

OPINION NO. 66-178**Syllabus:**

1. Section 143.34 of the Revised Code does not permit the Civil Service Commission to allow sergeants (second lower grade) to take the examination for police chief if the two captains are eligible and willing to take the examination.

2. The Civil Service Commission may legally allow, by rule within its discretion, the two captains to take the examination for chief of police the second time.

To: James K. Leedy, Wayne County Pros. Atty., Wooster, Ohio
By: William B. Saxbe, Attorney General, December 14, 1966

Your letter requesting my opinion reads as follows:

"The Civil Service Commission of the City of Wooster, which operates under the statutory form of government, recently conducted an examination for police chief. Two candidates with the rank of captain took the examination and failed to attain the grade of 70 as required by the rules of

the commission. Therefore, the commission was unable to establish an eligible list as required by amended section 143.34 in accordance with the terms of section 143.19 of the Revised Code.

"The Commission has no rules applicable to the present situation where all applicants fail to attain a passing grade and thereby fail to become eligible for any list at all. The City of Wooster has two captains on active duty.

"Section 143.34, as amended, provides:

'whenever a municipal civil service commission determines that there are less than two persons holding positions in the rank next lower than the position to be filled, who are eligible and willing to compete, such commission shall allow the persons holding positions in the then next lower rank who are eligible to compete with the persons holding positions in the next lower than the position to be filled.'

(Italics supplied)

"The next lower rank under captain in the Wooster Police Department is the rank of sergeant.

"Our questions then are as follows:

"1. Under the present circumstances as outlined does amended section 143.34 permit the commission in its discretion to allow those sergeants who are eligible and willing to compete to take the second examination for police chief?

"2. If the answer to the first question is 'yes', does section 143.34 require the commission to include the captains in the second examination?

"3. If the answers to the first two questions are 'no', then may the commission, in its discretion, allow the two police captains to take the examination a second time?"

You ask three questions of a situation which appear never to have arisen before, or, at least, never to have produced a court decision or an attorney general's ruling upon which we may rely. In Hauschild v. Cleveland, 77 Ohio Law Abs. 260, wherein seventeen police officers

were suspended and filed suit to be restored to their positions, the court held:

"* * * the Director of Public Safety and the Civil Service Commission are not obliged to await the outcome of the proceedings through the courts before making appointments to bring the Police Department up to strength. * * * In fact it was the duty of the Director of Safety to fill such vacancies under the provisions of Sec. 143.34 R.C. * * *

"* * * * * * *"

In this same case the Court of Appeals in a per curiam opinion, at page 265, said:

"* * * * * * *"

"Generally speaking, the Civil Service Commission is the judge of the facts necessary to establish eligibility to take examinations in accordance with its rules, being subject to court review only where its jurisdiction is exceeded or its powers are abused. It is a fundamental proposition of law that a court will not substitute its own judgment for that of an administrative agency or board unless it is clearly shown that the board was guilty of an abuse of discretion.

"* * * * * * *"

Now to answer your first question, it would appear that under Section 143.34, Revised Code, and the opinion of the court in the above quoted case, that it is the duty of the Civil Service Commission to establish who is eligible to take examinations, and that the commission could well, and legally, rule that the captains could take the second examination, and such authority could not be questioned. It could well be argued that the captains would be eligible to take the second examination without the Civil Service Commission having a rule to such effect, because the law gives the captains such right, and there being no prohibition against persons take the same examination more than once.

Section 143.34, Revised Code, which provides that when there are less than two persons (one or none) holding positions in the rank next lower than the position to be filled, that the commission shall allow persons in the second lower (sergeants) rank to take the examination. However, if the two captains are eligible and willing to take the examination, then it would appear that this section would preclude any from the second lower (sergeants) rank from taking the examination, as the law provides the commission could not admit the sergeants when there are two eligible to take the examination.

You are, therefore, advised that Section 143.34, Revised

Code does not permit the Civil Service Commission to allow sergeants (second lower rank) to take the examination for police chief if the two captains are eligible and willing to take the examination.

Having answered your first question in the negative, it is not necessary to consider your second question.

To answer your third question, you are advised that the commission may legally allow the two captains to take the examination for chief of police the second time.