

**OPINION NO. 80-056****Syllabus:**

1. The requirement of R.C. 3770.02 that the State Lottery Commission shall not employ a person who has been convicted of a felony or unexpunged misdemeanor of the first, second, or third degree applies to all persons, including those initially hired by the Commission prior to the effective date of such requirement.
2. Persons convicted of minor misdemeanors or misdemeanors of the fourth degree (including minor misdemeanors or misdemeanors of the fourth degree involving traffic violations) may be employed by the State Lottery Commission pursuant to R.C. 3770.02.
3. The Director of the State Lottery Commission must update his information concerning the criminal records of the State Lottery Commission employees as often as, in his discretion, he deems necessary to maintain an accurate record.

**To: Edwin C. Taylor, Executive Director, Ohio Lottery Commission, Cleveland, Ohio**  
**By: William J. Brown, Attorney General, September 11, 1980**

I have before me your request for an opinion pertaining to R.C. 3770.02, which, as amended by Am. S.B. 139, 113th Gen. A. (1980) (eff. Aug. 1, 1980), provides in pertinent part:

No person shall be employed by the commission who has been convicted of a felony or unexpunged misdemeanor of the first, second, or third degree in any jurisdiction. The director shall request the bureau of criminal identification and investigation or, in his discretion, any other state or federal agency, to supply to him the criminal records of any employee or job applicant.

The questions raised concerning the foregoing are as follows:

1. [Do] the requirements pertaining to criminal convictions apply to those already employed by the State Lottery Commission on the effective date of [Am. S.B. 139] ?
2. Is there any distinction which applies to traffic convictions to exempt them from the provisions of [Am. S.B. 139] ?
3. How often must the Director update his information concerning the criminal records of the State Lottery Commission employees?

The first question addresses the meaning of the following portion of R.C. 3770.02: "No person shall be employed by the commission who has been convicted of a felony or unexpunged misdemeanor of the first, second, or third degree in any jurisdiction." Your question is whether persons initially hired by the State Lottery Commission prior to August 1, 1980 (the effective date of Am. S.B. 139) are somehow exempt from this prohibition. The answer to your question depends upon whether the employment of an individual is something that happens once, when the individual is first hired, or whether it is a status that continues as long as the individual is in the employ of the Commission. If the former is the case, then persons initially hired by the Commission prior to August 1, 1980, are not subject to the requirements concerning criminal convictions; if the latter is the case, then such employees are subject to those requirements.

It is my opinion that the quoted language of R.C. 3770.02 must be construed to mean that the Commission shall never have in its employ any person convicted of a felony or unexpunged misdemeanor of the first, second, or third degree, and, thus, that all employees, including those hired prior to August 1, 1980, are subject to the criminal conviction requirements. This interpretation is supported by the provision of amended R.C. 3770.02 which authorizes the director to request "the criminal records of any employee or job applicant" (emphasis added). If the director were not able to discharge an employee convicted of a crime, there would be no need for the director to review the criminal records of "employees." It is evident from your third question that this is the interpretation which you consider appropriate. The conclusion that the Director must update his information concerning the criminal records of Commission employees is obviously premised on the belief that the lack of conviction requirement constitutes a continuing job qualification and, therefore, that no person who has been convicted of one of the specified crimes may become or remain an employee of the Commission.

It might be argued that persons employed by the Commission prior to August 1, 1980, had some sort of right to retain their employment without the subsequent imposition of additional job qualifications. I am, however, unaware of any legal support for such an argument. R.C. 3770.02, as in existence prior to August 1, 1980, provided for all officers and employees of the Commission to be appointed by the Director, subject to approval by the Commission, and to "serve at the commission's pleasure." Hence, those persons employed prior to August 1, 1980, had no right to continuing employment which could have been impaired by the imposition of a non-conviction requirement. Further, the state has a rational basis in enacting the qualification because of the necessity of maintaining the credibility of the State Lottery Commission and the highly sensitive nature of its work. Therefore, this job qualification furthers a reasonable government objective.

I direct your attention also to Sections 3 and 5 (uncodified) of Am. S.B. 139. Section 3 requires the Director of Administrative Services, in consultation with the Director of the State Lottery Commission, to review and revise the job classifications and salary schedules for employees of the Commission and expressly provides that each employee of the Commission "shall retain no less than his present status and rate of pay on the effective date of this act." Section 5 provides that any person who was employed by the Lottery Commission on August 1, 1980, in a position which is included in the classified service became a permanent, certified employee, subject to all provisions of R.C. Chapter 124 governing employees in the classified service of the state. Pursuant to these provisions, persons initially hired by the Commission prior to August 1, 1980, became subject to the provisions of R.C. Chapter 124, even as persons hired after that date are subject to those provisions under amended R.C. 3770.02, which requires employees to "be appointed and compensated pursuant to Chapter 124. of the Revised Code."

Thus, it appears that persons employed by the Commission prior to August 1, 1980, attained civil service status and, where appropriate, classified civil service status, as of August 1, 1980, and have the same rights under the civil service statutes as persons hired after that date. Even as civil service status accrued to all employees of the Commission on August 1, 1980, so also the non-conviction requirement became applicable to all employees of the Commission as of that date. Clearly, the relevant provisions of R.C. Chapter 124 will apply to any attempt to discharge an employee for failure to comply with the non-conviction requirement. I perceive no difference in application of the non-conviction requirement to employees hired before August 1, 1980, and those hired after August 1, 1980.

Your second question is whether there is any distinction which applies to traffic convictions to exempt them from the provisions of R.C. 3770.02. By its terms, R.C. 3770.02 bars the employment by the Commission of persons who have been convicted of "a felony or unexpunged misdemeanor of the first, second, or third degree." It contains no exception for persons convicted of traffic offenses; it does not, however, apply to persons convicted of minor misdemeanors (punishable by a maximum fine of \$100) or misdemeanors of the fourth degree (punishable by a maximum fine of \$250 and a maximum term of imprisonment of 30 days). See R.C.

2929.21. In order to determine whether a particular traffic offense constitutes the type of offense to which the non-conviction provisions of R.C. 3770.02 apply, it is necessary to examine the statutes governing that offense. I note that many traffic offenses are classified as minor misdemeanors, but that subsequent commission of an offense within a year of the first offense will sometimes constitute a misdemeanor of a higher degree. See, e.g., R.C. 4511.99(D) (violation constitutes minor misdemeanor, but second offense within one year of first offense constitutes misdemeanor of the fourth degree and subsequent offenses within that year constitute misdemeanors of the third degree).

Your third question is how often the Director must update his information concerning the criminal records of the State Lottery Commission employees. No statute directly addresses that point; rather, it appears to be an administrative decision which is left to the Director's discretion. See generally State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 459, 166 N.E. 2d 365, 372 (1960) (where a statute authorizes the performance of an act but does not prescribe how it is to be accomplished, it may be performed in a reasonable and lawful manner). Pursuant to R.C. 3770.02, the Director is required to confer at least once each month with the Commission, to advise it of the operation and administration of the lottery. He might choose to have the criminal records updated for such meetings; however, no such requirement is imposed by statute. If the Director has reason to believe that an employee has a conviction which would disqualify him for employment by the Commission he would, of course, have a duty to act promptly to obtain records that might confirm the fact of such conviction. In the absence of particular facts requiring immediate action, however, the Director may set such a schedule for updating criminal records as, in his judgment, is adequate for the performance of his duties.

Therefore, it is my opinion, and you are hereby advised, that:

1. The requirement of R.C. 3770.02 that the State Lottery Commission shall not employ a person who has been convicted of a felony or unexpunged misdemeanor of the first, second, or third degree applies to all persons, including those initially hired by the Commission prior to the effective date of such requirement.
2. Persons convicted of minor misdemeanors or misdemeanors of the fourth degree (including minor misdemeanors or misdemeanors of the fourth degree involving traffic violations) may be employed by the State Lottery Commission pursuant to R.C. 3770.02.
3. The Director of the State Lottery Commission must update his information concerning the criminal records of the State Lottery Commission employees as often as, in his discretion, he deems necessary to maintain an accurate record.