

**OPINION NO. 86-070****Syllabus:**

1. A board of township trustees of a non-civil service township may implement a layoff of police constables and police district employees hired under R.C. 509.01 and R.C. 505.49(A), respectively, who have been awarded certificates attesting to satisfactory completion of a police basic training program; such layoffs need not follow the procedures prescribed by R.C. 505.491-.495 for the removal or suspension of such persons, but may be accomplished in any reasonable manner.
2. Police constables and police district employees, who have been awarded certificates attesting to satisfactory completion of a police basic training program, may not exercise police powers while they are properly laid off.

**To: Gary L. Van Brocklin, Mahoning County Prosecuting Attorney, Youngstown,  
Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, September 23, 1986**

I have before me your request for my opinion concerning the following questions:

September 1986

1. What procedure should be followed, in "non-civil service" townships, to layoff and recall police constables and police district employees who have been awarded certificates attesting to satisfactory completion of police basic training programs?
2. Can a Board of Township Trustees prevent police constables and police district employees, who have been awarded certificates attesting to satisfactory completion of police basic training programs, from exercising police powers when they are laid off?

Your request specifically refers to police constables and police district employees who work in non-civil service townships and who have been awarded certificates attesting to satisfactory completion of police basic training programs. In order to answer your first question, it is necessary to examine the statutes governing the appointment of such persons. R.C. 509.01 authorizes a board of township trustees to designate qualified persons to serve as police constables. Concerning such police constables, R.C. 509.01 further states in relevant part:

Police constables so designated, who have been awarded a certificate attesting to satisfactory completion of an approved state, county, or municipal police basic training program, as required by section 109.77 of the Revised Code, may be removed or suspended only under the conditions and by the procedures in sections 505.491 to 505.495, inclusive, of the Revised Code. Any other police constable shall serve at the pleasure of the township trustees.

R.C. 505.49 speaks to the appointment of township police district employees, namely a chief of police, patrolmen and other personnel. See generally R.C. 505.48 (authorizing creation of township police district by resolution of township trustees). R.C. 505.49 states in relevant part:

(A) The township trustees by a two-thirds vote of the board may adopt rules necessary for the operation of the township police district, including a determination of the qualifications of the chief of police, patrolmen, and others to serve as members of the district police force.

The township trustees by a two-thirds vote of the board shall appoint a chief of police for the district, determine the number of patrolmen and other personnel required by the district, and establish salary schedules and other conditions of employment for the employees of the township police district. The chief of police of the district shall serve at the pleasure of the township trustees and shall appoint patrolmen and such other personnel as the district may require, subject to rules and limits as to qualification, salary ranges, and numbers of personnel established by the township board of trustees. The township trustees may include in the township police district and under the direction and control of the chief of police, any constable appointed pursuant to section 509.01 of the Revised Code, or designate the chief of police or any patrolman appointed by him as a constable, as provided for in section 509.01 of the

Revised Code, for the township police district.

A patrolman, other police district employee, or police constable, who has been awarded a certificate attesting to satisfactory completion of an approved state, county, or municipal police basic training program, as required by section 109.77 of the Revised Code, may be removed or suspended only under the conditions and by the procedures in sections 505.491 to 505.495 of the Revised Code. Any other patrolman, police district employee, or police constable shall serve at the pleasure of the township trustees. In case of removal or suspension of any appointee an appeal may be had from the decision of the board to the court of common pleas of the county in which the district is situated, to determine the sufficiency of the cause of removal or suspension. (Emphasis added.)

Both R.C. 509.01 and R.C. 505.49(A) address the removal or suspension of police constables and police district personnel, and provide that any such person, who has been awarded a certificate as described in R.C. 109.77 attesting to satisfactory completion of a police basic training program, may be removed or suspended only under the conditions and by the procedures set forth in R.C. 505.491-.495.

R.C. 505.491 sets forth the grounds for which constables and police district personnel may be removed, and reads as follows:

When the board of trustees of a township has reason to believe that any chief of police, patrolman, or other township police district employee appointed under division (A) of section 505.49 of the Revised Code, or any police constable appointed under section 509.01 of the Revised Code, has been guilty, in the performance of his official duty, of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, neglect of duty, gross immorality, habitual drunkenness, incompetence, or failure to obey orders given him by the proper authority, the board shall immediately file written charges against such person, setting forth in detail a statement of such alleged guilt and, at the same time, or as soon thereafter as possible, serve a true copy of such charges upon the person against whom they are made. Such service may be made on the person or by leaving a copy of the charges at the office or residence of such person. Return thereof shall be made to the board, as is provided for the return of the service of summons in a civil action.

R.C. 505.492-.495 provide for an investigation, possible suspension of the accused, and hearing upon charges brought under R.C. 505.491.

Thus, a person may be removed or suspended under R.C. 505.491-.495 only for reasons of misconduct and may be removed only after an investigation and hearing have been conducted. See generally 1970 Op. Att'y Gen. No. 70-032. Your question concerns the scope of a township's authority to lay off police constables and police district personnel, who have received a certificate evidencing satisfactory completion of a police basic training program, in light of the provisions of R.C. 505.49(A), R.C. 509.01, and R.C. 505.491-.495.

In order to answer your question, it is first necessary to determine whether a non-civil service township possesses the requisite authority to lay off police constables and police district personnel. See generally Trustees of New London Township v. Miner, 26 Ohio St. 452 (1875)(board of township trustees has only those powers expressly conferred by the General Assembly or necessarily implied therefrom).

As discussed above, R.C. 509.01 empowers the board of township trustees to appoint persons to serve as police constables. In Thomas v. Board of Trustees, 5 Ohio App. 2d 265, 215 N.E.2d 434 (Trumbull County 1966), the court found that, pursuant to R.C. 509.01, the board of township trustees has authority to appoint, and the implied authority to discharge, police constables. Although this case was decided prior to the enactment of 1967-1968 Ohio Laws, Parts II-III, 2540 (Am. H.B. 191, eff. Nov. 24, 1967), amending R.C. 509.01 and enacting R.C. 505.491-.495, to provide the removal and suspension provisions in those sections, Thomas still stands for the proposition that certain powers may be implied from the express appointive power of the board of trustees. See, e.g., 1974 Op. Att'y Gen. No. 74-038 (authority to direct and supervise the activities of constables is necessarily implied from the original appointive power vested in the board of township trustees by R.C. 509.01); 1965 Op. Att'y Gen. No. 65-177 (pursuant to R.C. 509.01, the board of township trustees may determine when a police constable is on duty).

Further, the Ohio Supreme Court has consistently held that the power to appoint employees in the civil service includes the power to lay off such employees, where such layoff is for the purpose of improving the efficiency of the public service. See Weston v. Ferguson, 8 Ohio St. 3d 52, 53, 457 N.E.2d 818, 819 (1983) ("the power to create a position in the civil service includes the power to abolish it....This is particularly true where the purpose of such abolishment is economy or the increased efficiency of the public service" (citations omitted)); State ex rel. Stoer v. Raschig, 141 Ohio St. 477, 49 N.E.2d 56 (1943) (syllabus, paragraph one); State ex rel. Stine v. McCaw, 137 Ohio St. 13, 27 N.E.2d 488 (1940) (syllabus, paragraph one) ("power to create a position in the civil service includes the power to abolish the position, particularly where the purpose of the abolishment of such position is that of economy or improvement in the public service").<sup>1</sup> I note that the township employees about whom you ask are employed in non-civil service townships and are not, therefore, in the civil service for purposes of R.C. Chapter 124. See generally R.C. 124.40(B) (authorizing the

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<sup>1</sup> There has long existed, in various forms, statutory authority for an appointing authority to lay off employees in the civil service. See, e.g., G.C. 486-16. See also note 2, infra. However, the cases cited above for the proposition that the power to appoint employees in the civil service includes the power to lay off such employees appear to be based on the proposition that the power to lay off may be implied from the power to appoint, rather than being derived from an express statutory authorization to lay off employees. Further, the cases addressing layoffs of civil service employees appear to limit the reasons for which such layoffs may be implemented to only those which promote economy or efficiency of the public service.

board of trustees of those townships specified in R.C. 124.01(G) to create a township civil service commission to have jurisdiction limited to employees of the township police or fire department if the department has ten or more employees); 1980 Op. Att'y Gen. No. 80-019 (inclusion of members of police department within jurisdiction of township civil service commission). See also R.C. 124.34 (procedures for the suspension, reduction, or removal of, among others, the chief of police or other member of a civil service township police department). I see no basis, however, for finding that the powers which may be implied from the township trustees' power to appoint persons in a non-civil service township are more restrictive than those of public employers who appoint employees in the civil service. See generally 1981 Op. Att'y Gen. No. 81-061. Thus, I conclude that the township trustees' power to appoint police constables under R.C. 509.01 in a non-civil service township includes the power to lay off such constables.

The scheme for the appointment of township police district personnel under R.C. 505.49(A) differs somewhat from that prescribed by R.C. 509.01. Pursuant to R.C. 505.49(A), the board of township trustees appoints a chief of police who then appoints "patrolmen and such other personnel as the district may require, subject to rules and limits as to qualification, salary ranges, and numbers of personnel established by the township board of trustees." The powers which may be implied from the power to appoint are, as a general rule, subject to any constricting statutory authority. See Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (the power to employ necessarily includes the power to fix compensation, subject to any statutes which limit the fixing of such compensation). Since the appointment of police district personnel by the chief of police is subject to rules and limits established by the board of trustees as to, among other things, the number of patrolmen and other personnel, the power to determine when a layoff is required appears to remain in the board, although it appears that the chief of police maintains the implied power to establish a procedure for the layoff of police district personnel. See Ryman v. Reichart, 604 F. Supp. 467, 471 (S.D. Ohio 1985) (the decision to abolish the position of a person appointed under R.C. 505.49(A) is a legislative act of the board of township trustees in accordance with the statutory grant of authority to "determine the number of patrolmen and other personnel required by the district").

Although I have concluded that the power to implement a layoff with regard to police constables and police district personnel may be implied, it is necessary to determine whether

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apparently based upon the constitutional provision set forth in Ohio Const. art. XV, §10, which states that appointments and promotions in the civil service "shall be made according to merit and fitness." It does not appear that a non-civil service township would necessarily be limited to such reasons in implementing a layoff of township employees. See generally State ex rel. Giovanello v. Village of Lowellville, 139 Ohio St. 219, 222, 39 N.E.2d 527, 529 (1942) (declining to impose the requirements of Ohio Const. art. XV, §10 on the statutory provisions governing village employees since villages are not included in the civil service under art. XV, §10).

the removal and suspension provisions contained in R.C. 509.01, R.C. 505.49(A), and R.C. 505.491-.495 constrict the power which the board of township trustees may exercise in determining to implement a layoff of police constables or police district personnel employed pursuant to those statutes, respectively.

The removal and suspension provisions set forth in R.C. 509.01, R.C. 505.49(A), and R.C. 505.491-.495 were, as noted above, added in Am. H.B. 191. Concerning the intent of such legislation, Op. No. 74-038 states, at 2-166, that the bill was designed:

to provide a degree of job security or tenure to constables who had qualified under R.C. 109.77....Prior to this change, all police constables served at the pleasure of the township trustees....However, H.B. No. 191 provided a qualified constable with tenure that could be denied only where some form of delinquency, as set out in R.C. 505.491, et seq., could be established. (Citations omitted.)

It is well settled that where the legislature uses certain language in one instance and different language in another instance, different results were intended. See Metropolitan Securities Co. v. Warren State Bank, 117 Ohio St. 69, 158 N.E. 81 (1927); Kiefer v. State, 106 Ohio St. 285, 139 N.E. 852 (1922). In this regard, I note that at the time the legislature amended R.C. 509.01 and R.C. 505.49(A) to include the removal and suspension provisions set forth above, there was existing legislation governing civil service employees which distinguished between removals, suspensions, and layoffs. R.C. 143.03 (now at R.C. 124.06),<sup>2</sup> 1959 Ohio Laws 1049 (Am. H.B. 794, eff. Nov. 2, 1959) stated:

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 sections 143.01 to 143.48, inclusive, of the Revised Code, and the rules of the director of state personnel or the municipal civil service commission within their respective jurisdictions. (Emphasis added.)

The fact that the legislature has distinguished between an employee's removal, suspension, or layoff under civil service provisions, and yet has addressed only removals and suspensions in R.C. 509.01 and R.C. 505.49(A) makes it clear that the latter statutes were intended to address only the removal or suspension, but not the layoff, of persons employed under those sections. Cf. Gannon v. Perk, 46 Ohio St. 2d 301, 348 N.E.2d 342 (1976); State ex rel. Buckman v. Munson, 141 Ohio St. 319, 48 N.E.2d 109 (1943)(civil service laws and rules are designed, in part, to protect classified employees from unjust charges of

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<sup>2</sup> R.C. 124.321 currently sets forth the reasons for which employees in the civil service may be laid off. R.C. 124.322-.328 set forth the procedures which an appointing authority must follow in effecting a layoff of personnel. R.C. 124.34 sets forth the grounds and procedure for removing, suspending, and reducing the pay or position of employees in the classified civil service.

misconduct or inefficiency and from discrimination for religious or political reasons; such provisions do not, however, restrict public employers from acting in good faith to effect necessary and desirable economies or to lay off unessential employees for reasons of economy); Curtis v. State ex rel. Morgan, 108 Ohio St. 292, 140 N.E. 522 (1923)(statutory provisions governing removal proceedings have no application in situations where employee is laid off for economic reasons). I conclude, therefore, that the removal and suspension provisions of R.C. 509.01 and R.C. 505.49(A) do not constrict the power of the board of township trustees in a non-civil service township to implement a layoff of township constables or police district personnel. See Ryman v. Reichert, 604 F. Supp. at 470, n. 3 (concluding that R.C. 505.491-.495 had no application where an employee's job was abolished, such statutes applying to cases of discharge).

Further support for this conclusion is found in the case of Smith v. Fryfoogle, 70 Ohio St. 2d 58, 434 N.E.2d 1346 (1982). The court in Fryfoogle determined that the procedures set forth in R.C. 505.491 have limited application and are mandated only when a removal or suspension is sought for any type of misconduct set forth in the statute. The court explained:

In those instances where the trustees have reason to believe that the chief of police, or other officer, has been guilty of a named offense, the best interests of the government, the employee, and the public are served by a quasi-judicial proceeding where notice, hearing, compulsory attendance of witnesses, and advocacy are brought to bear upon the truth of the charges.

70 Ohio St. 2d at 60, 434 N.E.2d at 1348.

Part of your first question concerns the procedure which a board of township trustees or the chief of police of a police district of a non-civil service township should follow in accomplishing layoffs. Since no statutes direct the manner in which layoffs shall be conducted, I must conclude that the board, and in the case of a police district, the chief of police, may do so in any reasonable manner, depending upon the circumstances involved in each situation.<sup>3</sup> See generally State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 112 N.E. 138 (1915); Jewett v. Valley Railway Co., 34 Ohio St. 601 (1878).<sup>4</sup> In this regard, I note that in the case of Ryman v. Reichert, a desk officer with a township police department

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<sup>3</sup> If a personnel action is termed a "layoff," but is in actuality a removal, it is necessary to follow any applicable statutory provisions concerning removals. See Weston v. Ferguson, 8 Ohio St. 3d 52, 457 N.E.2d 818 (1983); State ex rel. Jones v. Preston, 117 Ohio App. 295, 192 N.E.2d 186 (Franklin County 1962). See also Elrod v. Burns, 427 U.S. 347 (1976) (holding that patronage dismissals of non-civil service employees of a county sheriff's office are unconstitutional under the first and fourteenth amendments to the United States Constitution).

<sup>4</sup> Pursuant to R.C. Chapter 4117, certain townships and township employees may bargain collectively. As stated in R.C. 4117.08(C), "[u]nless a public employer agrees

alleged that, due to the abolishment of her position, she was deprived of a property interest without due process of law. The court found that due process does not require a pre-abolishment hearing since there was "no risk that Plaintiff suffered stigma as a result of losing her job because she was not discharged; her job was abolished." 604 F. Supp. at 471. The court, thus, found that although due process requires that an employee receive a hearing prior to discharge,<sup>5</sup> a hearing is not required prior to the abolishment of a public employee's position. The situation about which you ask involves a temporary layoff, rather than the abolishment of a position. As in the situation of a job abolishment, however, a temporary layoff involves no alleged misconduct on the part of the employee being laid off. See generally In re Moreo, 13 Ohio App. 3d 22, 24, 468 N.E.2d 85, 88 (Montgomery County 1983) (distinguishing between a job abolishment and a layoff, and stating that, "[t]he former contemplates a permanent elimination of a particular position while the latter contemplates retention of the position being temporarily unfilled due to either lack of work or lack of funds"). Thus, there is no potential for stigma resulting from such layoff, and it appears, therefore, that due process does not require a pre-layoff hearing.

Your second question asks whether a board of township trustees may prevent police constables and police district employees, who have been awarded certificates attesting to satisfactory completion of a police basic training program as described in R.C. 109.77, from exercising police powers while they are laid off. R.C. 109.77 prohibits a person from being appointed as a peace officer for various entities, including townships, unless the person has received a certificate, as described in that section, attesting to his satisfactory completion of an approved police basic training program. R.C. 109.77 does not, however, authorize a person who has received such a certificate to exercise police powers absent authorization by an appropriate public employer.

A similar situation was recently addressed in 1986 Op. Att'y Gen. No. 86-014, concerning the authority of a person who has received a certificate under R.C. 3303.07 evidencing his satisfactory completion of a chartered fire safety inspector training program to act on behalf of a township as a fire safety inspector. Op. No. 86-014 states at 2-67 to 2-68:

The evident intent of this legislative scheme is that a person may receive a certificate under R.C.

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otherwise in a collective bargaining agreement, nothing in [R.C. Chapter 4117] impairs the right and responsibility of each public employer to:...(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees...." For purposes of this opinion, I will assume that there exist no collective bargaining agreements governing the layoff of any of the constables or police district personnel about whom you ask.

<sup>5</sup> Citing Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062 (6th Cir. 1984); Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983), aff'd, 105 S.Ct. 1487, \_ U.S. \_ (1985).



3303.07 in order to serve as a fire safety inspector for a fire agency. It is my judgment that the receipt of a certificate under R.C. 3303.07 for completion of a chartered training program for fire safety inspectors indicates that an individual has the qualifications needed to serve as a fire safety inspector. It does not, however, bestow upon him the authority to so serve. A fire safety inspector receives that authority when he is appointed as a fire safety inspector by a fire agency which, in accordance with R.C. 3737.01(B), serves the function of "examin[ing] the property of another person for the purpose of identifying fire safety hazards."...

By definition, a fire safety inspector must be a member of the civil service or be employed by or voluntarily serve a village or township. R.C. 3737.01(C). It is clear that a fire safety inspector may not be employed by a township without appointment by the township trustees, and I believe, further, that a fire safety inspector may not voluntarily serve a township without acknowledgment by the township that the inspector is serving on behalf of the township to carry out the functions of the township. I conclude, therefore, that a person who has received a certificate issued by the State Superintendent of Public Instruction under R.C. 3303.07, evidencing his satisfactory completion of a chartered fire safety inspector training program, must be appointed as a fire safety inspector by a board of township trustees or other fire agency before he will be considered to be a fire safety inspector for purposes of R.C. Chapter 3737 and 2 Ohio Admin. Code Chapter 1301:7-1.

Similarly, where a police constable or township police district employee has been laid off, he is not authorized to act, during the period in which he is laid off, in his capacity as a peace officer on behalf of the township, even though he has received a certificate as described in R.C. 109.77. See Op. No. 65-177 (syllabus, paragraph two) ("[t]he township trustees must determine when a township constable is on duty. If the township trustees determine that the township constable is on duty twenty-four hours a day, he is entitled to carry a concealed weapon at all times").

Confusion in this area appears to have arisen out of the conclusions reached in Op. No. 74-038, which states in the syllabus:

1. A township constable who has qualified under R.C. 109.77, and has been appointed under R.C. 509.01, may only be removed or suspended pursuant to R.C. 505.491, et seq. In the absence of such a removal or suspension, he may continue to perform the duties and exercise the authority provided him by statute.

2. A board of township trustees has implied authority under R.C. 509.01 to coordinate the activities of available constables in such matters as traffic patrols, but may not by resolution prohibit a constable from exercising his statutory powers and duties.

The syllabus appears to imply that once a township police constable who has received a certificate described in R.C. 109.77 has been appointed under R.C. 509.01, he may continue to

act in his capacity as a constable to carry out his statutory powers and duties until he has been removed or suspended in accordance with R.C. 505.491-.495. The facts set forth in Op. No. 74-038 indicate, however, that the township wished to remove, rather than lay off, the township constable. See, note 3, supra. Pursuant to R.C. 509.01, where a township seeks the removal of township police constables possessed of certificates as described in R.C. 109.77, such removal may be accomplished only pursuant to R.C. 505.491-.495. Since the facts addressed in Op. No. 74-038 indicated that none of the statutory grounds for removal existed, the opinion concluded that such constable could not be removed. Thus, the opinion appears to find that where the township attempted to remove a police constable who had received a certificate as described in R.C. 109.77, but failed to follow the procedures mandated by R.C. 505.491-.495, such officer was not removed and was entitled to continue in his employment as a township police constable.

Op. No. 74-038 did not, however, concern a situation like that about which you ask, in which a township seeks to lay off unnecessary constables and police district personnel who have been awarded certificates as described in R.C. 109.77. Thus, assuming the township carries out such layoffs in a proper manner, see note 3, supra, the laid off personnel will have no authority to execute their statutory powers and duties as township constables or township police district personnel during the period in which they are laid off.

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

1. A board of township trustees of a non-civil service township may implement a layoff of police constables and police district employees hired under R.C. 509.01 and R.C. 505.49(A), respectively, who have been awarded certificates attesting to satisfactory completion of a police basic training program; such layoffs need not follow the procedures prescribed by R.C. 505.491-.495 for the removal or suspension of such persons, but may be accomplished in any reasonable manner.
2. Police constables and police district employees, who have been awarded certificates attesting to satisfactory completion of a police basic training program, may not exercise police powers while they are properly laid off.