

OPINION NO. 77-026

Syllabus:

(1) City attorneys, soliciotrs, law directors and county prosecutors may ascertain, with or without reference to State Board of Psychology Rules 4732-5-01 through 4732-5-03, whether there has been a violation of R.C. 4732.21.

(2) The State Board of Psychology has exclusive authority, pursuant to R.C. 4732.24, to seek injunctive relief against those engaged in the unauthorized practice of psychology, but may not initiate criminal prosecutions under R.C. 4732.21.

To: William C. Webster, Pres., Ohio State Board of Psychology, Columbus, Ohio

By: William J. Brown, Attorney General, May 20, 1977

You have requested my opinion regarding the Psychology Board's power to enforce rules that it promulgates. Specifically, your concern is whether the State Board of Psychology alone may prosecute violations of its Rules 4732-5-01 through 4732-5-03 (formerly, PSY-4-01 through PSY-4-03) or whether county and city prosecutors, solicitors and law directors may also exercise this discretion. The above Rules set forth specific psychological procedures which the Board has determined "create a serious hazard to mental health and require professional expertise in psychology." The Rules were promulgated by the Board in accordance with R.C. Chapter 119 pursuant to the power conferred upon it by R.C. 4732.23. R.C. 4732.23 reads, in pertinent part, as follows:

"Nothing in this chapter shall:

". . .

"(C) Restrict any person in any capacity from offering services of a psychological nature, provided they neither hold themselves out to the public by the title of psychologist or school psychologist nor utilize psychological procedures that the state board of psychology judges by uniform rule in accordance with Chapter 119. of the Revised Code to be a serious hazard to mental health and to require professional expertise in psychology;

". . ."

This section of the Revised Code and R.C. 4732.22, which lists certain classes of exempted individuals, comprise exceptions to R.C. 4732.21. R.C. 4732.21 states:

"(A) On and after December 1, 1972, no person who is not a licensed psychologist shall offer or render services as a psychologist or otherwise engage in the practice of psychology for a compensation or other personal gain.

"(B) On and after December 1, 1972, no person who is not a licensed psychologist or a licensed school psychologist shall offer or render services as a school psychologist or otherwise engage in the practice of school psychology for a compensation or other personal gain."

It is this statute which prohibits practicing psychology or school psychology without being licensed to do so. R.C. 4732.23(C) and the Rules promulgated pursuant thereto exempt from the licensure mandated by R.C. 4732.21 certain persons whose practices do not endanger the public's mental health. Thus, Rules 4732-5-01, 4732-5-02 and 4732-5-03 merely define certain procedures which, when practiced for compensation, make the alleged psychologist subject to R.C. 4732.21. Conversely, as provided by R.C. 4732.23(C), if the practitioner neither holds himself out to the public as a psychologist nor employs psychological procedures in a manner defined by the Rules, he need not be licensed.

It is clear, then, that Rules 4732-5-01 through 4732-5-03 are guidelines to be used in determining whether one falls within a statutory exception to the licensing requirement of R.C. 4732.21. Rather than being specific prohibitions themselves, these Rules define certain psychological procedures which when practiced, require the practitioner to be licensed, unless otherwise exempted. Nothing in the Rules or the Revised Code provides for an administrative hearing to ascertain who is or is not exempted from R.C. 4732.21, prior to initiating prosecution under that section. Further, it is my understanding that no such hearings have been held in the past by the Board. Hence, the Rules would not preclude a prosecutor or city attorney from filing a complaint asserting a violation of R.C. 4732.21, provided such official had the power by statute.

City attorneys, solicitors, and law directors are authorized by R.C. 1901.34 to prosecute criminal cases brought before the municipal court when the offense is a violation of a municipal ordinance or occurred within the municipal corporation. See: 1977 Op. Att'y. Gen. No. 77-016.

The jurisdiction of the municipal court is set forth in R.C. 1901.20 and 2931.041. Those sections provide in part that a municipal court has jurisdiction over misdemeanors occurring within the limits of the municipal corporation.

As defined by R.C. 2901.02(F) which classifies crimes in Ohio, a violation of R.C. 4731.21 is a misdemeanor. It follows that city attorneys, solicitors, and law directors, who may prosecute cases brought before the municipal court, have power to prosecute violations of R.C. 4732.21.

Whether the county prosecutor has the power to prosecute violations of R.C. 4732.21 is determined by R.C. 309.08, which describes his powers and duties as follows:

"The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and he shall faithfully urge the collection until it is effected or found to be impracticable to collect, and shall forthwith pay to the county treasurer all moneys belonging to the state or county which comes into his possession."

Clearly, the prosecuting attorney is authorized to prosecute criminal actions arising out of R.C. 4732.21, so long as the offense occurred within the county.

As to civil actions, the General Assembly has specifically provided for injunctive relief in R.C. 4732.24 which states as follows:

"On complaint by the state board of psychology, the unlawful practice of psychology or school psychology may be enjoined by the common pleas court of the county in which such practice is occurring."

Thus, an injunction against the unlawful practice of psychology may be granted only upon complaint by the State Board of Psychology. As I stated in 1973 Op. Att'y. Gen. No. 73-089, it is well settled that a prosecuting attorney is unable to institute a civil action in the absence of a specific statute authorizing him to do so. See State ex rel. Schwartz v. Zumstein, 4 Ohio C.C.R. 268, 2 Ohio C. Dec. 530 (1890); aff'd, 30 W.L.B. 275, 10 Ohio D. Re. 827 (Sup. Ct. 1893). The powers of city attorneys, solicitors and law directors in this respect are similarly limited. See: 1977 Op. Atty. Gen. No. 77-016. Neither R.C. 4732.24 nor any related statute authorizes a county prosecutor or a city attorney to seek an injunction to prevent the unlawful practice of psychology. The power to seek such relief is, therefore, exclusively vested in the State Board of Psychology.

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

(1) City attorneys, solicitors, law directors and county prosecutors may ascertain, with or without reference to State Board of Psychology Rules 4732-5-01 through 4732-5-03, whether there has been a violation of R.C. 4732.21.

(2) The State Board of Psychology has exclusive authority, pursuant to R.C. 4732.24, to seek injunctive relief against those engaged in the unauthorized practice of psychology, but may not initiate criminal prosecutions under R.C. 4732.21.