

OPINION NO. 78-058**Syllabus:**

- 1) R.C. 124.41 requires that all persons originally appointed as policemen or policewomen in a city or civil service township police department be at least twenty-one years of age.
- 2) R.C. 737.15 and 737.16 permit the appointment of otherwise qualified persons of the age of eighteen to the offices of village marshal, deputy marshal, policeman, night watchman and special policeman.
- 3) R.C. 311.04 permits the appointment of an otherwise qualified person of the age of eighteen to the office of deputy sheriff.
- 4) R.C. 509.01 and 505.49 permit the appointment of otherwise qualified persons of the age of eighteen to township police positions, unless, in the operation of a police district pursuant to R.C. 505.48 et seq., the board of trustees under R.C. 505.49 has acted by a two-thirds vote to establish a higher age requirement.

To: Wilfred Goodwin, Executive Director, Ohio Peace Officer Training Council, Columbus, Ohio

By: William J. Brown, Attorney General, October 25, 1978

I have before me your predecessor's request for my opinion as to the effect of R.C. 3109.01, which fixes the legal age of majority at eighteen years, upon the various sections of the Revised Code that provide for the appointment of peace officers. Specifically, you have requested an opinion as to the age requirements applicable to the following types of peace officers:

- 1) Those employed by a municipal corporation or township having a civil service system.
- 2) Those serving a township which is not subject to the civil service laws.
- 3) Those serving as deputy sheriffs.

As noted in your letter, for many years the provisions of R.C. 3109.01 fixed the legal age of majority at twenty-one years. However, Am. Sub. S.B. 1, 135 Laws

of Ohio, effective January 1, 1974, amended the provisions of R.C. 3109.01 to read as follows:

All persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes.

The provisions of Am. Sub. S.B. 1 amended over seventy sections of the Revised Code, many of which set an age requirement for a variety of activities. For example, the provisions of R.C. 143.32, now R.C. 124.42, were amended to specify that no person shall be eligible for appointment as a fireman in a fire department subject to the civil service laws who has not attained the age of eighteen. As you observe, however, Am. Sub. S.B. 1 left unchanged the age requirement of what is now R.C. 124.41, which requires that an individual attain the age of twenty-one before becoming eligible for appointment to the police departments subject thereto. Moreover, as you have further observed, Am. Sub. S.B. 1 made no change in several other sections of the Revised Code which, while providing for the appointment of peace officers, set no specific age requirements.

Consequently, your question requires an analysis of statutory provisions for the appointment of the classes of peace officers listed in your letter. I believe, however, that an examination of the general principles controlling requirements for public office will be useful prior to any consideration of the specific offices listed in your letter.

There are a number of tests which have been applied by the courts over the years to distinguish the public officer from the public employee. It has been said that where an individual has been appointed in a manner prescribed by law, has a designation or title given him by law, and performs governmental functions concerning the public assigned by law, he must be regarded as a public officer. See, e.g., State, ex rel. v. Brennan, 49 Ohio St. 33 (1892); State, ex rel Attorney General v. Wilson, 29 Ohio St. 347 (1876). A public office has also been described as a charge or trust conferred by public authority for a public purpose with independent and continuing duties requiring the exercise of a portion of the sovereign power. State, ex rel. Herbert v. Ferguson, 142 Ohio St. 496 (1944). Because police officers, by whomever appointed or elected, derive their authority from the sovereign power for the purpose of enforcing observance of the law, they are generally regarded as public officers rather than public employees. See, e.g., Cleveland v. Luttner, 92 Ohio St. 493 (1915); New York, Chicago and St. Louis Railroad Co. v. Fieback, 87 Ohio St. 254 (1912). Your questions thus center upon the authority of the General Assembly to set qualifications for appointment to the law enforcement positions listed in your letter.

While it is often said that all persons are normally eligible and qualified for office unless excluded by some constitutional, statutory or legal disqualification, the power of a legislative authority to fix qualifications for the offices it creates has long been recognized. See, e.g., Boyd v. Nebraska, 143 U.S. 135, 36 L.Ed. 103, 12 S. Ct. 375 (1891); State, ex rel. Boda v. Brown, 157 Ohio St. 368 (1952). Moreover, it has further been established, in recognition of legislative power to fix such qualifications, that there is no basic or inherent right to public office. State, ex rel. Platz v. Mucci, 10 Ohio St. 2d 60 (1967). For this reason, reasonable qualifications for office, including those pertaining to age, have consistently been recognized as valid. Boyd v. Nebraska, *supra*, (The age limits for certain office may by constitutional or statutory provision be placed beyond the age of majority). State, ex rel. Boda v. Brown, *supra*, (The General Assembly may establish a mandatory retirement age); State ex rel. City of Garfield Heights v. Nadratowski, 46 Ohio St.2d 441 (1976) (Prohibition against holding other public office has a reasonable basis so as to be within the equal protection clause). For this reason, I am of the opinion that the General Assembly or other appropriate legislative authority, is authorized to fix age requirements for appointment as a peace officer.

As set forth above, the amended terms of R.C. 3109.01 specify that persons of the age of eighteen years are of full age for all purposes. However, I am unable to conclude that the General Assembly's use of this language in R.C. 3109.01 precludes

any exercise of its power to set qualifications for office in instances where it may elect to set a higher age requirement. Under the terms of R.C. 1.51, where a general statutory provision conflicts with a local provision, they shall be construed, if possible, so that effect is given to both. To the extent that the provision of R.C. 3109.01 that persons of the age of eighteen are of full age for all purposes may seem in conflict with any specific statutory provisions which set a higher age requirement, I am of the opinion that effect may be given to both through the recognition of the legislative power to impose an age requirement beyond the age of majority.

With this conclusion in mind, I turn now to the statutory provisions for the appointment of the various peace officers listed in your letter. As noted above, R.C. 124.41 provides for the appointment of personnel to a police department, in pertinent part, as follows:

No person shall be eligible to receive an original appointment to a police department, as a policeman or policewoman, subject to the civil service laws of this state, unless he has reached the age of twenty-one and has not more than one hundred twenty days prior to the date of such appointment, passed a physical examination, given by a licensed physician, showing that he or she meets the physical requirements necessary to perform the duties of a policeman or policewoman as established by the civil service commission having jurisdiction over the appointment.

By its own terms, this requirement is limited to appointments to police departments subject to the civil service laws of this state. R.C. 124.01(C) defines the classified civil service for the purposes of Chapter 124, to include the competitive classified service of the state, the counties, cities, city health districts, general health districts, and city school districts and civil service townships. Consequently, the provisions of R.C. 124.41 set forth above apply only to appointments to the police departments of one or more of these entities. While several of these subdivisions of the state have law enforcement powers, only the cities and service townships are authorized to create police departments. I am, therefore, of the opinion that the provisions of R.C. 124.41 operate to set a minimum age of twenty-one for original appointment as a policeman or policewoman to a city or civil service township police department. It should, however, also be noted that R.C. 124.41 further specifies that nothing in the section shall be construed as preventing either a municipal corporation or a civil service township from establishing a police cadet program and employing persons at age eighteen for the purpose of training.

While the express terms of R.C. 124.41 refer to "municipal corporations," it must be observed that R.C. 124.01 does not include within the scope of the civil service those in the service of a village. For this reason, employees of a village are not subject to the provisions of R.C. Chapter 124, 1916 Op. Att'y Gen. No. 1772, p. 1186. R.C. 737.15 provides for the appointment of a village marshal, designated chief of police. R.C. 737.16 provides for the appointment of deputy marshalls, policemen, night watchmen and special policemen. R.C. 737.15 requires that a village marshal be a resident of the village and pass a physical examination. No age requirement is set by R.C. 737.15. R.C. 737.16 requires that all persons appointed under the section pass a physical examination. Again, no age or residency requirements are set. Under the home rule provisions of Ohio Const. Art. XVIII, §3, a village legislative authority may well be authorized to set a higher age requirement for appointment to its police force. Because qualification as an elector is the most basic qualification for holding public office, however, I am of the opinion that the terms of R.C. 737.15 and 737.16, when read in conjunction with R.C. 3109.01, must be construed as requiring all persons appointed thereunder be at least eighteen years of age.

R.C. 311.04 authorizes the sheriff of each county to appoint deputies. This section sets no age, residency or physical requirements for such an appointment. Under the terms of R.C. 3109.01, therefore, it would appear that any otherwise

qualified person who has attained the age of eighteen years may be appointed by the sheriff.

As discussed in 1976 Op. Att'y Gen. No. 76-027, a board of township trustees may elect one of several methods to provide police protection. Where a township has elected to become a civil service township, the operation of its police department is subject to the provisions of R.C. 124.41 as discussed above. However, where a township has not become a civil service township, its trustees may choose to provide police protection through the appointment of constables pursuant to R.C. 509.01. That section authorizes the board of trustees to designate any qualified persons as police constables, with no specific age set. Consequently, under the terms of R.C. 3109.01, it would appear that any otherwise qualified person who has attained the age of eighteen may be appointed pursuant to R.C. 509.01.

The board of township trustees, however, may also elect to obtain police services through the creation of a township police district pursuant to R.C. 505.48 et seq. Under the terms of R.C. 505.49(A), where such a district has been created, the township trustees of a non-civil-service township may, by a two-thirds vote, adopt rules and regulations for the operation of the district, including a determination of the qualifications of the chief of police, patrolmen and other police force members. It would, therefore, appear that an individual of the age of eighteen years is eligible for appointment to a township district police force, absent a regulation adopted by a two-thirds vote of the trustees establishing a higher age requirement.

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

- 1) R.C. 124.41 requires that all persons originally appointed as policemen or policewomen in a city or civil service township police department be at least twenty-one years of age.
- 2) R.C. 737.15 and 737.16 permit the appointment of otherwise qualified persons of the age of eighteen to the offices of village marshall, deputy marshall, policeman, night watchman and special policeman.
- 3) R.C. 311.04 permits the appointment of an otherwise qualified person of the age of eighteen to the office of deputy sheriff.
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