OPINION NO. 90-013

Syllabus:

A county employee serving in a position in the classified civil service is, as of the effective date of a statutory provision changing such position to the unclassified service, no longer in the classified service of the county and is no longer entitled to the protections afforded classified employees. (1986 Op. Att'y Gen. No. 86-015, overruled).

To: Richard L. Ross, Morgan County Prosecuting Attorney, McConnelsville, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, April 3, 1990

I have before me your opinion request concerning the status of county employees occupying positions which the legislature has, by statute, changed from the classified to the unclassified civil service. You specifically ask: "Are the occupants of those office[s] that the Legislature removes from the classified service and places in the unclassified service unclassified, or is only the next appointee to that office unclassified?"

The civil service system has been established by the legislature in accordance with the mandate of Ohio Const. art. XV, §10, which states:

> 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.

The legislature has, therefore, provided a statutory scheme, set forth in R.C. Chapter 124, pursuant to which the civil service system operates.

As defined in R.C. 124.01(A), "civil service" includes "all offices and positions of trust or employment in the service of...the counties...." Further, pursuant to R.C. 124.11, the county civil service is divided into the classified and the unclassified service. As explained in *Yarosh v. Becane*, 63 Ohio St. 2d 5, 9-10, 406 N.E.2d 1355, 1359 (1980):

> Positions in the classified service are those for which merit and fitness can be determined by examination. Employees in the classified service can only be removed for good cause and only after the procedures enumerated in R.C. 124.34 and the rules and regulations thereunder are followed. Positions in the unclassified service require qualities that the General Assembly has deemed are not determinable by examination. Employees in the unclassified service do not receive the protections afforded employees in the classified service.
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> R.C. 124.11(B) defines the classified service as all positions not specifically enumerated in the unclassified service. R.C. 124.11(A) enumerates the positions in the unclassified service.[1] (Footnote added.)

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[1] As noted in *Johnson v. State*, 54 Ohio Misc. 7, 14, 375 N.E.2d 1268, 1271 (C.P. Montgomery County 1977), "R.C. 124.11 is not the final arbiter of whether a given position is in the classified or unclassified civil service....[W]here there is language elsewhere in the Revised Code expressly designating a certain position as being in either the classified or unclassified service,...then that language controls as to the classified or unclassified status of the position."

Your question asks whether persons serving in positions which were formerly in the classified service of the county, which positions have since been assigned by statutory amendment to the unclassified service, remain in the classified service while serving in those positions. This issue has been addressed twice recently by the judiciary.[2] In *Shearer v. Cuyahoga County Hospital*, 34 Ohio App. 3d 59, 516 N.E.2d 1287 (Cuyahoga County 1986), the appellant had been employed in a position which was designated by statute as a classified position. During her employment, however, by legislative change, her position became unclassified. Subsequently, appellant was discharged without a hearing. In considering whether appellant had been denied due process of law in being discharged without a hearing, the court stated:

> It is within the General Assembly's legislative power to redesignate certain positions as unclassified as the necessity arises.
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> [*Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985)] determined that a public employee has a property right in continued employment, of which he may not be deprived without due process of law. Appellant argues that *Loudermill* entitles her to due process prior to termination, since she was hired as a classified employee.
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> We disagree. *Loudermill* does not stand for the proposition that the appellant has a property right in continued status as a classified civil servant, but, rather that a classified civil servant has a property right in continued employment which may not be terminated without due process. *Loudermill* does not mandate that the appellant who once was, but is no longer, a classified civil servant be afforded procedural due process prior to termination. (Citation omitted.)

34 Ohio App. 3d at 60, 516 N.E.2d at 1288.

In a similar case, *Lawrence v. Edwin Shaw Hospital*, 34 Ohio App. 3d 137, 517 N.E.2d 984 (Franklin County 1986), the court considered the constitutionality of an amendment to R.C. 124.11(A) which moved appellants' positions from the classified to the unclassified service. After the effective date of the amendment, appellants were laid off. They then appealed their layoffs to the State Personnel Board of Review which ruled that it could not hear the layoff appeals because appellants were unclassified civil service employees over whom the Board has no jurisdiction. *See generally* R.C. 124.03 (setting forth the powers and duties of the State Personnel Board of Review). In its syllabus, the court summarized the constitutional validity of the amendment to R.C. 124.11, as follows:

> County hospital employees laid off subsequent to the enactment of R.C. 124.11(A)(20), which places county hospital employees appointed under R.C. 339.03 and 339.06 into the unclassified civil service, are not thereby subjected to an unconstitutional taking of property without compensation, nor to an unconstitutional impairment of contract rights, nor to a retroactive application of the statute, nor to a violation of the due process and equal protection guarantees of the Ohio and United States Constitutions.

Thus, the Franklin County Court of Appeals found, as did the Cuyahoga County Court of Appeals, that a statutory amendment which changed certain public employees from the classified to the unclassified service did not violate the

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2 Prior to the decisions in *Shearer v. Cuyahoga County Hospital*, 34 Ohio App. 3d 59, 516 N.E.2d 1287 (Cuyahoga County 1986) and *Lawrence v. Edwin Shaw Hospital*, 34 Ohio App. 3d 137, 517 N.E.2d 984 (Franklin County 1986), I concluded that a classified employee whose position was, by statutory amendment, changed to the unclassified service retained his rights as a classified employee so long as he remained in that position. 1986 Op. Att'y Gen. No. 86-015. Based upon *Shearer* and *Lawrence*, however, I hereby overrule Op. No. 86-015.

procedural due process or other constitutional guarantees of such public employees.[3]

It is, therefore, my opinion, and you are hereby advised, that a county employee serving in a position in the classified civil service is, as of the effective date of a statutory provision changing such position to the unclassified service, no longer in the classified service of the county and is no longer entitled to the protections afforded classified employees. (1986 Op. Att'y Gen. No. 86-015, overruled).

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[3] Your opinion request mentions the case of *Esselburne v. Ohio Dept. of Agriculture*, 29 Ohio App. 3d 152, 504 N.E.2d 434 (Franklin County 1985). That case is distinguishable from both *Shearer* and *Lawrence*, discussed above. In *Esselburne* the employee's change in status from classified to unclassified which the court found to be invalid was attempted, not through statutory amendment, but through administrative action. The court found the rule pursuant to which the change was attempted to be invalid as inconsistent with the statutory scheme of R.C. Chapter 124.