

## OPINION NO. 72-077

**Syllabus:**

1. A shortage of mine foremen creates an "emergency" within the meaning of Section 4155.06, Revised Code, which permits the appointment of a noncertified man as a temporary foreman.

2. A temporary mine foreman appointed under Section 4155.06, Revised Code, need not meet the requirements for certification of mine foremen prescribed by Sections 4151.20 and 4151.21, Revised Code.

3. A temporary mine foreman appointed under Section 4155.06, Revised Code, may serve until a certified foreman can be obtained, provided that he may not serve for "a period longer than six months or until such time thereafter as an examination is held for such certified men under Section 4151.17 of the Revised Code."

4. A temporary mine foreman appointed under Section 4155.06, Revised Code, who takes and fails an examination for certification within six months after his appointment, may serve out his six-month term, but may not continue to serve until the next examination is held.

5. A temporary mine foreman appointed under Section 4155.06, Revised Code, may not be reappointed to serve an additional term after the end of his term.

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To: Joe Shump, Director, Department of Industrial Relations, Columbus, Ohio  
By: William J. Brown, Attorney General, August 29, 1972

Your request for my opinion reads as follows:

"The Mine Examining Board within the Division of Mines is charged with the duty of conducting examinations for offices and positions in the Division of Mines and for mine foremen and fire bosses. Recently, several issues have arisen which require statutory interpretation, therefore, I would like your opinion on the following questions:

"1. Does a shortage of mine foremen create an 'emergency' within the meaning of Section 4155.06, Revised Code, so as to permit the appointment of a non-certificate man as a temporary foreman?

"2. Must a temporary foreman meet the qualifications prescribed in Sections 4151.20 and 4151.21, Revised Code, for mine foreman?

"3. How long may a noncertificate man appointed under authority of Section 4155.06 serve?

"4. Assuming that such a noncertificate man takes and fails an examination within three months after his appointment, may he be permitted to serve out the six-month period prescribed in 4155.06? May he continue to serve until the next examination is given?

"5. After the term prescribed in 4155.06 expires, may a noncertificate man be reappointed to serve additional terms?

Section 4155.06, Revised Code, provides for the appointment of noncertificate men for an emergency. That Section provides, in part, as follows:

"In emergencies arising at a mine because of accident, death, illness, or any other cause, the owner, lessee, or agent may appoint noncertificate men as foremen and fire bosses to act until certified foremen and fire bosses satisfactory to him can be secured. Such appointee may not serve in such capacity for a period longer than six months or until such time thereafter as an examination is held for such certified men under Section 4151.17 of the Revised Code.\* \* \*"

A regular mine foreman must be certified under Sections 4151.19 and 4151.20, or Section 4151.21, Revised Code, having met qualifications based on United States citizenship, age, actual experience in mine work, and an examination by the Mine Examining Board. The foreman's duties are prescribed by Sections 4155.02 and 4155.03, Revised Code, and reveal a strong orientation toward safety. Section 4155.03 reads, in part, as follows:

"Unless the miner or loader has the required qualifications, the mine foreman, or the person whom he delegates as overseer, shall supervise the work of such miner or loader as to the manner in which he performs his duties, and shall instruct him concerning all things relating to his safety, and shall further instruct such miner or loader not to handle or use any explosives, except in the mine foreman's or overseer's presence, until such time as he is competent to handle and use the same with safety. The mine foreman shall have the work of such inexperienced person supervised so long as such person is not working with an experienced miner or loader, until such person is competent to work alone."

Section 4155.04, Revised Code, requires the employment of foremen, and reads, in part, as follows:

"The owner, lessee, or agent of each mine who is an employer as defined in section 4123.01 of the Revised Code, or any mine working three or more men, shall employ a certified mine foreman. In gaseous mines, only a holder of a first class mine foreman's certificate shall be employed as mine foreman. In other mines, the foreman and assistant foreman must hold a second class mine foreman's certificate. All such mines shall have at least one mine foreman on duty at all times when men are employed in the loading or mining of coal."

Section 4123.01 (B), Revised Code, defines "employer" as, among others, "[e]very person, firm, and private corporation,\* \* \* that (a) has in service three or more workmen or operatives\* \* \*." Clearly, the legislature has expressed its intention that virtually every mining operation employ a foreman.

In order to provide for those situations in which a certified foreman is not available, whether because of "accident" or "illness", or due to "any other cause", the legislature enacted Section 4155.06. That Section should be construed to give effect to the legislative intent which the foregoing discussion revealed or to enable and require an employer to provide a qualified mine foreman at all times, preferably a certificate holder.

In response to your first question, the "emergencies" referred to in Section 4155.06 could well be shortages of mine foremen and fire bosses. A shortage of foremen is certainly a cause that could shut down a mine as much as accident or illness. Because of the legislature's use of the broad term, "any other cause", and because of the legislative intent to provide foremen at all times, this Section does authorize the appointment of noncertificate men as temporary foremen during any shortage of foremen, whatever the cause. However, it obviously was not intended to relieve the employer of his duty to provide a certified foreman as soon as practicable.

In response to your second question, the clear implication of Section 4155.06 is that a temporary foreman need not meet the qualifications for certification imposed by Sections 4151.20 and 4151.21. However, it is also clear that he should have enough knowledge and experience to be able to satisfy the demands of safety and performance mentioned in Sections 4155.02, 4155.03 and 4155.04, Revised Code. His position is analogous to that of a noncertified man to whom a foreman delegates some of his duties. Such person must be,

in the judgment of the foreman, competent to perform such duties. Section 4155.02, Revised Code.

In response to your third question, the temporary foreman is appointed and authorized by Section 4155.06 "to act until certified foremen\* \* \*satisfactory to him [the owner, lessee, or agent] can be secured." However, his tenure is further limited by the next sentence, which reads as follows:

"Such appointee may not serve in such capacity for a period longer than six months or until such time thereafter as an examination is held for such certified men under section 4151.17 of the Revised Code."

This Section establishes two limitations on the term of service: six months, or until such time thereafter as it takes for an examination to be held. If the temporary foreman takes and fails an examination before the end of the six months, he need not be relieved of his position. Even after having failed one examination, he should be able to serve for the remainder of the six-month period mentioned in the statute. Any other construction would render the statutory term "thereafter" superfluous.

But he may not continue to serve thereafter until the next examination is held. The language of the Section specifically allows a minimum of six months plus any additional time required for him to take one examination, but does not authorize any further extension of time. The time limitation is apparently intended both to allow a temporary foreman a chance to become certified, and to prevent one who has failed the examination from continuing to act as foreman, at least after his six-month minimum term has expired.

Similar reasoning provides the answer to your fifth question. There is no provision in the language of the statute for reappointment of a temporary foreman after the expiration of his term, and such reappointment would be contrary to the legislative intent. As previously discussed, the statutes regulating mine foremen reveal a strong orientation toward safety. A man who has demonstrated his unfamiliarity with basic safety knowledge by failing the certification examination cannot be given responsibility for the safety of a crew of men a second time before mastering the safety knowledge, and demonstrating such mastery by passing the prescribed examination.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. A shortage of mine foremen creates an "emergency" within the meaning of Section 4155.06, Revised Code, which permits the appointment of a noncertified man as a temporary foreman.

2. A temporary mine foreman appointed under Section 4155.06, Revised Code, need not meet the requirements for certification of mine foremen prescribed by Sections 4151.20 and 4151.21, Revised Code.

3. A temporary mine foreman appointed under Section 4155.06, Revised Code, may serve until a certified foreman can be obtained, provided that he may not serve for "a period longer than six months or until such time thereafter as an examination is held for such certified men under Section 4151.17 of the Revised Code."

4. A temporary mine foreman appointed under Section 4155.06, Revised Code, who takes and fails an examination for certification within six months after his appointment, may serve out his six-month term, but may not continue to serve until the next examination is held.

5. A temporary mine foreman appointed under Section 4155.06, Revised Code, may not be reappointed to serve an additional term after the end of his term.