ohio
By: Lee Fisher, Attorney General, March 11, 1991

I have before me your request for an opinion from my predecessor regarding the validity of an employment contract entered into between a board of county commissioners and its administrative assistant/staff officer (hereinafter "administrative assistant"). According to information provided, the Belmont County Board of County Commissioners has entered into an employment contract with its administrative assistant. The employment contract provides for the employment of the individual as administrative assistant for a term of two years, and sets forth provisions concerning the responsibilities, salary, benefits, and discharge of the administrative assistant. In addition, the information provided indicates that the position of administrative assistant is in the unclassified service. In light of the foregoing, you have asked the following: "Is an employment contract for a commissioners unclassified employee for a specific term valid under Ohio Revised Code 124.01 and 124.11, in that it may override Civil Service laws."

I note at the onset that information provided indicates that the position of administrative assistant is not that of an independent contractor. Rather, this position is created by, and in the service of, the board of county commissioners. Under R.C. 305.16, a board of county commissioners is empowered to employ such individuals "as are necessary for the care and custody of the court house, jail, and other county buildings, bridges, and other property under its jurisdiction and control." *See generally State ex rel. Hubbard v. Hilty*, 31 Ohio Law Abs. 538, 540 (Ct. App. Allen County 1940) ("[t]he power to establish, as well as the power to abolish, positions of the character mentioned, are some of the discretionary powers vested in a Board of County Commissioners"); 1960 Op. Att'y Gen. No. 1176, p. 134, at 137 ("[t]he authority of the board [of county commissioners] to obtain services of persons for the performance of various tasks, by appointment or employment, is spelled out in Sections 305.13, 305.14, 305.15 and 305.16, Revised Code"). I, therefore, assume that the position of administrative assistant has been established pursuant to the grant of authority provided in R.C. 305.16, and that the position is in the service of the county.

Positions in the service of a county are in the civil service. *See* R.C. 124.01(A) ("civil service," as used in R.C. Chapter 124, "includes *all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof*" (emphasis added)). *See generally State ex rel. Giovanello v. Village of Lowellville*, 139 Ohio St. 219, 39 N.E.2d 527 (1942) (syllabus, paragraph one) ("[s]ection 10, Article XV of the Constitution, which requires appointments in the civil service to be made according to merit and fitness to be ascertained as far as practicable by competitive examinations, applies to the...counties"). Thus, an administrative assistant employed by a board of county commissioners is in the civil service.

The civil service in Ohio is governed by the provisions of R.C. Chapter 124,¹ under the grant of authority set forth in Ohio Const. art. XV, §10.² *See*

¹ I note that the civil service in Ohio was originally governed by G.C. Chapter 486, a predecessor to modern R.C. Chapter 124. *See* 1913 Ohio Laws 698 (Am. S.B. 7, passed April 28, 1913). Upon recodification of the entire General Code into the Revised Code, G.C. Chapter 486 became R.C. Chapter 143. *See* 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953). Subsequently, the General Assembly amended and removed the provisions concerning the civil service from R.C. Chapter 143 to R.C. Chapter 124. *See* 1973 Ohio Laws 533 (Am. S.B. 174, eff. Dec. 4, 1973). The provisions of the current civil service law set forth in R.C. Chapter 124, thus, were set out formerly in R.C. Chapter 143 and G.C. Chapter 486.

² Ohio Const. art. XV, §10 provides: "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."

Yarosh v. Becane, 63 Ohio St. 2d 5, 9, 406 N.E.2d 1355, 1358-59 (1980); *State ex rel. Click v. Thornmyer*, 105 Ohio App. 479, 490, 151 N.E.2d 246, 252 (Franklin County 1958). Pursuant to R.C. 124.11, the civil service in Ohio is divided into the classified service and the unclassified service. *State ex rel. Ohio Ass'n of Public School Employees v. Civil Service Comm. of Girard*, 45 Ohio St. 2d 295, 296, 345 N.E.2d 58, 60 (1976) (per curiam). You indicate that the position of administrative assistant is an unclassified position and I assume, for purposes of this opinion, that the position has been correctly exempted. See R.C. 124.11(B) ("[t]he classified service shall comprise all persons in the employ of...the several counties..., not specifically included in the unclassified service").

In answering your question, it is helpful first to note the distinctions between the classified service and the unclassified service as set out in R.C. Chapter 124. Individuals in the classified service attain their positions through a merit system based primarily on competitive examination, see R.C. 124.23; see also Ohio Const. art. XV, §10, and are provided procedural protection from arbitrary removal, see R.C. 124.34. *Yarosh v. Becane*, 63 Ohio St. 2d at 9, 406 N.E.2d at 1359; see also *State ex rel. Neffner v. Hummel*, 142 Ohio St. 324, 329-30, 51 N.E.2d 900, 902-03 (1943) (per curiam). See generally *Curtis v. State ex rel. Morgan*, 108 Ohio St. 292, 140 N.E. 522 (1923) (syllabus, paragraph four) ("[t]he fundamental purpose of civil service laws and rules is to establish a merit system, whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations, and to safeguard appointees against unjust charges of misconduct and inefficiency, and from being unjustly discriminated against for religious or political reasons or affiliations"). In contrast, individuals in the unclassified service are employed at the discretion of an appointing authority, and are not provided the same procedural safeguards afforded to individuals in the classified service. *Yarosh v. Becane*, 63 Ohio St. 2d at 9, 406 N.E.2d at 1359; *Eudela v. Ohio Dept. of Mental Health and Mental Retardation*, 30 Ohio App. 3d 113, 506 N.E.2d 947 (Franklin County 1986).

Further, it is well established in Ohio that individuals in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause.³ See *State ex rel. Trimble v. State Bd. of Cosmetology*, 50 Ohio St. 2d 283, 285, 364 N.E.2d 247, 249 (1977); *Eudela v. Ohio Dept. of Mental Health and Mental Retardation*; *Huber v. Celebrezze*, 14 Ohio App. 3d 299, 300-01, 471 N.E.2d 181, 183-84 (Franklin County 1984). It, thus, is apparent that one of the distinguishing characteristics between individuals in the classified service and the unclassified service is that individuals in the classified service have been granted, pursuant to R.C. 124.11 and R.C. 124.34, a statutory claim of entitlement to continued employment, to which individuals in the unclassified service are not entitled. See *Deryck v. Akron City School Dist.*, 633 F. Supp. 1180, 1182 (N.D. Ohio 1986); *Vodila v. Clelland*, 613 F. Supp. 69, 70-71 (N.D. Ohio 1985); see also *State ex rel. Trimble v. State Bd. of Cosmetology*, 50 Ohio St. 2d at 285 n.1, 364 N.E.2d at 249 n.1 (the unclassified service is not included in the classified service, see R.C. 124.11, and, therefore, is not subject to the tenure protection afforded the classified service, see R.C. 124.34); *Ohio Ass'n of Public School Emp. v. Board of Educ. of City of Columbus*, 28 Ohio St. 2d 58, 63, 275 N.E.2d 610, 613 (1971) (per curiam) ("[i]t is only those nonteaching employees of a city school district that are in the classified service who are afforded tenure protection. Those in the unclassified service of a city school district have no statutory tenure protection"). See generally *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (interpreting R.C. 124.34 as creating a protected property right in continued employment for individuals in the classified service), *cert. denied*, 488 U.S. 941 (1988).

The question then arises as to whether a board of county commissioners may grant to an individual in the unclassified service a contractual claim of entitlement to continued employment or whether R.C. 124.11 and R.C. 124.34, by specifically

³ Although individuals in the unclassified service may be dismissed from their positions without cause, such individuals may not be dismissed in violation of their constitutional rights.

granting only individuals in the classified service a statutory claim of entitlement to continued employment, foreclose such action by a board of county commissioners. It is well settled in Ohio that a board of county commissioners has only those powers which are prescribed by statute or necessarily implied therefrom, in order to perform the duties entrusted to it. *State ex rel. Shriver v. Board of Comm'rs of Belmont County*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraph two); *Elder v. Smith*, 103 Ohio St. 369, 133 N.E. 791 (1921) (syllabus, paragraph one). I have been unable to locate a section of the Revised Code, other than R.C. Chapter 4117 authorizing collective bargaining agreements,⁴ which expressly authorizes a board of county commissioners to enter into employment contracts which provide a specific term of employment with individuals in the unclassified service.

In order to determine whether the board of county commissioners has the implied power to so contract with an unclassified county employee, it is useful to examine the legislative intent in creating unclassified positions. It is clear that the General Assembly, by placing, pursuant to R.C. 124.11, a position in the unclassified service, has determined that the individual serving in that position has no statutory claim of entitlement to continued employment, but rather serves at the pleasure of his appointing authority. See *State ex rel. Trimble v. State Bd. of Cosmetology; Eudela v. Ohio Dept. of Mental Health and Mental Retardation; Huber v. Celebrezze*. Positions, generally, are placed in the unclassified service because they involve policy-making or fiduciary responsibility. See *State ex rel. Ryan v. Kerr*, 126 Ohio St. 26, 30, 183 N.E. 535, 536 (1932); *Huber v. Celebrezze*, 14 Ohio App. 3d at 301, 471 N.E.2d at 184; *Deering v. Hirsch*, 43 Ohio Law Abs. 370, 373, 62 N.E.2d 577, 578-79 (Ct. App. Hamilton County 1945) (per curiam), *appeal dismissed mem. for the reason that no debatable constitutional question exists*, 146 Ohio St. 24, 63 N.E.2d 679 (1945), *reversed on other grounds*, 146 Ohio St. 288, 65 N.E.2d 649 (1946); *Johnson v. Dept. of Admin. Services*, 54 Ohio Misc. 7, 10, 375 N.E.2d 1268, 1270 (C.P. Montgomery County 1977). Since positions in the unclassified service involve policy-making implications or fiduciary responsibilities, it follows reasonably that the appointing authority should be able to have people of his own choosing in these positions. See *State ex rel. Ryan v. Kerr*, 126 Ohio St. at 30, 183 N.E. at 536; *State ex rel. Kook v. Civil Service Comm. of Wooster*, 10 Ohio Op. 271, 273, 26 Ohio Law Abs. 36, 37 (C.P. Wayne County 1934). To authorize a board of county commissioners and an individual in the unclassified service to enter an employment contract, which contains a specific term of employment, would clearly frustrate the General Assembly's intent to vest appointing authorities with the discretion to appoint and remove individuals in the unclassified service. Hence, in order to effectuate the General Assembly's intent, as expressed through R.C. 124.11 and R.C. 124.34, I find that a board of county commissioners does not have the authority to enter into an employment contract which contains a specific term of employment with an individual in the unclassified service. See generally *Henry v. Central Nat'l Bank*, 16 Ohio St. 2d 16, 242 N.E.2d 342 (1968) (syllabus, paragraph two) (the primary purpose of statutory interpretation is to determine and give effect to legislative intent).

Further, a board of county commissioners "is inhibited by law from making any agreement which has the effect of restraining it or its successors in office from exercising any of the discretionary powers vested in it, or performing any of the duties imposed upon it by law." *State ex rel. Hubbard v. Hilty*, 31 Ohio Law Abs. at 540; see *State ex rel. Allen v. Lutz*, 111 Ohio St. 333, 338, 145 N.E. 483, 484 (1924) ("[i]n order to bind a subsequent board of county commissioners and future Legislatures, the right and power to so do must clearly appear, and not be left to inference alone from the nature of the contract and the kind of work affected thereby"), *appeal dismissed*, 273 U.S. 654 (1927); 1956 Op. Att'y Gen. No. 6450, p. 301, at 304 ("[c]ontracts for appointment of officers and employment of an attorney are noted as partaking of the legislative or governmental character, and accordingly not to be extended into the terms of future boards"). It is clear that a contract providing a specific term of employment to an unclassified employee would restrain

⁴ As you have not indicated to the contrary, I assume for purposes of this opinion that the contract in question is not a collective bargaining agreement.

a succeeding appointing authority's exercise of discretion with respect to the removal and appointment of persons in such unclassified position.

I note that my conclusion is buttressed by the fact that the Ninth District Court of Appeals in Ohio, in addressing an unclassified employee's assertion that a contract entered into between herself and her employer, a board of education of a city school district, gave her an express contractual claim of entitlement to continued employment, determined that:

The contention that the terms of the contract itself, apart from any statutory considerations, gave appellant a right to continued employment is also without merit.

"....

Members of a board of education of a school district are public officers, whose duties are prescribed by law. Their contractual powers are defined by the statutory limitations existing thereon, and they have no power except such as is expressly given, or such as is necessarily implied from the powers that are expressly given.

...."

Schwing v. McClure (1929), 120 Ohio St. 335, paragraph one of the syllabus. *The determination of whether employees shall be classified or unclassified is a legislative function, and cannot be circumvented by executive or administrative actions:*

"...The placing of certain positions in the classified service or in the unclassified service, or employees being protected by the civil service law, or not being protected by the civil service law, is a legislative function, and the Legislature in this case exercised that legislative function by prescribing under what conditions an employee shall be considered as being protected by the civil service law, or shall not be considered as being protected by the civil service law.

...."

State ex rel. Dunn v. Fosdick (1916), 21 N.P.N.S. 187, 191. To allow the board in this case to confer upon an unclassified servant the incidents of classified service by contract would be to allow the board to thwart the clear legislative intent that only certain types of employees are to have a right to continued employment, and would effectively obliterate the distinctions between classified and unclassified servants.

....

As the board had no power to enter into such a contract, we find that the "continuing contract" with appellant is void as a matter of law, to the extent that it attempted to grant appellant a right to continued employment as an unclassified civil servant. (Emphasis added.)

Davidson v. Sheffield-Sheffield Lake Bd. of Educ., C.A. No. 89CA004624, slip op. at 4-5, 7 (Ct. App. Lorain County May 23, 1990) (unreported); *see also Hart v. Sheffield-Sheffield Lake Bd. of Educ.*, C.A. No. 89CA004708, slip op. at 5 (Ct. App. Lorain County Nov. 7, 1990) (unreported) ("[i]n the case at bar, there appears to be no legislation giving the School Board the authority to enter into such a continuing contract, and to imply such a power in this instance would be to circumvent well-established principles of civil service law. The civil service system in Ohio, as aforementioned, specifically provides for classified and unclassified civil servants. To permit a city school district to enter into contracts of this nature would clearly circumvent the strong legislative policy of the State of Ohio by allowing a School Board to place the incidents of classified status upon unclassified civil servants"). In *Davidson*, the court found that since the board of education lacked the express authority to enter into the contract at issue, and that to imply such authority would thwart the General Assembly's intent that only individuals in the classified service have a claim of entitlement to continued employment, the contract which attempted

to grant an individual in the unclassified service an express contractual claim of entitlement to continued employment with the board of education was void as a matter of law.

Based upon the foregoing, it is my opinion, and you are hereby advised, that absent a collective bargaining agreement, a board of county commissioners does not have the authority to enter into an employment contract which contains a specific term of employment with an individual serving in a position determined, pursuant to R.C. 124.11, to be in the unclassified service.