

Opinion No. 79-30

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OPINION OF: Jeff Bingaman, Attorney General

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TO: Mr. Harold F. Olson, Director, Department of Game and Fish, State Capitol, Santa Fe, New Mexico 87503

PUBLIC OFFICERS AND EMPLOYEES

Citizenship may be required as a condition of appointment as a Wildlife Conservation Officer.

QUESTIONS

May citizenship be required as a condition of appointment as a Wildlife Conservation Officer?

CONCLUSIONS

Yes.

ANALYSIS

The position of Wildlife Conservation Officer is not specifically established by law nor, therefore, are his duties specifically defined. However, pursuant to Section 17-1-5(A) NMSA 1978, the State Game Commission shall employ a director who in turn shall employ:

"such conservation officers . . . as he shall deem proper and necessary to enforce and administer the laws and regulations relating to game and fish, and who shall prescribe their duties respectively."

Section 17-2-46 NMSA 1978 provides for enforcement of the Wildlife Conservation Act by the director, each conservation officer, each sheriff in his respective county and each member of the New Mexico State Police. Such persons shall, with probable cause, be empowered to seize any wildlife held in violation of the Act and search vehicles and containers believed to hold wildlife protected by the Act. Warrants for arrest shall be issued as in any other criminal case.

OPINION

Pursuant to the authority granted under Section 17-15, **supra**, the director of the Department of Game and Fish has established the position of Wildlife Law Enforcement Officer. Because Section 17-2-46, **supra**, has provided that these officers have the discretionary enforcement powers of other peace officers, the director has required all such officers attend the Law Enforcement Academy. Section 29-7-6(A) NMSA 1978 requires that all applicants for admission to the Academy be United States citizens and have reached the age of majority.

Thus, the condition of citizenship for appointment as a Wildlife Conservation Officer is imposed by virtue of the requirement that such officers attend the Law Enforcement Academy. In addition, Section 29-1-9 NMSA 1978 provides in pertinent part that:

"no sheriff of a county, mayor of a city or other person authorized by law to appoint . . . policemen or other peace officers in the state of New Mexico . . . shall appoint . . . any person who shall not be a citizen of the state of New Mexico. . . ."

Recently the United States Supreme Court considered the question of whether a state could require persons engaged in law enforcement {74} to be citizens. In **Foley v. Connelie**, 435 U.S. 291, 297 (1978), the Court examined the nature of state police work and found that because the police function fulfilled "a most fundamental obligation of government to its constituency," a citizenship requirement could be imposed. See also, **Ambach v. Norwick**, 47 U.S.L.W. 4387, April 17, 1979. The **Foley** Court noted:

"Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals." 435 U.S. at 298.

The duties of Wildlife Law Enforcement Officers, as enumerated in Section 17-2-46, **supra**, clothe such officers with discretion as broad as that of the police. Indeed, Section 17-2-46 gives concurrent enforcement power of the Wildlife Conservation Act to county sheriffs and the state police. As the Supreme Court concluded:

"Citizenship may be a relevant qualification for fulfilling those 'important nonelective executive, legislative, and judicial positions,' held by 'officers who participate directly in the . . . execution . . . of broad public policy.'" **Foley, supra**, at 296, citing **Sugarman v. Dougall**, 413 U.S. 634, 647 (1973).

Accordingly, by operation of state law Wildlife Law Enforcement Officers can be required to hold New Mexico and United States citizenship, and such a requirement has been sustained by the United States Supreme Court.

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