

OPINION NO. 97-059**Syllabus:**

1. Pursuant to R.C. 124.09, R.C. 124.20, and R.C. 124.34, the Director of Administrative Services has authority to adopt rules providing for the involuntary disability separation of county employees.
2. 2 Ohio Admin. Code 123:1-33-02, adopted by the Director of Administrative Services, authorizes county appointing authorities to issue involuntary disability separation orders in appropriate circumstances and pursuant to prescribed procedures.

To: Martin Frantz, Wayne County Prosecuting Attorney, Wooster, Ohio
By: Betty D. Montgomery, Attorney General, December 29, 1997

We have received your request for an opinion on the question whether administrative rules governing involuntary disability separations apply to county employees. You have asked

specifically whether county appointing authorities may lawfully rely on rules adopted by the Department of Administrative Services as authority for effecting involuntary disability separations. Your basic concern is whether there is statutory authority for the rules to be applied to county employees.¹

Your question relates to circumstances in which an ill or injured county employee has exhausted all forms of paid and unpaid leave, cannot perform the essential functions of the job, and has an unfavorable prognosis for recovery. If the employee fails or refuses to seek disability retirement under the Public Employees Retirement System and the appointing authority has no viable available vacancy in a lesser classification, there arises the question whether the employee may be the subject of an involuntary disability separation order. You are considering a situation in which there is no applicable collective bargaining agreement, and this opinion is limited to such a situation.

Your request refers to rule 123:1-33-01. Pursuant to recent amendments, however, the basic provisions governing involuntary disability separations now appear in rule 123:1-33-02. *See* 2 Ohio Admin. Code 123:1-33-02 (eff. Nov. 10, 1996). As currently in effect, rule 123:1-33-02(A) authorizes an appointing authority to request that an employee submit to a medical or psychological examination prior to involuntary disability separation, unless the employee is hospitalized or has exhausted his or her disability leave benefits. The examination is conducted in accordance with rule 123:1-33-01, with the approval of the Director of Administrative Services, and results are provided to the appointing authority and the employee. *See* 2 Ohio Admin. Code 123:1-33-01 and 123:1-33-02(A).²

¹ This opinion does not address a situation in which the electors of a county, by charter provision, have established a county civil service commission, personnel office, or personnel department in accordance with R.C. 301.23, or a situation in which a county board has adopted an alternative form of government under R.C. Chapter 302.

² The current provisions of rule 123:1-33-01 state:

(A) An appointing authority, with the approval of the director, may require that an employee submit to a medical or psychological examination. Such examination shall be conducted by a licensed practitioner approved in advance by the director of administrative services. Prior to the examination, the appointing authority shall supply the examining practitioner with facts relating to the perceived disabling illness, injury, or condition, and shall supply additional information including physical and mental requirements of the employee's position; duty statements; job classification specifications; and position descriptions. The cost of the examination shall be paid by the appointing authority. Both the appointing authority and the employee shall receive the results of that examination and related documents subject to division (C)(1) of section 1347.08 of the Revised Code.

(B) Employee's failure to appear for examination. An employee's refusal to submit to the examination, the unexcused failure to appear for an examination, or the refusal to release the results of an examination amounts to insubordination, punishable by the imposition of discipline up to and including removal.

If, after receiving the results of the examination, the appointing authority "initially determines that an employee is incapable of performing the essential job duties of the employee's assigned position due to a disabling illness, injury, or condition," the appointing authority must institute pre-separation proceedings. 2 Ohio Admin. Code 123:1-33-02(B). The employee is entitled to a hearing for the presentation of testimony and evidence. *Id.*

The appointing authority considers the testimony and evidence presented at the pre-separation hearing and, if the appointing authority determines "that the employee is unable to perform his or her essential job duties, then the appointing authority shall issue an involuntary disability separation order." 2 Ohio Admin. Code 123:1-33-02(C). An employee who receives such a separation order may appeal that order to the Personnel Board of Review. 2 Ohio Admin. Code 123:1-33-02(E). An employee who is the subject of an involuntary disability separation order has certain reinstatement rights if there is recovery from the disability. 2 Ohio Admin. Code 123:1-33-02(D) and (F); 2 Ohio Admin. Code 123:1-33-04. *See generally* 2 Ohio Admin. Code 123:1-33-03 (voluntary disability separation).

In order to answer your question, we need to look at the authority of the Director of Administrative Services to adopt rules. R.C. 124.09 grants the Director of Administrative Services authority 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 R.C. Chapter 124. R.C. 124.09(A); *see Armitage v. Miami Univ.*, 103 Ohio App. 3d 461, 659 N.E.2d 873 (Butler County 1995).³

R.C. 124.20 provides more specifically that, with the approval of the State Personnel Board of Review, the Director of Administrative Services "shall adopt rules...[f]or the classification of officers, positions, and employments, in the civil service of the state and the several counties thereof," *see also* R.C. 124.14(A), and "[f]or appointment, promotions, transfers, layoffs, suspensions, reductions, reinstatements, and removals therein." R.C. 124.20(A), (B). It is evident that the word "therein" refers to "the civil service of the state and the several counties thereof." *Id.* Thus, the Director of Administrative Services has express authority to adopt and enforce rules governing reductions, suspensions, and removals in the county civil service.⁴ *See also* R.C. 124.06 ("[n]o 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"); 2 Ohio Admin. Code 123:1-1-07.⁵ Implicit in this authority is the

2 Ohio Admin. Code 123:1-33-01.

³ Except for rules dealing with job classification and assignment of pay ranges under R.C. 124.14, rules adopted under R.C. 124.09 are subject to approval, disapproval, or modification by the State Personnel Board of Review. R.C. 124.09(A).

⁴ Various civil service commissions have corresponding authority with respect to the entities within their jurisdiction. *See* R.C. 124.01(E),(G); R.C. 124.06; R.C. 124.40.

⁵ The board of county commissioners, by resolution, may establish a county personnel department, and that department may exercise powers, duties, and functions of the Department of Administrative Services and the Director of Administrative Services specified in R.C. 124.01-

condition that the Director may not issue rules that are unreasonable or inconsistent with statutory enactments covering the same subject matter. *See Carroll v. Department of Admin. Servs.*, 10 Ohio App. 3d 108, 460 N.E.2d 704 (Franklin County 1983).

Pursuant to R.C. 124.34, an officer or employee who is in the classified service may not be reduced in pay or position, suspended, or removed "except as provided in [R.C. 124.32],⁶ and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office." R.C. 124.34 (footnote added). "Involuntary disability separation" is a separation from the civil service made "when an employee becomes unable to perform the essential job duties of the employee's position," without the voluntary consent of the employee. 2 Ohio Admin. Code 123:1-47-01(A)(34); *cf.* 2 Ohio Admin. Code 123:1-33-03 (voluntary disability separation). Such a separation constitutes a reduction, suspension, or removal from the civil service pursuant to R.C. 124.34. *See Collyer v. Broadview Developmental Center*, 74 Ohio App. 3d 99, 598 N.E.2d 75 (Franklin County 1991); R.C. 124.03(A) (as used in R.C. 124.03, "discharge includes involuntary disability separations"); 2 Ohio Admin. Code 123:1-33-04(J) (an employee who does not make a timely application for reinstatement following disability separation "shall be deemed permanently separated from service"); 2 Ohio Admin. Code 123:1-47-01(A)(74), (77), and (83).⁷

.64 and R.C. Chapter 325. R.C. 124.14(G); 2 Ohio Admin. Code Chapter 123:1-2. The county personnel department may not assume any powers or duties of the State Personnel Board of Review. R.C. 124.14(G)(2). Any submittals required by R.C. 124.20 "shall be made to the county personnel department with jurisdiction in the matter, if one has been established." R.C. 124.20(B).

⁶ R.C. 124.32(A) governs transfers of persons in the classified services. R.C. 124.32(B) provides for the reinstatement of persons in the classified service who have been separated without delinquency or misconduct. It states, in part:

[I]f such separation is due to injury or physical disability, such person shall be reinstated to the same office or similar position he held at the time of his separation, within thirty days after written application for reinstatement and after passing a physical examination made by a licensed physician designated by the director, showing that he has recovered from such disability, provided further that such application for reinstatement be filed within three years from the date of separation, and further provided that such application shall not be filed after the date of service eligibility retirement.

R.C. 124.32(B) (emphasis added). When the reference to R.C. 124.32 was inserted into R.C. 124.34, R.C. 124.32 contained procedures governing layoffs. *See* 1974 Ohio Laws, Part II, 191, 193, 195 (Am. Sub. S.B. 243, eff. July 23, 1974).

⁷ Prior to the recent amendment of rules 123:1-33-01 and 123:1-33-02, provisions governing involuntary disability separation appeared in rules 123:1-33-01 to 123:1-33-03. *See* [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 123:1-33-01 to 123:1-33-03, at 1115-16. At that

An individual who is unable to perform the essential functions of a job is incompetent or unable to perform the job, or is lacking in the necessary efficiency. *See, e.g., Linston v. State*, No. 78AP-98 (Ct. App. Franklin County July 20, 1978); *State ex rel. Baker v. Giles*, No. 78AP-440 (Ct. App. Franklin County Oct. 10, 1978). Use of the term "incompetent" or "inefficient" describes an inability to perform at an acceptable level. It does not indicate the presence of any delinquency or misconduct. *See, e.g., Ohio Dep't of Taxation v. Ferguson*, 22 Ohio Op. 3d 120 (Ct. App. Franklin County 1981); *State ex rel. Baker v. Giles*. Thus, a person who is disabled may be reduced, suspended, or removed from the civil service pursuant to R.C. 124.34 upon a finding of "incompetency" or "inefficiency," *i.e.*, inability to perform the job. *See, e.g., Winners v. Berea City School Dist. Bd. of Educ.*, No. 56458 (Ct. App. Cuyahoga County Jan. 18, 1990).⁸

The removal, suspension, and reduction provisions of R.C. 124.34 apply to officers and employees "in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof." *See also* R.C. 124.40. Thus, they are applicable to classified employees who serve the state or a county. As discussed above, the Director of Administrative Services has the authority to adopt and implement rules governing removals, suspensions, and reductions from the state and county classified service. *See* R.C. 124.09(A); R.C. 124.20; *see also* R.C. 124.06. In the exercise of that authority, the Director has adopted rules governing removals, suspensions, and reductions. *See* 2 Ohio Admin. Code Chapter 123:1-31. Provisions of rule indicate that the Director's personnel practice rules apply to boards of county commissioners and county elected officials, boards, agencies, and appointing authorities unless a board, official, agency, or appointing authority adopts other rules in accordance with R.C. Chapters 124 and 325. 2 Ohio Admin. Code 123:1-1-07; *see also* note 5, *supra*.

The provisions governing disability separation at one time appeared in Chapter 123:1-31, along with other provisions governing removals, suspensions, and reductions under R.C. 124.34. *See* 2 Ohio Admin. Code Chapter 123:1-31; [1981-1982 Monthly Record] Ohio Admin. Code 123:1-31-02, at 388 (repealed). In 1981, the disability separation provisions were moved to Chapter 123:1-33, where they have remained, subject to various amendments. *See* [1981-1982

time, rule 123:1-33-03 referred specifically to "a section 124.34 of the Revised Code order of involuntary disability separation." [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 123:1-33-03(B), at 1116. This language was dropped in the amended version, but there is no indication of an intent to change the involuntary disability separation proceeding from a proceeding under R.C. 124.34.

⁸ R.C. 124.34 authorizes an employee to appeal an order of reduction, suspension, or removal to the State Personnel Board of Review or the appropriate civil service commission, *see* R.C. 124.01(E), (G); R.C. 124.40, within ten days of its filing. *See also* 2 Ohio Admin. Code 123:1-33-02(E). R.C. 124.34 authorizes an appeal from the decision of the State Personnel Board of Review or commission to the court of common pleas "[i]n cases of removal or reduction in pay for disciplinary reasons." An involuntary disability separation is not a removal or reduction for disciplinary reasons, so the appeal to the court is not available in those circumstances and is not referenced in the administrative rules. *See Armitage v. Miami Univ.*, 103 Ohio App. 3d 461, 659 N.E.2d 873 (Butler County 1995); *Collyer v. Broadview Developmental Center*, 74 Ohio App. 3d 99, 598 N.E.2d 75 (Franklin County 1991).

Monthly Record] Ohio Admin. Code 123:1-33-02, at 389. The presence of the disability separation provisions in Chapter 123:1-33 appears to have caused some confusion.

Much of Ohio Admin. Code Chapter 123:1-33 deals with the disability leave program created pursuant to R.C. 124.385. That program, by its terms, is available only to employees who have completed one year of continuous state service,⁹ meet necessary qualifications, and either are paid directly by warrant of the Auditor of State, *see* R.C. 124.385(A); R.C. 124.382(B), or are included in a list of employees of state elected officials, *see* R.C. 124.385(A)(1); R.C. 124.14(B)(2). *See also* 2 Ohio Admin. Code 123:1-33-12(A). Hence, county employees who are not paid directly by warrant of the Auditor of State are not eligible for disability leave benefits under R.C. 124.385.¹⁰ Therefore, county employees generally are not subject to the provisions of R.C. 124.385 or to rules that apply only to the disability leave program. *See* 2 Ohio Admin. Code 123:1-33-07 to 123:1-33-16.¹¹

The fact that the rule providing for involuntary disability separation now appears in Chapter 123:1-33 does not mean, however, that involuntary disability separation is limited to persons who are eligible for the disability leave program under R.C. 124.385. By its terms, the involuntary disability separation rule applies to an "appointing authority." 2 Ohio Admin. Code 123:1-33-02; *see also* 2 Ohio Admin. Code 123:1-33-01. "Appointing authority" means the officer, commission, board, or body with "the power of appointment to, or removal from, positions in any office, department, commission, board, or institution." R.C. 124.01(D); *see also* 2 Ohio Admin. Code 123:1-47-01(A)(7). The term "appointing authority" thus is broad enough to include county officials who have authority to appoint civil service employees. *See* R.C. 124.01(A), (C), (D), (F).

As discussed above, R.C. 124.20 provides that the Director of Administrative Services "shall adopt rules" governing classification, appointments, suspensions, reductions, and removals in the civil service of the state and the counties. Thus, the Director's rules governing suspension, reduction, or removal through involuntary disability separation are appropriately applied both to state appointing authorities and to county appointing authorities. *See* R.C. 124.06; 2 Ohio Admin. Code 123:1-1-07; 1977 Op. Att'y Gen. No. 77-015 (syllabus, paragraph 1) ("[c]ounty boards and county officers are required to comply with the rules adopted by the Director of Administrative Services pursuant to R.C. 124.09 and R.C. 124.20").

⁹ As defined in R.C. 124.01(B), "[s]tate service" includes offices and positions in the service of "the state, the counties, and general health districts thereof, except the cities, city health districts, and city school districts."

¹⁰ Pursuant to the final paragraph of R.C. 124.39, a political subdivision (including a county), is permitted to adopt policies similar to those contained in R.C. 124.385. A county employee who is subject to such a provision receives disability benefits pursuant to the county policy and not pursuant to R.C. 124.385 or rules adopted thereunder.

¹¹ It is clear that individuals who are subject to involuntary disability separation may also be entitled to disability benefits. *See* 2 Ohio Admin. Code 123:1-33-11. Further, the reinstatement provisions apply to all disability separations, including those for which disability benefits are granted. *See* 2 Ohio Admin. Code 123:1-33-04.

The authorities discussed above thus disclose that, pursuant to R.C. 124.09, R.C. 124.20, and R.C. 124.34, the Director of Administrative Services has authority to adopt rules providing for the involuntary disability separation of county employees. The Director has exercised that authority in adopting rule 123:1-33-02, which authorizes county appointing authorities to issue involuntary disability separation orders in appropriate circumstances and pursuant to prescribed procedures.¹²

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 124.09, R.C. 124.20, and R.C. 124.34, the Director of Administrative Services has authority to adopt rules providing for the involuntary disability separation of county employees.
2. 2 Ohio Admin. Code 123:1-33-02, adopted by the Director of Administrative Services, authorizes county appointing authorities to issue involuntary disability separation orders in appropriate circumstances and pursuant to prescribed procedures.

¹² Your request letter refers to several cases that questioned the validity of predecessor administrative code sections. Our examination of those cases in light of existing statutes indicates that they do not compel a contrary conclusion. The authorities you cited indicate that a "disability leave" constitutes a reduction, suspension, or removal under R.C. 124.34, but that the separation does not constitute delinquency or misconduct for purposes of R.C. 124.32. See *Darity v. State Personnel Bd. of Review*, No. 78AP-498 (Ct. App. Franklin County May 10, 1979); *State ex rel. Baker v. Giles*, No. 78AP-440 (Ct. App. Franklin County Dec. 7, 1978); *State ex rel. Baker v. Giles*, No. 78AP-440 (Ct. App. Franklin County Oct. 10, 1978). *Carroll v. Department of Administrative Services*, 10 Ohio App. 3d 108, 460 N.E.2d 704 (1983), held that the Director of Administrative Services could not require an employee to submit to a medical examination for the purpose of imposing upon the employee an involuntary utilization of the employee's sick leave. The current provisions do not require the involuntary use of sick leave. Instead, they establish a procedure for reduction, suspension, or removal in accordance with R.C. 124.34.