

November 10, 2003

The Honorable Richard D. Welch
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

SYLLABUS:

2003-033

1. A board of county commissioners is without authority to limit the power possessed by the various county appointing authorities to appoint individuals, without regard to their counties of residence, to positions in the classified and unclassified service of the county.
2. A board of county commissioners is without authority to limit the eligibility of individuals for appointment to positions in county employment, whether in the classified or unclassified service, by requiring that the appointees reside, or agree to reside, within the county.



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OPINION NO. 2003-033

The Honorable Richard D. Welch
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

Dear Prosecutor Welch:

You have requested an opinion concerning the authority of a board of county commissioners to adopt a residency requirement that would be applicable to all persons who become county employees, regardless of the department or agency of county government by which they are employed. You specifically ask:

1. May the Board of Commissioners institute a countywide policy that no employees may be hired in any county agency unless they are residents of the county prior to hiring?
2. Does the answer to question 1 differ if the employee is being hired into the classified or unclassified service? Does it matter which county agency is hiring the employee?
3. May the Board of Commissioners institute a hiring policy requiring all newly hired county employees to become residents of the county within a specified time after being hired? If so, is there any law setting forth what would be considered an acceptable time period for establishing residency?

In addressing your questions, we begin with the well-settled principle that a board of county commissioners is a creature of statute with only those powers and duties vested in the board by statute. *Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993) (“[c]ounties ... may exercise only those powers affirmatively granted by the General Assembly”). No statute expressly authorizes a board of county commissioners to condition the hiring of all county employees upon their residing in the county or to limit the power possessed by other county appointing authorities to appoint employees without regard to their place of residence. In addition, because the appointment of county employees, as well as the eligibility of individuals for appointment to positions in the county

service, are matters that are otherwise governed by statute, we find that a board of county commissioners possesses no authority by necessary implication to impose such a requirement. For the reasons that follow, therefore, we conclude that a board of county commissioners has no power to adopt a countywide policy that requires all newly hired county employees to be, or to agree to become, county residents.¹

Although your opinion request separately asks about a county residency requirement that is applicable at the time of hiring and a county residency requirement that calls for an employee to become a resident at some time after appointment, both requirements have the same effects, *i.e.*, limiting the eligibility of an individual for appointment as a county employee and restricting the power of county officers and entities to exercise their powers of appointment. With respect to the authority possessed by a board of county commissioners to adopt either such requirement, the differences between the two are not significant. This opinion will, therefore, address both types of residency requirement together.

¹ You have not asked, and this opinion does not address, whether the General Assembly may impose a residency requirement upon public officials or public employees. *See, e.g.*, R.C. 3.15 (in part, requiring members of the General Assembly to be residents of the districts they represent, requiring each judge and each elected officer of a court to be a resident of the territory of that court, and requiring each elective officer of a political subdivision to be a resident of that political subdivision). In addition, this opinion will not address whether a residency requirement may be imposed upon bargaining units of county employees by means of a collective bargaining agreement. *See State ex rel. Parsons v. Fleming*, 68 Ohio St. 3d 509, 513, 628 N.E.2d 1377 (1994) (“R.C. 4117.08(B) prohibits the parties to a collective bargaining agreement from bargaining over matters concerning the original, and not the promotional, appointment process”). *But see City of St. Bernard v. SERB*, 74 Ohio App. 3d 3, 598 N.E.2d 15 (Hamilton County 1991) (finding that residency is a mandatory subject of collective bargaining; in the event of conflict between a residency ordinance and a residency provision in a collective bargaining agreement, the ordinance prevails). Rather, this opinion concerns the authority of a board of county commissioners to establish a countywide policy that all newly-hired employees, regardless of appointing authority, be, or agree to become, county residents.

It is also useful to note that the validity of residency requirements has been addressed several times by Ohio’s courts. For the most part, the cases have dealt with municipal residency requirements. For example, in *Buckley v. City of Cincinnati*, 63 Ohio St. 2d 42, 406 N.E.2d 1106 (1980), the residency requirement was imposed by ordinance. A board of county commissioners, however, has no analogous legislative authority to impose such a residency requirement. In *Fraternal Order of Police v. Hunter*, 49 Ohio App. 2d 185, 360 N.E.2d 708 (Mahoning County 1975), the challenged residency requirement had been adopted by the municipal civil service commission. Again, however, a board of county commissioners has no authority analogous to that possessed by a municipal civil service commission under R.C. 124.40 to adopt rules governing employees under its jurisdiction.

Your questions also indicate that part of your concern is whether the county commissioners' authority may differ depending upon the identity of the county agency or department in which the position to be filled is located. As you are aware, the General Assembly has authorized boards of county commissioners to exercise various types of authority with respect to the appointment of particular county employees. For example, R.C. 6117.01(C) states in part:

The board of county commissioners may employ a registered professional engineer to be the county sanitary engineer for the time and *on the terms it considers best* and may authorize the county sanitary engineer to employ necessary assistants *upon the terms fixed by the board....*

The board may create and maintain a sanitary engineering department, which shall be *under its supervision* and which shall be headed by the county sanitary engineer, for the purpose of aiding it in the performance of its duties under this chapter and [R.C. Chapter 6103] or its other duties regarding sanitation, drainage, and water supply provided by law. The board shall provide suitable facilities for the use of the department and shall provide for and pay the compensation of the county sanitary engineer and all authorized necessary expenses of the county sanitary engineer and the sanitary engineering department. The county sanitary engineer, *with the approval of the board*, may appoint necessary assistants and clerks, and the compensation of those assistants and clerks shall be provided for and paid by the board. (Emphasis added.)

See also, e.g., R.C. 3354.05(A) (when exercising its authority to appoint trustees of a community college district, a board of county commissioners may appoint only persons who are residents of the district). Because of the many separate provisions that confer authority upon boards of county commissioners with respect to the employment of particular types of county employees, it is not possible within the scope of an opinion to determine whether there may be any position of county employment for which a board of county commissioners has authority to impose a residency requirement. This opinion is limited, therefore, to a discussion of the power of a board of county commissioners to establish a residency requirement that would apply uniformly to all positions of county employment.

Appointment to positions of county employment is governed by the civil service provisions of R.C. Chapter 124. *See Yarosh v. Becane*, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980). *See generally* R.C. 124.01(A) (defining “[c]ivil service,” in part, as including “all offices and positions of trust or employment in the service of the state and the counties”); R.C. 124.01(D) (defining the term “appointing authority,” as used in R.C. Chapter 124, as meaning “the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution”). As expressly provided by R.C. 124.06:

No person shall be *appointed*, removed, transferred, laid off, suspended, reinstated, promoted, or reduced as an officer or *employee* in the civil service, *in*

any manner or by any means other than those prescribed in this chapter, and the rules of the director of administrative services or the municipal or civil service township civil service commission within their respective jurisdictions. (Emphasis added.)

In accordance with R.C. Chapter 124, the manner in which a county appointing authority may make original appointments varies, depending, in part, upon whether the position is classified or unclassified. As explained in 1996 Op. Att’y Gen. No. 96-040 at 2-154:

Under Ohio law, civil service is divided into the classified service and the unclassified service. R.C. 124.11; *see* Ohio Const. art. XV, § 10. Classified civil servants attain their positions through a merit system based primarily on competitive examinations and are afforded procedural protection from arbitrary removal. R.C. 124.23, .34. In contrast, unclassified civil servants are appointed at the discretion of the appointing authority and serve at the pleasure of the appointing authority. Unclassified employees may be dismissed at any time without cause, provided that dismissal is not made for discriminatory or other unlawful reasons. (Various citations omitted.)

To respond fairly to your questions, we address the provisions governing these different types of positions.

Pursuant to R.C. 124.11(A), the positions enumerated therein are assigned to the unclassified service, “which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter.” As provided by R.C. 124.11(A), various county employees hold positions within the unclassified service of a county. *See, e.g.*, R.C. 124.11(A)(9) (with limited exceptions, “persons employed by and directly responsible to elected county officials or a county administrator and holding a fiduciary or administrative relationship to such elected county officials or county administrator, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination”); R.C. 124.11(A)(28) (“deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals or holding a fiduciary relation to their principals”). *See generally Yarosh v. Becane* (describing those duties performed by deputy sheriffs who are in a fiduciary or administrative relationship to the sheriff and who thereby serve as unclassified county employees). Thus, within a county, the various elective and principal executive officers, among others, may appoint persons to positions in the unclassified service.

As a general rule, “[a]n unclassified employee is appointed at the discretion of the appointing authority and serves at the pleasure of such authority.” *State ex rel. Hunter v. Summit County Human Resource Comm’n*, 81 Ohio St. 3d 450, 453, 692 N.E.2d 185 (1998). It is,

therefore, within the power of the individual officer or entity who has the power to appoint unclassified employees to determine the qualifications of those appointees.²

Although numerous statutes empower individual county officers and entities to appoint individuals to serve in the unclassified service of the county, no statute or rule of the Director of Administrative Services³ restricts to county residents those individuals who are eligible for

² A board of county commissioners, itself, may appoint certain county employees. *See, e.g.*, R.C. 305.13 (authority to appoint a clerk); R.C. 305.16 (authority to employ “a superintendent, and such watchmen, janitors, and other employees 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”). In other instances, a board of county commissioners has the power to approve appointments made by other county officers or entities. *See, e.g.*, R.C. 307.804 (appointment of employees for the county microfilming center); R.C. 329.02 (in part, requiring the county director of job and family services, “with the approval of the board of county commissioners, [to] appoint all necessary assistants and superintendents of institutions under the jurisdiction of the department, and all other employees of the department”). In such situations, the board of county commissioners is included within the definition of “appointing authority” for purposes of R.C. Chapter 124. *See State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181, 480 N.E.2d 758 n.1 (1985). Otherwise, the power to appoint most county employees does not reside, either in whole or in part, in the board of county commissioners. *See, e.g.*, R.C. 309.06(A) (stating, in part, “[t]he prosecuting attorney may appoint any assistants, clerks, and stenographers who are necessary for the proper performance of the duties of his office and fix their compensation”); R.C. 313.05(A) (power of county coroner to appoint deputy coroners and other employees); R.C. 325.17 (authorizing the county auditor, county treasurer, county sheriff, county engineer, and county recorder, among others, to “appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them”); R.C. 5126.024(C) (authorizing the superintendent of a county board of mental retardation and developmental disabilities to employ persons for any positions authorized by the MR/DD board). The power a board of county commissioners may exercise in the appointment of those county employees for whom it is the appointing authority does not, however, include the power to regulate the appointment of individuals by other county appointing authorities. *See* 1984 Op. Att’y Gen. No. 84-092 (syllabus) (“[t]he board of county commissioners, when it is not the appointing authority, is without authority to grant to county employees not covered by a collective bargaining agreement compensation equivalent to that obtained by other county employees pursuant to a collective bargaining agreement, except to the extent that it is exercising its limited statutory authority with respect to certain fringe benefits”).

³ *See generally* R.C. 124.09(A) (requiring the Director of Administrative Services to “[p]rescribe, amend, and enforce administrative rules for the purpose of carrying out the functions, powers, and duties vested in and imposed upon the director by this chapter. Except in the case of rules adopted pursuant to [R.C. 124.14], the prescription, amendment, and

appointment to positions in the unclassified county service or restricts the power of county appointing authorities to appoint individuals of their choosing, regardless of county of residence, to positions in the unclassified service of the county. Similarly, no statute or rule of the Director of Administrative Services authorizes a board of county commissioners to impose such restrictions. We conclude, therefore, that a board of county commissioners may not limit the power possessed by county appointing authorities to appoint individuals, regardless of county of residence, to positions in the unclassified service of the county. Similarly, a board of county commissioners may not limit to county residents those who are eligible for appointment by other county appointing authorities to positions in the unclassified county service.

Let us now turn to the appointment of employees in the classified service of the county. Pursuant to R.C. 124.11(B), any of those positions that are not listed in R.C. 124.11(A) are in the classified service, which is divided into the competitive and unskilled labor classes. According to R.C. 124.11(B)(1), which states in part:

The competitive class shall include all positions and employments in the state and the *counties*.... *Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer, or reduction, as provided in this chapter, and the rules of*

enforcement of rules under this division are subject to approval, disapproval, or modification by the state personnel board of review”).

The General Assembly has provided alternatives to the Director’s administration of R.C. Chapter 124 within counties. Pursuant to R.C. 124.14(G)(2), a board of county commissioners, “by a resolution adopted by a majority of its members,” may establish a county personnel department to exercise the powers and duties of the Director of Administrative Services under R.C. 124.01-.64 and R.C. Chapter 325 for those employees for whom the board of county commissioners is the appointing authority or co-appointing authority. Once a county personnel department has been established, other county appointing authorities may, after notice to the Director of Administrative Services, “elect to use the services and facilities of the county personnel department.” R.C. 124.14(G)(3). In accordance with R.C. 124.14(G)(4), a board of county commissioners may disband such department, and, in accordance with R.C. 124.14(G)(5), any county appointing authority may return to the Department of Administrative Services for the implementation of R.C. 124.01-.64 and R.C. Chapter 325 for its employees. Beyond the power to establish and disband a county personnel department as described in R.C. 124.14(G)(1), however, a board of county commissioners has no authority with respect to the duties and powers performed by that department. Nonetheless, under the alternative provided by R.C. 124.14(G), it is the county personnel department, not the board of county commissioners, that may perform the powers, including rule making, of the Director of Administrative Services. Further, a county personnel department may exercise the Director’s powers and duties only with respect to those county employees whose appointing authorities have elected to use the county personnel department’s services.

the director of administrative services, *by appointment from those certified to the appointing officer in accordance with this chapter.* (Emphasis added.)

See R.C. 124.27(B) (stating, in part, “[a]ppointments to all positions in the classified service, that are not filled by promotion, transfer, or reduction, as provided in [R.C. 124.01-.64] and the rules of the director prescribed under those sections, shall be made only from those persons whose names are certified to the appointing authority, and no employment, except as provided in those sections, shall be otherwise given in the classified service of this state or any political subdivision of this state”). See also R.C. 124.34(A) (specifying that the tenure of classified civil service employees “shall be during good behavior and efficient service”).⁴

Subject to various exceptions, the general scheme for making original appointments, *i.e.*, appointments other than by promotion, transfer, or reduction, to positions in the competitive classified service involves examination of applicants pursuant to R.C. 124.23(A),⁵ preparation of an eligible list by the Director of Administrative Services from the results of the examination, R.C. 124.26, and the Director’s certification of names from the eligible list to the appointing authority, R.C. 124.27. From the names certified to it by the Director, the appointing authority may make an appointment.

Pursuant to R.C. 124.23(B), civil service examinations are open to “all citizens of the United States and those persons who have legally declared their intentions of becoming United States citizens, within certain *limitations* to be *determined by the director of administrative services*, as to *citizenship, age, experience, education, health, habit, and moral character.*” (Emphasis added.) See generally note three, *supra*. R.C. 124.23(B) imposes no residency requirement upon those eligible for examination.⁶

Eligibility for examination or appointment to positions in the classified service is also addressed in R.C. 124.25, which authorizes the Director of Administrative Services to refuse to examine, certify, or appoint an applicant “who is found to lack any of the established preliminary requirements for the examination, who is addicted to the habitual use of intoxicating liquors or drugs to excess, who has a pattern of poor work habits and performance with previous

⁴ See *Fraternal Order of Police v. Hunter* (in a municipality whose charter had incorporated provisions of state law regarding civil service, a municipal residency requirement was found to be invalid as being in conflict with the state civil service law granting classified employees the right to continue in their employment, subject only to the statutory requirements of good behavior and efficient service, regardless of residency).

⁵ See generally R.C. 124.30 (describing instances in which appointments to positions in the classified service may be made without competition).

⁶ R.C. 124.23(B), as amended by Am. Sub. H.B. 513, 124th Gen. A. (2002) (eff. March 31, 2003), no longer authorizes the Director to impose residence limitations on those eligible for civil service examination.

employers, who has been convicted of a felony, who has been guilty of infamous or notoriously disgraceful conduct, who has been dismissed from either branch of the civil service for delinquency or misconduct, or who has made false statements of any material fact, or practiced, or attempted to practice, any deception or fraud in the application or examination, in establishing eligibility, or securing an appointment.” Again, however, none of the reasons described in R.C. 124.25 for which the Director may refuse to examine, certify, or appoint an applicant relates to the applicant’s residency.

Nothing within R.C. 124.23, R.C. 124.25, or elsewhere within the Ohio Revised Code establishes a requirement that an individual reside within a county in order to be eligible for appointment to a position in the competitive classified service of that county.⁷ Similarly, no statute limits the power of county appointing authorities to appoint persons, regardless of county of residence, to positions in the competitive classified service of the county. Furthermore, no statute or rule of the Director of Administrative Services authorizes a board of county commissioners to establish either such requirement. We conclude, therefore, that a board of county commissioners is without authority to require all county appointing authorities to hire only county residents to serve in positions in the competitive classified service of the county or to limit to county residents those who are eligible for appointment to such positions. *See State ex rel. Halleck v. Delaware County Comm’rs*, No. 96CA-E-04-021, 1996 Ohio App. LEXIS 6158 (Delaware County Dec. 13, 1996) (finding that appointments to the competitive class of the classified service are governed by R.C. 124.11(B), which requires that such appointments be made in accordance with R.C. Chapter 124 and rules of the Director of Administrative Services, and that, therefore, a board of county commissioners was without authority to adopt a policy that prohibited employment of family members in the same department of county government).

The last category of civil service employees subject to appointment under R.C. Chapter 124 is the unskilled labor class of the classified service.⁸ R.C. 124.11(B)(2) states, in part:

The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by *appointment from lists of applicants registered by the director*. The director or the commission, *by rule*, shall require an applicant for registration in the labor class to *furnish such evidence* or take

⁷ Am. Sub. H.B. 513 also amended R.C. 124.27 so that it no longer requires all appointees to positions in the classified service to be, or immediately become, residents of the state.

⁸ There are certain instances in which an unskilled labor position may, instead, be part of the unclassified civil service. *See generally* R.C. 124.11(A)(12) (including in the unclassified service, among others, “such unskilled labor positions as the director of administrative services or any municipal civil service commission may find it impracticable to include in the competitive classified service; provided such exemptions shall be by order of the commission or the director, duly entered on the record of the commission or the director with the reasons for each such exemption”).

such tests as the director considers proper *with respect to* age, *residence*, physical condition, ability to labor, honesty, sobriety, industry, capacity, and experience in the work or employment for which application is made. Laborers who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought, and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. (Emphasis added.)⁹

R.C. 124.11(B)(2) thus authorizes the Director of Administrative Services, in registering applicants for appointment to positions in the unskilled labor class of the classified service, to consider an applicant's residency, but only if consideration of that matter is authorized by rule. *See generally* note three, *supra* (authority of county personnel department to exercise Director's rule-making authority for county employees within its jurisdiction). No rule adopted by the Director of Administrative Services, however, limits an individual's eligibility for employment in the unskilled labor class of the classified county service to employment in the county of one's residence. Similarly, no statute authorizes a board of county commissioners to impose such a limitation upon those seeking employment in the unskilled labor class of a county's classified service or to limit the power possessed by other county appointing authorities to make appointments to the unskilled labor class of the classified county service without regard to the appointee's county of residence.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. A board of county commissioners is without authority to limit the power possessed by the various county appointing authorities to appoint individuals, without regard to their counties of residence, to positions in the classified and unclassified service of the county.

⁹ *See generally Board of Educ. v. North Olmsted Civil Service Comm'n*, 13 Ohio App. 3d 201, 203, 468 N.E.2d 749 (Lorain County 1983) (“[t]o qualify for the unskilled labor class, the applicant need not possess and demonstrate a special skill or expertise. Rather, the unskilled laborer must demonstrate the physical ability and a sufficient ‘work ethic’ to indicate that he will adequately perform the job. Thus, registration in the labor class may be accomplished either by taking noncompetitive tests or by furnishing required evidence of age, *residence*, physical condition, ability to labor, honesty, sobriety, industry, capacity and work experience. Although the qualifications and methods of selection differ, both competitive and unskilled labor positions are in the classified service and are entitled to the protections afforded classified civil servants” (emphasis added)).

2. A board of county commissioners is without authority to limit the eligibility of individuals for appointment to positions in county employment, whether in the classified or unclassified service, by requiring that the appointees reside, or agree to reside, within the county.

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro", written in a cursive style.

JIM PETRO
Attorney General