

OPINION NO. 91-049**Syllabus:**

1. Service as a full-time employee of the Department of Liquor Control by a person who has received certification of satisfactory completion of an approved police basic training program does not qualify as service as a liquor control investigator, as defined in R.C. 145.01(DD), unless that employee is engaged in the enforcement of R.C. Chapter 4301.
2. A full-time employee of the Department of Liquor Control, who is appointed on other than a permanent basis to service as an investigator in either the enforcement or intelligence division of the Department to enforce the provisions of R.C. Chapter 4301 and is in compliance with R.C. 109.77(B), is a liquor control investigator, as defined in R.C. 145.01(DD). Service as a liquor control investigator constitutes service "while serving as a law enforcement officer," for purposes of R.C. 145.33(B).

To: John R. Hall, Department of Liquor Control, Columbus, Ohio
By: Lee Fisher, Attorney General, November 22, 1991

You have requested my opinion concerning the eligibility of certain Department employees to participate in the Public Employees Retirement System

(PERS) retirement plan established for law enforcement officers pursuant to R.C. 145.33(B).

According to your letter, the Department employs certain persons as "investigators in non-enforcement positions in the Beer & Wine and Permit Divisions whose primary function is to investigate and assure compliance with the Rules and Regulations of the Department." You further state that the Department is authorized to assign such employees on a temporary basis to the enforcement or intelligence divisions as liquor control investigators, provided that the employees have been properly trained and certified as peace officers under R.C. 109.77. The employees about whom you ask are "in traditionally non-enforcement positions," but have prior training and certification as peace officers. For purposes of this opinion, I will assume that the certification to which you refer is certification of satisfactory completion of an approved police basic training program, the terminology used in R.C. 109.77.

Based upon these facts, you specifically ask:

[1.] Are employees of the department of liquor control, who are not assigned permanently to the enforcement or intelligence divisions of the department, yet who have had prior service as peace officers as defined in O.R.C. §109.71 and who have been properly trained and certified, or who may serve on a temporary basis as law enforcement officers, eligible for election of P.E.R.S. Law Enforcement retirement benefits under O.R.C. §145.33(B)?

[2.] If so, does the training and certification process under O.R.C. §109.77 by itself grant them eligibility to make such an election, and are continued contributions by that employee to PERS-LE proper once training and certification are achieved and maintained until retirement?

The Statutory Scheme

Division (A) of R.C. 145.33 establishes the general plan for PERS members seeking to retire on age and service retirement. R.C. 145.33(B), however, establishes a separate age and service retirement program for a member who has the requisite number of years "of total service credit, including credit for military service under division (C)(2) of this section, *while serving as a law enforcement officer*" (emphasis added), and who either attains a certain age or resigns or is discharged for certain reasons. Thus, in order to be eligible for age and service retirement under R.C. 145.33(B), one requirement is that the member have the requisite number of years of total service credit *while serving as a law enforcement officer to the exclusion of some other public employment.*

Under R.C. 145.01(OO), the term "law enforcement officer" explicitly includes a "liquor control investigator." R.C. 145.01(DD), in turn, defines the term "liquor control investigator," for purposes of R.C. Chapter 145, as "a full-time employee of the department of liquor control who is engaged in the enforcement of Chapter 4301 of the Revised Code and is in compliance with section 109.77 of the Revised Code." Thus, in order to qualify as a liquor control investigator and, thus, as a law enforcement officer for purposes of R.C. 145.33(B), a full-time employee of the Department of Liquor Control must be engaged in the enforcement of R.C. Chapter 4301 and also must be in compliance with R.C. 109.77.¹

¹ 1987-1988 Ohio Laws, Part III, 4276 (Am. Sub. H.B. 552, eff. Dec. 15, 1988) added, among others, liquor control investigators to the category of persons considered to be law enforcement officers for purposes of R.C. Chapter 145. Uncodified section 3 of Am. Sub. H.B. 552 made provision for persons already serving as liquor control agents to elect whether to be included under R.C. 145.33(B), as follows: "Not later than ninety days after the effective date of this act, each...liquor control investigator...shall indicate to the [Public Employees Retirement] System, on a form supplied to each such member by the System, his choice of whether to receive benefits under division (A) of [R.C. 145.33] or under division (B) of that section."

Your request letter mentions that some of the employees about whom you ask may have previous certification as peace officers or may be assigned temporarily to the enforcement division or intelligence division of the Department. Neither of those factors, however, is alone determinative of an employee's status as a liquor control investigator under R.C. 145.01(DD). First, an employee must be a full-time employee of the Department of Liquor Control before he can begin to qualify as a liquor control investigator. Next, the employee must also be engaged in the enforcement of R.C. Chapter 4301. Whether a particular employee is engaged in the enforcement of R.C. Chapter 4301 is a factual determination, dependent upon the duties performed by that employee; it is not necessarily dependent upon the "division" of the Department to which the employee is assigned.

In this regard, pursuant to *Webster's New World Dictionary* 463 (2d college ed. 1978), the word "enforce," when used with reference to a law, means "to compel observance of." As set forth in R.C. 4301.01(A)(4), one of the duties of the Department of Liquor Control is to enforce R.C. Chapter 4301, which establishes, among other things, numerous requirements and prohibitions concerning the sale, possession, distribution, and use of beer and intoxicating liquor. *See, e.g.*, R.C. 4301.21 (restrictions on the sale of beer and intoxicating liquor for consumption on premises); R.C. 4301.211 (prohibiting advertising of retail price of beer and malt beverages); R.C. 4301.24 (restrictions applicable to manufacturers and wholesale distributors); R.C. 4301.58 (activities prohibited without permit); R.C. 4301.60 (prohibition against transportation of beer, intoxicating liquor, or alcohol without proper permit); R.C. 4301.66 (prohibition against obstructing search of place where beer or intoxicating liquor is possessed, kept, sold, or given away).

Concerning the execution of the enforcement duties assigned to the Department by R.C. Chapter 4301, R.C. 4301.021 provides that the Director of Liquor Control "shall exercise all powers and perform all duties created and enjoined by [R.C. Chapters 4301 and 4303, except those assigned to the Liquor Control Commission]." Although certain divisions within the Department of Liquor Control have been created by statute, *see* R.C. 121.04, R.C. 121.07 allows the Director of Liquor Control, with the approval of the Governor, to consolidate any two or more of the offices heading the divisions created by statute or to eliminate or add divisions within the Department. Further, pursuant to R.C. 121.07, the Director is empowered to exercise control and supervision of the Department, as follows:

With the approval of the governor, the director of each department shall establish divisions within his department, and distribute the work of the department among such divisions....

....

The director of each department may prescribe rules for the government of his department, the conduct of its employees, the performance of its business, and the custody, use, and preservation of the records, papers, books, documents, and property pertaining thereto.

Thus, within the limits imposed by R.C. 121.04 and R.C. 121.07, the Director of Liquor Control has broad authority to distribute and assign the responsibilities of the Department. Consequently, the Director of Liquor Control has the discretion under R.C. 121.07 to determine how the Department's "enforcement" obligations are accomplished, and by whom.

Finally, to qualify as a "liquor control investigator" for purposes of R.C. Chapter 145, those persons who are employed by the Department of Liquor Control on a full-time basis and who engage in the enforcement of R.C. Chapter 4301 must also be in compliance with R.C. 109.77. Specifically concerning liquor control investigators, R.C. 109.77(B) states:

No person shall, after September 20, 1984, receive an original appointment on a permanent basis as a liquor control investigator in the enforcement division or intelligence division of the department of liquor control, engaged in the enforcement of Chapter 4301. of the Revised Code,....unless the person previously has been awarded a certificate by the executive director of the Ohio peace officer training council attesting to his satisfactory completion of an approved police basic training program. *Every person who is appointed on a temporary basis or for a probationary term or on other than a*

permanent basis as a liquor control investigator in the enforcement division or intelligence division of the department of liquor control, engaged in the enforcement of Chapter 4301. of the Revised Code,....shall forfeit his position as such unless the person previously has satisfactorily completed or, within one year from the time of his appointment, satisfactorily completes an approved police basic training program. (Emphasis added.)

Thus, R.C. 109.77(B), in part, prohibits the original appointment of an individual as a permanent liquor control investigator in the enforcement division or intelligence division of the Department unless and until that person has been certified by the executive director of the Ohio Peace Officer Training Council as having satisfactorily completed an approved police basic training program. *See generally* R.C. 109.75(C) (certification of peace officers who have satisfactorily completed basic training programs). Further, pursuant to R.C. 109.77(B), a person who is appointed on a temporary basis as a liquor control investigator in the enforcement or intelligence divisions of the Department, engaged in the enforcement of R.C. Chapter 4301, "shall forfeit his position as such unless the person previously has satisfactorily completed or, within one year from the time of his appointment, satisfactorily completes an approved police basic training program." Thus, R.C. 109.77(B) requires that a person who is temporarily assigned to the intelligence division or the enforcement division of the Department for the enforcement of R.C. Chapter 4301 must have already completed, or within one year from the date of appointment complete, an approved police basic training program.

Application Of The Statutory Scheme To Your Request

For ease of discussion, I will first address that portion of your second question which asks whether a full-time employee of the Department of Liquor Control qualifies for participation in the retirement plan established by R.C. 145.33(B) *merely* because he has received training and certification under R.C. 109.77. As set forth above, compliance with R.C. 109.77 is only one requirement which a full-time employee of the Department of Liquor Control must meet in order to qualify as a liquor control investigator and thus, as a law enforcement officer for purposes of R.C. 145.33(B). Pursuant to R.C. 145.01(DD), in order to qualify as a liquor control investigator, one must be engaged in the enforcement of R.C. Chapter 4301. Thus, although a full-time employee of the Department of Liquor Control may have received training and certification under R.C. 109.77, such training and certification, *absent employment in the enforcement of R.C. Chapter 4301*, does not constitute service as a law enforcement officer for purposes of R.C. 145.33(B).

Turning now to your first question, you specifically refer to persons who may be assigned on other than a permanent basis to serve as liquor control investigators in the enforcement division or intelligence division of the Department, some of whom may have prior certification as having completed an approved police basic training program.

As set forth above, in order to be in compliance with R.C. 109.77(B), those full-time Department employees who are temporarily assigned to the intelligence or enforcement divisions for the enforcement of R.C. Chapter 4301 must have satisfactorily completed, or within one year of appointment satisfactorily complete, an approved police basic training program. Once the requisite compliance with R.C. 109.77(B) is established, if the full-time Department employee, while assigned to the intelligence or enforcement division, enforces R.C. Chapter 4301, he is a liquor control investigator, as defined in R.C. 145.01(DD). Accordingly, the time served as a liquor control investigator constitutes service as a law enforcement officer for purposes of R.C. 145.33(B).

I caution, however, that the statutory scheme governing membership and retirement in PERS requires that each member and his employer make contributions to PERS during the member's service. R.C. 145.47-48. For those persons participating in the law enforcement plan, the employer and employee contribution rates are higher than the rates fixed for non-law enforcement members. 1 Ohio Admin. Code 145-3-02. While law enforcement and non-law enforcement service may be combined for purposes of receiving regular retirement benefits, employees performing law enforcement service on only a sporadic basis may never be able to accumulate the requisite number of years of law enforcement service (a minimum of

fifteen or twenty-five years) necessary to receive the enhanced law enforcement benefit under R.C. 145.33(B).² Thus, while an employee's non-law enforcement retirement benefits will not be reduced or delayed because of such service, whether sporadic service as a law enforcement officer would be helpful to a particular individual in qualifying for retirement *under R.C. 145.33(B)* depends upon whether he ultimately accumulates the minimum number of years of law enforcement service necessary to qualify for retirement under that section. *See generally* R.C. 145.33(C)(3) ("[o]nly credit for his service as a law enforcement officer, or service credit purchased as a policeman or state highway patrolman shall be used in computing the benefits under [R.C. 145.33(B)] for...any person who is originally employed as...[a] liquor control investigator...on or after December 15, 1988").

It may be advisable, in assigning individuals to temporary service, to bear in mind that the following facts are true: (1) those full-time Department employees who are in compliance with R.C. 109.77 and who enforce the provisions of R.C. Chapter 4301 while assigned on other than a permanent basis to the intelligence or enforcement divisions are liquor control investigators, as defined in R.C. 145.01(DD), while so assigned; (2) service as a liquor control investigator constitutes service as a law enforcement officer for purposes of R.C. Chapter 145, and is subject to the higher employee and employer contribution rates for law enforcement officers; and, thus (3) persons who render service as law enforcement officers on only an occasional basis will contribute to PERS at a higher rate for their law enforcement service, but may never accumulate sufficient service time as a law enforcement officer to qualify for retirement under R.C. 145.33(B).

In answer to your first question, service rendered by a full-time employee of the Department of Liquor Control, who is assigned on only an occasional basis to the enforcement division or intelligence division of the Department and who is in compliance with R.C. 109.77(B), constitutes service "while serving as a law enforcement officer," for purposes of R.C. 145.33(B), if his duties while so assigned constitute the enforcement of R.C. Chapter 4301.

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

1. Service as a full-time employee of the Department of Liquor Control by a person who has received certification of satisfactory completion of an approved police basic training

² In Sub. H.B. 382, 119th Gen. A. (1991) (eff. June 30, 1991), R.C. 145.02 was amended so that it no longer prohibits a public employee who was contributing and receiving full credit under R.C. 145.33(B) from contributing on concurrent non-law enforcement service. R.C. 145.33 was also amended to provide a member with both law enforcement and non-law enforcement service the following options:

(C)(1) A member with service credit as a law enforcement officer and other service credit under this chapter may elect one of the following:

(a) To have all his service credit under this chapter, including credit for service as a law enforcement officer, used in calculating a retirement allowance under division (A) of this section [age and service retirement for non-law enforcement service] if he qualifies for an allowance under that division;

(b) If he qualifies for an allowance under division (B) of this section, to have his service credit as a law enforcement officer used in calculating a benefit under division (B) of this section and his credit for all service other than law enforcement service under this chapter used in calculating a benefit consisting of a single life annuity having a reserve equal to the amount of his accumulated contributions and an equal amount of the employer's contributions.

Sub. H.B. 382 did not, however, change the minimum number of years of law enforcement service required to qualify for retirement under R.C. 145.33(B).

program does not qualify as service as a liquor control investigator, as defined in R.C. 145.01(DD), unless that employee is engaged in the enforcement of R.C. Chapter 4301.

2. A full-time employee of the Department of Liquor Control, who is appointed on other than a permanent basis to service as an investigator in either the enforcement or intelligence division of the Department to enforce the provisions of R.C. Chapter 4301 and is in compliance with R.C. 109.77(B), is a liquor control investigator, as defined in R.C. 145.01(DD). Service as a liquor control investigator constitutes service "while serving as a law enforcement officer," for purposes of R.C. 145.33(B).