

OPINION NO. 94-087

Syllabus:

1. An employee in the unclassified service of a county may only be a candidate for public office in a partisan election when no federal or state constitutional or statutory provision prohibits such candidacy, and when the county does not prohibit such candidacy.

2. An employee in the unclassified service of a county who wishes to be a candidate for public office in a partisan election must comply with any applicable rules and policies set forth by the county to regulate its employees' participation in partisan political activities.
3. Pursuant to 5 U.S.C. §1502(a)(3), if a highway superintendent in the unclassified service of a county highway department is a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), the superintendent may not be a candidate for county commissioner in a partisan election. If a highway superintendent in the unclassified service of a county highway department is not a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), the superintendent may be a candidate for county commissioner in a partisan election.

To: Gregory A. Carroll, Adams County Prosecuting Attorney, West Union, Ohio

By: Lee Fisher, Attorney General, December 8, 1994

You have requested an opinion concerning the participation of a civil service employee in political activity. You indicate that a highway superintendent in the county highway department contemplates seeking the office of county commissioner in a partisan election. See R.C. 305.01 (providing for the election of county commissioners). The position of highway superintendent is a fiduciary position. Your question is whether a person employed in a county fiduciary position may pursue an elected partisan position while continuing to hold his present position.

Fiduciary Positions Are in the Unclassified Service

In Ohio, the civil service comprises the classified service and the unclassified service. R.C. 124.11; *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). Pursuant to R.C. 124.11(A)(9), "persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials" are in the unclassified service. See also *Deering v. Hirsch*, 43 Ohio Law Abs. 370, 373, 62 N.E.2d 577, 579 (Ct. App. Hamilton County) ("[i]f the duties involve determination of policy, financial integrity, employment, and direction of subordinates, the exercise of sound discretion and mature judgment, confidential preparation and preservation of records, and a nice discernment of ideals of public service, then the relationship which springs into being as result of appointment is by common right and reason fiduciary in character, and such position is universally recognized as properly falling into the category of the unclassified service"), *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). A person who serves as highway superintendent in the county highway department is employed by and directly responsible to the county engineer, see R.C. 325.17; R.C. 5543.19,¹ and, according to your

¹ No provision within the Revised Code expressly authorizes the creation and operation of a "county highway department." A county engineer, however, has general charge of the construction, reconstruction, improvement, maintenance, and repair of all bridges and highways

request letter, holds a fiduciary relationship to the county engineer. The position of highway superintendent in the county highway department, therefore, is in the unclassified service.

The Control of "Political Activity" Includes Candidacy for Public Office in a Partisan Election

As a general matter, individuals in the classified service of the state are prohibited from participating in political activity other than to vote or express freely their political opinions. R.C. 124.57; 2 Ohio Admin. Code 123:1-46-02. The term "political activity" refers "to partisan activities, campaigns, and elections involving primaries, partisan ballots or partisan candidates." Rule 123:1-46-02(A)(2). *See generally Heidtman v. Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955) (syllabus, paragraph two) (the word "politics," as used in R.C. 143.41 (now R.C. 124.57),² "must be defined as politics in its narrower partisan sense"). Specific examples of prohibited political activity include, but are not limited to, the following:

- (1) Candidacy for public office in a partisan election;
- (2) Candidacy for public office in a nonpartisan general election if the nomination to candidacy was obtained in a partisan primary or through the circulation of nominating petitions identified with a political party;
- (3) Filing of petitions meeting statutory requirements for partisan candidacy to elective office;

....

Rule 123:1-46-02(C). Because the term "political activity" encompasses candidacy for public office in a partisan election, an individual in the classified service of a county may not be a candidate for public office in a partisan election. *See, e.g.,* 1982 Op. Att'y Gen. No. 82-085 (a city police officer may not be a candidate for the position of village council member in a partisan election).

within his county, under the jurisdiction of the board of county commissioners; the construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees under R.C. 5571.01, R.C. 5571.06-.07, R.C. 5571.15, R.C. 5573.01-.15, and R.C. 5575.02-.09; and the construction, reconstruction, resurfacing, or improvement of the roads of a road district under R.C. 5573.21. R.C. 5543.01; *see* R.C. 5543.09. Accordingly, a county engineer may employ, pursuant to R.C. 325.17 or R.C. 5543.19, those employees as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads and bridges. *See generally State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph four) ("[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"), *aff'd sub nom. State ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). Thus, the term "county highway department," as used in this opinion, is to be understood as referring to the office of the county engineer.

² In 1973, R.C. 143.41 was renumbered R.C. 124.57. *See* 1973 Ohio Laws, Part I, 533 (Am. S.B. 174, eff. Dec. 4, 1973).

An Employee in the Unclassified Service of a County May Be a Candidate for Public Office in a Partisan Election, Subject to the Constraints Imposed by Law and Any Constraints Imposed by the County

The prohibition against participating in political activity set forth in R.C. 124.57 and rule 123:1-46-02, however, does not apply to individuals in the unclassified service. Pursuant to rule 123:1-46-02(E), "[e]mployees in the unclassified service, who serve at the pleasure of the appointing authority and are not subject to competitive examination, are not prohibited from engaging in political activity unless specifically precluded by federal or state constitutional or statutory provisions." Because a properly promulgated administrative rule is given the force and effect of law, *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990), an individual in the unclassified service of a county may participate in political activity unless specifically precluded by federal or state constitutional or statutory provisions.

As noted above, political activity includes candidacy for public office in a partisan election. Accordingly, pursuant to rule 123:1-46-02(E), an individual in the unclassified service of a county may be a candidate for public office in a partisan election unless specifically precluded by federal or state constitutional or statutory provisions.

Although rule 123:1-46-02(E) permits an individual in the unclassified service to run for public office in a partisan election when no federal or state constitutional or statutory provision prohibits such candidacy, Ohio courts have stated that a public employer may prohibit its unclassified employees' participation in partisan political activity. *Painter v. Graley*, 70 Ohio St. 3d 377, 639 N.E.2d 51 (1994); *State ex rel. Vana v. Maple Heights City Council*, 54 Ohio St. 3d 91, 561 N.E.2d 909 (1990); see also *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986) (state restriction against becoming a candidate for judge on the basis of age upheld). In this regard, the Ohio Supreme Court has stated:

Although an unclassified employee is not prohibited by statute or [municipal] ordinance from seeking partisan elected office, that fact does not lead to the conclusion that a public employer may not himself prohibit his at-will employees from running for such an office. Stated differently, such an employer is not constitutionally required to accept his subordinate's decision to become a candidate for election to partisan elected office, and maintain the employment of that subordinate during his candidacy or term of office.

Painter v. Graley, 70 Ohio St. 3d at 381, 639 N.E.2d at 54-55 (footnote omitted); accord *State ex rel. Vana v. Maple Heights City Council*.

In light of the Ohio Supreme Court decisions cited above, it appears that, notwithstanding rule 123:1-46-02(E), a county may prohibit an employee in the unclassified service from becoming a candidate for public office in a partisan election. Further, it reasonably follows therefrom that, if a county does not prohibit its unclassified employees from becoming candidates for public office in partisan elections, the county may set forth rules and policies that regulate such employees' participation in partisan politics. For example, the county may require the employee to notify the county of his intention to participate in partisan political activity or set forth rules designed to arrive at a balance between the interests of an employee in participating in a partisan political activity and the interest of the county, as an employer, in promoting the efficiency of the public services it performs through its employees. Any unclassified employee who wishes to participate in partisan political activity thus must comply with any applicable rules

and policies set forth by the county to regulate an employee's participation in partisan political activity.

Accordingly, an employee in the unclassified service of a county may only be a candidate for public office in a partisan election when no federal or state constitutional or statutory provision prohibits such candidacy, and when the county does not prohibit such candidacy. An employee in the unclassified service of the county who wishes to be a candidate for public office in a partisan election must comply with any applicable rules and policies set forth by the county to regulate its employees' participation in partisan political activities.

Under Certain Conditions, A Highway Superintendent in the County Highway Department May Be a Candidate for County Commissioner

With regard to your specific inquiry, research discloses no state constitutional or statutory provisions prohibiting a highway superintendent in the county highway department from seeking the office of county commissioner in a partisan election. *Cf., e.g.,* R.C. 3501.15 ("no person shall serve as a member, director, deputy director, or employee of the board of elections who is a candidate for any office to be filled at an election, except the office of delegate or alternate to a convention, member of the board of directors of a county agricultural society, presidential elector, or a member of a party committee. No person who is a candidate for an office or position to be voted for by the electors of a precinct, except for a candidate for county central committee who is not opposed by any other candidate in that election and precinct, shall serve as a precinct election officer in said precinct"); R.C. 3501.27 (no person "who is a candidate for an office to be voted for by the voters of the precinct in which he is to serve shall serve as an election officer"). There is also no federal constitutional provision prohibiting an individual in the unclassified service of a county from participating in political activity.

There is, however, a federal statutory provision that imposes restrictions on the political activities of certain state and local officials or employees. 5 U.S.C. §1502 describes the types of political activities in which certain state or local officers or employees may not engage, and provides in relevant part that, "[a] State or local officer or employee may not ... be a candidate for elective office."³ 5 U.S.C. §1502(a)(3) (1988). The prohibition set forth in 5 U.S.C. §1502(a)(3) prohibits a "State or local officer or employee" from being a candidate in a partisan election. *See* 5 U.S.C. §1503 (1988); 1985 Op. Att'y Gen. No. 85-080 at 2-317.

For purposes of 5 U.S.C. §1502(a)(3), "State or local officer or employee" denotes

an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—

(A) an individual who exercises no functions in connection with that activity; or

³ 5 U.S.C. §1502(a)(3) does not apply to the Governor or Lieutenant Governor of a state or an individual authorized by law to act as Governor, the mayor of a city, a duly elected head of an executive department of a state or municipality who is not classified under a state or municipal merit or civil-service system, or an individual holding elective office. 5 U.S.C. §1502(c) (1988).

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

5 U.S.C. §1501(4) (1988). Thus, if a highway superintendent in a county highway department is employed principally "in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency," and exercises some function in connection with that activity, the highway superintendent is a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), and is prohibited by 5 U.S.C. §1502(a)(3) from being a candidate for elective office in a partisan election. The determination whether a highway superintendent is a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), requires the resolution of factual questions that can best be answered by the concerned parties on a case-by-case basis. In particular it requires the resolution of two factual questions: first, whether the highway superintendent is employed principally in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency; and second, whether the highway superintendent exercises some function in connection with that activity. The Attorney General is not in a position to answer these factual questions in this instance or similar instances. See generally 1983 Op. Att'y Gen. No. 83-057 at 2-232 (the Attorney General's office "is not equipped to serve as a fact-finding body").

As a final matter, whether the county engineer authorizes his unclassified employees to participate in partisan political activity, which the Ohio Supreme Court has stated is a matter to be determined within a public employer's reasonable discretion, see *Painter v. Graley*, is a matter of local concern. Thus, for purposes of this opinion, it is assumed that the county engineer has not prohibited the highway superintendent from becoming a candidate for county commissioner in a partisan election.

In light of the foregoing, it appears that, pursuant to 5 U.S.C. §1502(a)(3), if a highway superintendent in the unclassified service of a county highway department is a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), the superintendent may not be a candidate for county commissioner in a partisan election. If a highway superintendent in the unclassified service of a county highway department is not a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), the superintendent may be a candidate for county commissioner in a partisan election.

Conclusion

Therefore, it is my opinion and you are hereby advised that:

1. An employee in the unclassified service of a county may only be a candidate for public office in a partisan election when no federal or state constitutional or statutory provision prohibits such candidacy, and when the county does not prohibit such candidacy.
2. An employee in the unclassified service of a county who wishes to be a candidate for public office in a partisan election must comply with any applicable rules and policies set forth by the county to regulate its employees' participation in partisan political activities.

3. Pursuant to 5 U.S.C. §1502(a)(3), if a highway superintendent in the unclassified service of a county highway department is a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), the superintendent may not be a candidate for county commissioner in a partisan election. If a highway superintendent in the unclassified service of a county highway department is not a "State or local officer or employee," as defined in 5 U.S.C. §1501(4), the superintendent may be a candidate for county commissioner in a partisan election.