OPINION NO. 2008-034

Syllabus:

2008-034

Summit County's adoption of a policy authorizing the termination of

probationary employees ''for any reason'' and the county's pre-employment notice of such policy to prospective county employees do not establish, without evidence of fault on the part of the employee, ''just cause'' under R.C. 4141.29(D)(2)(a) for termination of a county probationary employee.

To: Sherri Bevan Walsh, Summit County Prosecuting Attorney, Akron, Ohio
By: Nancy H. Rogers, Attorney General, October 8, 2008

You have requested an opinion of the Attorney General concerning Summit County's obligations under R.C. Chapter 4141, Ohio's unemployment compensation law. By way of background, you state:

> [The Unemployment Compensation Review Commission (UCRC)] has repeatedly approved unemployment benefits for terminated employees who did not perform satisfactorily during their initial probationary period. Moreover, even though some probationary employees clearly violated County policies and procedures, the County provided written redetermination documentation which substantiated such violations during an appeal process or via telephonic hearings, the UCRC has allowed benefits. For example, recently a UCRC Senior Hearing Officer reversed its own hearing officer concerning a probationary employee who was terminated due to substantiated work-related performance deficiencies involving the essential functions of her job. The rational[e] was that the County did not have ''just cause'' to terminate in accordance with the standard delineated in R.C. § 4141.29(D)(2)(a), even though that employee was a probationary employee when terminated.
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> Based upon the foregoing, you specifically ask:
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> [w]hether the County of Summit, as a governmental entity, can include in its offer of employment to prospective employees, language that it can terminate the employee during his/her probationary period for any reason. If so, would such language permit the County of Summit to demonstrate that a probationary employee was terminated during the probationary period without presenting evidence of ''just cause''?

As will be explained below, we find that Summit County's provision of notice to a prospective employee that employment with the county will include a probationary period during which the employee may be terminated for any reason does not, in itself, establish ''just cause'' for termination of that employee during the probationary period for purposes of R.C. 4141.29(D)(2)(a).

I. Eligibility for Unemployment Compensation Benefits under R.C. Chapter 4141

The statutory scheme contained in R.C. Chapter 4141 determines the

eligibility of former Summit County employees, among others, to receive unemployment compensation benefits. *See, e.g., Summit County Fiscal Office v. Wood*, 2008-Ohio-2159, 2008 Ohio App. LEXIS 1856 (Summit County May 7, 2008). R.C. 4141.29 establishes the basic entitlement to unemployment compensation, in pertinent part, as follows: "Each eligible individual shall receive benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment in the amounts and subject to the conditions stipulated in this chapter." (Emphasis added.) In determining whether a former employee is entitled to receive unemployment compensation, "[t]he burden of proof is upon the claimant to establish the right to unemployment benefits under the unemployment compensation law of Ohio." *Shannon v. Bureau of Unemployment Comp.*, 155 Ohio St. 53, 97 N.E.2d 425 (1951) (syllabus, paragraph 1).

II. Eligibility Exception in R.C. 4141.29(D)(2)(a)

Your questions concern the exception in R.C. 4141.29(D)(2)(a) to the general entitlement described in R.C. 4141.29. According to R.C. 4141.29(D)(2)(a), former employees are not entitled, with certain exceptions, to receive unemployment compensation benefits if the Director of Job and Family Services finds that "[t]he individual quit work without *just cause* or has been discharged for *just cause* in connection with the individual's work."[1] (Emphasis added.)

The court in *Irvine v. State*, 19 Ohio St. 3d 15, 17, 482 N.E.2d 587 (1985), explained the nature of "just cause," as that term is used in R.C. 4141.29, as follows:

> The term "just cause" has not been clearly defined in our case law. We are in agreement with one of our appellate courts that "[t]here is, of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Peyton v. Sun T.V.* (1975), 44 Ohio App. 2d 10, 12 [73 O.O.2d 8].
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> The determination of what constitutes just cause must be analyzed in conjunction with the legislative purpose underlying the Unemployment Compensation Act. Essentially, the Act's purpose is "to enable unfortunate employees, who become and remain *involuntarily* unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day." (Emphasis *sic.*) *Leach* v. *Republic Steel Corp.* (1964), 176 Ohio St. 221, 223 [27 O.O.2d 122]; accord *Nunamaker* v. *United States Steel Corp.* (1965), 2 Ohio St. 2d 55, 57 [31 O.O.2d 47] . . . .

[1] R.C. 4141.29(D)(2)(a) excludes from its terms certain employees who, for example, separate for purposes of entering military service and those who separate under a collective bargaining or other agreement or established employer plan that "permits the employee, because of lack of work, to accept a separation from employment," R.C. 4141.29(D)(2)(a)(ii).

. . . .

> The determination of whether just cause exists necessarily depends upon the unique factual considerations of the particular case.

Thus, a determination whether just cause for discharge or resignation exists for purposes of R.C. 4141.29(D)(2)(a) depends upon the particular circumstances of each case, viewed in light of the legislative purpose of the unemployment compensation scheme—the assistance of those who are involuntarily unemployed.

Subsequently, the court in *Tzangas, Plakas & Mannos v. Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694, 653 N.E.2d 1207 (1995), examined the *Irvine* concept of "just cause," as that term is used in R.C. 4141.29. While retaining the *Irvine* approach of examining the totality of circumstances of an individual's unemployment, the *Tzangas* court emphasized that, "*[f]ault on behalf of the employee* remains an *essential component* of a just cause termination," 73 Ohio St. 3d at 698 (emphasis added).

The *Tzangas* court went on to refine the notion of employee fault to include unsuitability for a position, and stated:

> There is little practical difference between an employee who *will not* perform her job correctly and one who *cannot* perform her job correctly. In either case, the performance of the employee is deficient. That *deficiency*, which does not result from any outside economic factor, *constitutes fault on the employee's behalf.*

73 Ohio St. 3d at 698 (emphasis added). Thus, while the concept of "fault" under R.C. 4141.29(D)(2)(a) is broad enough to encompass an employee's failure to perform his job in a proper manner, whether from the employee's unwillingness or inability properly to perform the duties of the job, fault on the part of an employee must exist in order to find a termination for "just cause," as that term is used in R.C. 4141.29(D)(2)(a).

III. Application of R.C. 4141.29(D)(2)(a) to Discharged Probationary Summit County Employees

Your concern is whether the discharge of a Summit County employee during the employee's probationary period under a county policy that authorizes the discharge of probationary county employees "for any reason" establishes, without further inquiry into the circumstances of the employee's discharge, that such discharge was "for just cause in connection with the individual's work" for purposes of R.C. 4141.29(D)(2)(a). In other words, you ask whether Summit County's adoption of a policy that allows county employees to be terminated for any reason during their probationary period, along with the county's pre-employment notification to all prospective employees of such policy, establishes "just cause" for purposes of R.C. 4141.29(D)(2)(a) for the county's termination of any employee during the probationary period.

A. Appointment and Tenure of Classified County Employees under R.C. Chapter 124

To understand your question, it is useful briefly to examine the civil service

scheme governing the employment of public employees. We note first that the employment and tenure of most county employees are subject to the civil service provisions contained in R.C. Chapter 124. *See generally* R.C. 124.01(A) (defining "civil service," as used in R.C. Chapter 124, as including "all offices and positions of trust or employment in the service of the state and in the service of the counties, cities, city health districts, general health districts, and city school districts of the state"). A person employed under the civil service scheme holds a position that is in either the classified or the unclassified service. R.C. 124.11. *See generally* 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" (emphasis added)). As specified in R.C. 124.34(A), the tenure of classified employees "shall be during good behavior and efficient service." R.C. 124.34(A) further lists the reasons for which, and the manner in which, a classified employee may be, among other things, reduced in pay or position, suspended, fined, or removed.

Upon appointment, a classified employee begins serving a probationary period, during which the employee may be removed or reduced, "[i]f the service of the employee is unsatisfactory," R.C. 124.27(C). As further provided by R.C. 124.27(C): "A probationary employee duly removed or reduced in position for unsatisfactory service does not have the right to appeal the removal or reduction under section 124.34 of the Revised Code." Thus, R.C. 124.27(C) authorizes an employer of a probationary employee to remove or reduce that employee for unsatisfactory service, and the employee has no right to appeal that action under R.C. 124.34.

B. Summit County Employment

Summit County, however, differs from all other Ohio counties in that it has adopted a charter under Ohio Const. art. X, § 3. By virtue of its charter, Summit County possesses authority to vary the civil service hiring, tenure, and other provisions in R.C. Chapter 124 for Summit County employees. *See* R.C. 301.23 (stating, in part, "[t]he electors of any county may establish, by charter provision, a county civil service commission, personnel office, or personnel department. In any county which, by its charter, creates such a commission, office, or department, and provides a] for appointment to the county service on the basis of merit and fitness, as ascertained by competitive examination, Chapter 124. of the Revised Code is not operative"). As set forth in Article XV, § 10 of the Ohio Constitution, however, "[a]ppointments 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." Thus, although Summit County may exempt itself from the hiring and tenure provisions of R.C. Chapter 124, it must establish a] under which its employees are appointed "according to merit and fitness," Ohio Const. art. XV, § 10. *See, e.g.*, *State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 310, 107 N.E. 768 (1914) ("[a]s long as the provisions made in the charter of any municipality with reference to its civil service comply with the requirement of Sec-

tion 10 of Article XV, and do not conflict with any other provisions of the constitution, they are valid and . . . discontinue the general law on the subject as to that municipality'').

For purposes of addressing your question about the unemployment compensation eligibility of former Summit County employees who have been terminated during their probationary periods, it is not necessary to determine the reasons for which or manner in which Summit County's charter or ordinances authorize the county to terminate its probationary employees. Rather, as explained by the Ninth District Court of Appeals[2] in *Durgan v. Ohio Bur. of Employment Servs.*, 110 Ohio App. 3d 545, 549-50, 674 N.E.2d 1208 (Lorain County 1996):

> It is important to distinguish between just cause for discharge in the context of unemployment compensation and in other contexts. An employer may justifiably discharge an employee without incurring liability for wrongful discharge, but that same employee may be entitled to unemployment compensation benefits. See *Adams v. Harding Machine Co.* (1989), 56 Ohio App.3d 150, 155, 565 N.E.2d 858, 862. This is so because just cause, under the Unemployment Compensation Act, is predicated upon employee *fault. Tzangas*, 73 Ohio St.3d at 698, 653 N.E.2d at 1211; *Adams*, 56 Ohio App.3d at 155, 565 N.E.2d at 862. We are, therefore, unconcerned with the motivation or correctness of the decision to discharge. *Friedman v. Physicians and Surgeons Ambulance Serv.* (Jan. 6, 1982), Summit App. No. 10287, unreported, at 6, 1982 WL 2867. The Act protects those employees who cannot control the situation that leads to their separation from employment. See *Tzangas*, 73 Ohio St. 3d at 697, 653 N.E.2d at 1210.

Thus, regardless of the reasons for which Summit County's charter and ordinances authorize the county to discharge a probationary employee, whether a particular probationary employee has been terminated for ''just cause'' for purposes of R.C. 4141.29(D)(2)(a) is a separate and distinct question. *See Markovich v. Employer Unity, Inc.*, 2004-Ohio-4193, 2004 Ohio App. LEXIS 3825 (Summit County Aug. 11, 2004) (adopting the *Durgan* analysis of ''just cause'' under R.C. 4141.29(D)(2)(a)). *See also In re Guy*, 146 Ohio App. 3d 20, 26-27, 764 N.E.2d 1082 (Jefferson County 2001) (''the decision regarding the validity of [an employee's] suspension based on civil service laws is likewise distinct from the hearing officer's decision regarding [the employee's] eligibility for unemployment compensation. As previously stated, the findings of the civil service commission may be relevant, but they are not binding on the [unemployment compensation] hearing officer''); *Sellers v. Bd. of Review*, 1 Ohio App. 3d 161, 164, 440 N.E.2d 550 (Franklin County 1981) (''[t]here is a distinct difference between unsatisfactory performance under R.C. 124.27 and just cause for discharge pursuant to R.C.

[2] Included within the Ninth Appellate District are Summit, Lorain, Wayne, and Medina Counties. R.C. 2501.01(I).

4141.29. Justification for a decision not to retain a probationary employee pursuant to R.C. 124.27 does not ipso facto constitute just cause for discharge under R.C. 4141.29. In order to have just cause for discharge, pursuant to R.C. 4141.29, there must be some fault on the part of the employee involved, in the absence of an overwhelming contractual provision. Such fault does not require misconduct; but, nonetheless, fault must be a factor in the justification for discharge'').

As described in your letter, Summit County proposes the adoption of a policy that authorizes the county to dismiss probationary employees ''for any reason.'' Under such a policy, the county would be authorized to terminate a probationary employee for any reason, whether or not the termination was related to any fault of the employee. For purposes of determining whether a termination is for ''just cause'' for purposes of R.C. 4141.29(D)(2)(a), however, ''[f]ault on behalf of the employee is an essential component of a just cause termination.'' *Tzangas, Plakas & Mannos v. Ohio Bureau of Employment Servs.*, (syllabus, paragraph 2). That a probationary employee was dismissed under such a policy provides no evidence of fault on the part of the former employee for purposes of establishing whether Summit County had ''just cause,'' as that term is used in R.C. 4141.29(D)(2)(a), for terminating that employee.[3] We note, however, that Summit County maintains the opportunity to present evidence to establish that the termination of a former probationary employee was due to the former employee's fault, and was, therefore, a termination ''for just cause'' within the meaning of R.C. 4141.29(D)(2)(a). *See generally, e.g.*, *Abrams-Rodkey v. Summit County Children Serv.*, 163 Ohio App. 3d 1, 2005-Ohio-4359, 836 N.E.2d 1 (2005) (upholding fact-finder's determination, based upon presentation of evidence by dismissed employees and by employer, Summit County Children Services Board, of circumstances of employees' termination).

IV. Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that, Summit County's adoption of a policy authorizing the termination of probationary employees ''for any reason'' and the county's pre-employment notice of such policy to prospective county employees do not establish, without evidence of fault on the part of the employee, ''just cause'' under R.C. 4141.29(D)(2)(a) for termination of a county probationary employee.

[3] In addition, the county's pre-hiring notification of a probationary employee that the county has authority to discharge a probationary employee for any reason has no bearing upon the question whether ''just cause'' exists under R.C. 4141.29(D)(2)(a) should that employee be discharged during his probationary employment. *Cf. Tzangas, Plakas & Mannos v. Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694, 653 N.E.2d 1207 (1995) (pre-employment notification of the employer's reasonable expectations for the required work is a prerequisite to a finding of fault, for purposes of R.C. 4141.29(D)(2)(a), on the part of an employee who is discharged for being unsuitable for the position).