specified in section 6906-1, General Code, which are under the control of the county commissioners, and if such order is not complied with, to remove such obstructions, I know of no authority of the township trustees to charge the cost thereof against the persons responsible therefor.

I am of the opinion, therefore, that:

1. The township trustees have the authority to expend funds from the road and bridge fund for the improvement of duly dedicated streets which are in a platted area outside a municipality.

2. The county commissioners have the authority to order the removal of obstructions from streets within a platted area outside a municipality.

3. Township trustees have authority to order the removal of obstructions from streets within a platted area outside of municipality other than those set forth in section 6906-1, General Code, which are under the control of the county commissioners, when such obstructions make said streets unsafe for public travel.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4040.

CITY—MAY ADOPT ORDINANCE ESTABLISHING AGE LIMIT FOR POLICEMAN WHEN.

SYLLABUS:

A non-charter city may, by ordinance, provide an age limit beyond which a policeman shall be ineligible to serve on the police force, provided that such limitations as to age are reasonable and there is no discrimination.

COLUMBUS, OHIO, March 13, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "A city in Ohio has had a police department for years created under the provisions of section 4372 G. C., and the members of this department were appointed and are holding office under civil service regulations. The city does not maintain a police relief fund.
>
> On January 15, 1934, an ordinance was passed, a copy of which is inclosed, and from which we are quoting section four:
>
> > 'That no person shall be appointed as an officer or patrolman unless such persons shall be twenty-three years of age and under forty-five years of age, and no patrolman shall be eligible to serve on the police force of the city of ..... after said patrolman has passed the age of sixty years. Any patrolman before reaching sixty years of age shall be eligible to a captaincy.'
>
> On February 14, 1934, when this ordinance became effective, a member of the department had reached the age of sixty years and the question arises whether this officer must retire from the service.

The officials of the city have requested that we obtain your opinion as to council's legal authority in passing an ordinance containing such a provision as above quoted as it affects present members of the police force. The city in question is not a charter city.

In an opinion of your predecessor's, No. 1726, page 555 of the 1930 Opinions, it was held that the trustees of a firemen's pension fund had no legal authority to establish a rule that a fireman must retire from service at any certain age and the opinion further infers that a fireman could be removed only under civil service procedure, but it does not pass on the question of council's legal authority in fixing an age limit for retirement of firemen.

We will appreciate receiving your written opinion on this matter."

Your request raises two questions:

1. Has Council authority to pass such an ordinance?

2. Assuming Council has such authority what effect would this ordinance have on persons who are already employed on the police force?

Article XV, Section 10 of the Ohio Constitution provides as follows:

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

Pursuant to this express constitutional provision Sections 486-1, et seq., General Code, were passed by the legislature and set up a comprehensive scheme for regulating civil service in Ohio. As defined in Section 486-1, General Code, the term "civil service" "includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof."

Section 486-11, General Code, reads in part as follows:

"The commission shall require persons applying for admission to any examination, provided for by this act or by the rules of the commission prescribed thereunder, to file with the commission within a reasonable time prior to the proposed examination a formal application in which the applicant shall state under oath or affirmation:

* * * * * * * * *

(2) Nationality, *age* and place and date of birth.

* * * * * * * * *

(Italics the writer's)

Section 486-17a, General Code, reads in part as follows:

"The tenure of every officer, employe or subordinate in the classified service of the state, the counties, cities and city school districts, thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office. * * *"

Section 486-19, General Code, relative to municipal civil service commissions reads in part as follows:

> "* * * The procedure applicable to reductions, suspensions and removals, as provided for in sections 486-17 and 486-17a of the General Code, shall govern the civil service of municipalities. * * *"

If Article XV, Section 10, supra, were the only provision in the Ohio Constitution relative to this matter it would be quite obvious that the answer to your inquiries rested in an interpretation of Sections 486-1 et seq., General Code, and in the rules and regulations of the state and municipal civil service commissions. However, Article XVIII of the Ohio Constitution provides in part as follows:

> "* * * * * * * * *
>
> Sec. 3. Municipalities shall have authority to exericse all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.
>
> * * * * * * * * *
>
> Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government. * * *"

After the adoption of Article XVIII of the Ohio Constitution (so-called Home Rule Amendment) in 1912 the Supreme Court of this state was called to pass upon the authority of a municipality to set up a scheme of civil service regulation that might conflict with Sections 486-1 et seq., General Code. The Supreme Court was first called to pass upon this question in the case of *State ex rel. Lentz* vs. *Edwards* 90 O. S. 305. In the course of the court's opinion the following appears:

> "The manner of regulating the civil service of a city is peculiarly a matter of municipal concern. One of the powers of local self-government is the power of legislating with reference to the local government within the limitations of the constitutional provisions above referred to. As long as the provisions made in the charter of any municipality with reference to its civil service comply with the requirement of Section 10 of Article XV, and do not conflict with any other provisions of the constitution, they are valid and under the cases referred to discontinue the general law on the subject as to that municipality. That provisions adopted by a city might differ from the general laws within the limits defined was not only expected but the very purpose of the amendment was to permit such differences and make them effective.
>
> The averments of the petition show that the charter for the city of Dayton was framed and adopted under and in accordance with the terms of Article XVIII and duly certified to the secretary of state. By the sections of the charter, which are set forth in the petition, it is further shown that the city of Dayton fully complied with the letter and the spirit of Section 10 of Article XV by providing for appointments and promotions in the civil service of the city according to merit and fitness to be ascertained by competitive examinations."

The above decision as subsequently approved by the Supreme Court in a number of cases. One of the recent cases wherein the Supreme Court approved this doctrine was

the case of *Hile* vs. *Cleveland* 118 O. S. 99. The second branch of the syllabus of that case reads as follows:

> "2. Section 96 of the charter of the city of Cleveland, which provides that one seeking a promotion or appointment in the city civil service shall pass a competitive civil service examination 'unless he shall have served with fidelity for at least two years immediately preceding in a similar position under the city,' does not contravene section 10, Article XV, of the Ohio Constitution, but is in full accord therewith, and authorizes promotions and appointments of persons in the civil service of the city without civil service competitive examination, who have previously so served under the city."

From the opinion by Kinkade, J. at page 104 I quote the following:

> "The claim of plaintiff in error that the appointment was illegal because not made as required by Sections 486-1 to 486-31, General Code, is completely met and answered by the decision of this court in the case of *State ex rel. Lentz et al., Civil Service Commission* vs. *Edwards,* 90 Ohio St., 305, 107 N. E., 768, and cases therein cited, in which this court construed Section 3, Article XVIII, of the Constitution, with reference to the powers thereby conferred upon cities. That decision clearly held that power such as exercised in the instant case was conferred upon the city by Section 3, Article XVIII, of the Constitution. This court has several times since approved and followed that decision."

It is true that in both of these cases the Court was dealing with charter municipalities and was called to pass upon charter provisions. This might lead one to the belief that it is necessary for a municipality to adopt a charter in order to regulate their civil service affairs contrary to the provisions of Sections 486-1 et seq., General Code. However, the Supreme Court has declared that the power of local self-government is in nowise dependent upon the adoption by the municipality of a charter. In the case of *Perrysburg* vs. *Ridgway* 108 O. S. 245, it was held as disclosed by the first, fourth and fifth branches of the syllabus:

> "1. Since the Constitution of 1912 became operative, all municipalities derive all their 'powers of local self-government' from the Constitution direct, by virtue of Section 3, Article XVIII thereof.
>
> * * * * * * * * *
>
> 4. The exercise of 'all powers of local self-government,' as provided in Article XVIII, Section 3, is not in any wise dependent upon or conditioned by Section 7, Article XVIII, which provides that a 'municipality may adopt a charter.'
>
> 5. The grant of power in Section 3, Article XVIII, is equally to municipalities that do adopt a charter as well as those that do not adopt a charter, the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution. *(State, ex rel. City of Toledo* vs. *Lynch, Auditor,* 88 Ohio St., 71, 102 N. E., 670, 48 L. R. A. 720, Ann. Cas., 1914D, 949, disapproved upon the proposition that a charter is a prerequisite to the exercise of home-rule powers under Section 3, Article XVIII)."

You raise the question of the authority of a municipality to pass an ordinance

which will render a policeman ineligible to serve in such capacity after he has reached the age of sixty years. It must be remembered as stated in *State, ex rel. Lents* vs. *Edwards,* supra, that "as long as the provisions made in the charter of any municipality with reference to its civil service comply with the requirement of Section 10 of Article XV, and do not conflict with any other provisions of the constitution, they are valid and under the cases referred to discontinue the general law on the subject as to that municipality." While this refers to a charter provision it must be noted as stated in the Perrysburg case, supra, that the adoption of a charter is immaterial to the right of a municipality to exercise Home Rule powers. Does the ordinance in question violate Section 10 of Article XV of the Ohio Constitution? Has the ordinance a relationship to merit and fitness? As stated in Section 486-11, General Code, supra, the state civil service commission may make reasonable requirements as to age limits for applicants for various examinations. In the case of *Moriarty* vs. *Creelman,* 206 N. Y. 570, it was held as disclosed by the syllabus:

> "1. The municipal civil service commission of the city of New York is authorized to prescribe a minimum age limit of twenty-five years for the position of inspector in the bureau of fire prevention. This rule does not conflict etiher with the letter or the spirit of the provision of section 734 of chapter 466 of the Laws of 1901, which requires that an appointee to membership in the fire department must be 'over the age of twenty-one,' even if such provision is applicable.
>
> 2. There is no constitutional or inherent right to be appointed to the place in question. The public has the right to require that the fitness of the person appointed should be measured and established by any test honestly and reasonably appropriate to that end, and such an one, it may be fairly claimed, is the age limitation. *(People ex rel. Schau* vs. *McWilliams,* 185 N. Y. 92, 99, followed.)"

Having reached the conclusion that the city could certainly require that an applicant for the position of municipal policeman be of a certain age we still have the question of whether or not the municipality may require a policeman to divorce himself from his position when he reaches the age of sixty years.

From what has been said supra the city could pass such ordinances relative to their own civil service employess as are not in conflict with constitutional provisions. Reasonable physical requirements are certainly proper prerequisites for a policeman. The nature of his work is such that a policeman must be an aggressive and rugged type of an individual.

The importance of the policeman in the Middle Ages is shown by the following statement in 1 McQuillin Municipal Corporations (2nd Edition page 94):

> "The government of the Middle Ages was largely a matter of mere police —a system of penal prohibition. But organized police forces were either entirely lacking or wholly inefficient. Watch duty was often imposed upon chosen inhabitants. While, in feudal times, the lords of manors possessed police jurisdiction which they exercised in connection with their judicial administration, no regularly established police system existed in the municipalities of the mediaeval period, even in the highly developed governmental system of Venice, as late as the opening of the 14th century. In the free cities certain limited police authority was exercised.
>
> At the beginning of the 15th century citizens of London were required to

hang out candles between certain hours on dark nights to light the streets. In 1661 this was sought to be enforced by act of Parliament. In 1685 a lighting system was inaugurated by contract or franchise which marked an advanced step over the earlier methods. Later, in 1736, further improvement in lighting was put into effect."

It is true that a person of the age of sixty years might possibly be in better physical condition than most men of thirty years of age. However, it is likewise true that age does normally speaking, have some connection with a man's physical ability to perform the work of a policeman. It would hardly be proper for this office to say that the ordinance in question is or is not reasonable and a compliance with Article XV, Section 10 of the Ohio Constitution. The ordinance certainly has a connection with the constitutional provision of merit and fitness. The duly enacted ordinance in question is certainly valid if it is a compliance with the constitution, and it has long been the policy of this office not to pass upon the constitutionality of any law.

You also raise the question of the validity of such an ordinance as it applies to persons who are already on the police force. It is, of course, fundamental that no one has a vested property right in a public office or employment and the law making body, in the absence of special constitutional limitations, may fix the tenure of office of all public employees. See R. C. L. 614. Likewise no one has any constitutional or inherent right to be appointed to a public office or employment. See *Moriarty* vs. *Creelman,* 206 N. Y. 577, supra. It would seem to logically follow that if council has authority to pass such an ordinance it would apply to persons already on the police force. It should be noted that there is nothing in the ordinance in question that would lead to the conclusion that council did not intend the ordinance to apply to persons already on the police force.

In the rendition of this opinion I am aware of a decision of the Court of Common Pleas of Wayne County in Case No. 31673, *State of Ohio, ex rel. Cook* vs. *Civil Service Commission of Wooster.* This decision is exactly contrary to the views expressed in this opinion. However this opinion is predicated upon the presumption that the question is governed entirely by Sections 486-1, et seq., General Code and since the legislature has not set an age limit for policemen, council had no authority to pass the ordinance in question. No mention is made of the Home Rule powers of municipalities. For these reasons and while the decision is binding in Wayne County it nevertheless is not binding on the other counties of the state in view of the decisions of the Supreme Court of this state.

Without further prolonging this discussion it is my opinion in specific answer to your inquiries that a non-charter city may by ordinance, provide an age limit beyond which a policeman shall be ineligible to serve on the police force, provided that such limitations as to age are reasonable and there is no discrimination.

Respectfully,

JOHN W. BRICKER,
Attorney General.