Ethics and Liability of Off-Duty Police Officers

For many years, municipal officials have struggled with the issues surrounding the off-duty employment of police officers. Pursuant to the generally accepted wisdom, police officers are considered to be on the job 24 hours a day. In many cases, however, police officers must supplement their incomes by seeking secondary employment. Because of this, Alabama law implicitly recognizes the need for officers to accept off-duty employment. See, Sections 6-5-338.4 and 36-25-5(c), Code of Alabama 1975.

In addition to the financial benefits the officer receives from accepting off-duty employment, the benefits that a private employer receives by having a uniformed officer visible in his or her business are obvious. A less often understood aspect of off-duty employment, however, is that municipalities themselves also have an interest in allowing officers to accept off-duty work in some circumstances. The public can benefit greatly by having trained police officers available and visible.

For instance, having a uniformed officer seen working security by potential violators at school functions or in high-traffic areas like malls may prevent crimes from occurring. Even if the crime is not prevented, apprehending violators may be easier since the officer will be close at hand.

Despite the public benefits, however, off-duty employment of police officers raises many issues – such as liability concerns – that must be resolved. This is especially true where the officer will use the uniform, car, weapon or other public equipment during off-duty employment. Again, the public has an interest in allowing the officer to use this equipment while off-duty. Also, because officers are expected to be on-duty 24 hours a day, they may be called upon to act in their official capacity at any time, making it important for them to have ready access to official equipment.

When an off-duty officer is called upon to act in an official capacity, he or she becomes a municipal representative, and – generally speaking – the municipality becomes liable for any negligent action the officer takes. The liability issues of off-duty employment have plagued Alabama municipalities for years, largely as the result of a $1.6 million dollar judgment against an Alabama city for actions taken by an off-duty officer. See, *Birmingham v. Benson*, 631 So.2d 902 (Ala 1993).

In addition to the liability concerns, in recent years, ethical problems have arisen from the employment of off-duty officers. For instance, in one case before the Ethic Commission, a police chief and several of his officers were required to repay money they had received from off-duty employment because of alleged ethical violations.

This article is devoted to an examination of the concerns inherent in allowing off-duty employment of police officers, with particular emphasis on the ethical aspects. The liability concerns are largely the same as those discussed in the liability article found elsewhere in this publication, and will not be repeated here. There is, however, one aspect of the liability of off-duty police officers that is not discussed in detail in the liability article. That is the issue of when does the officer cease to be performing off-duty work and instead begin performing an action for which the municipality may be liable?

Tort Liability

The general rule is that once an officer begins performing a public duty or function, as opposed to the duties of their private employment, the officer is acting as a public employee. The issue is, frequently, one of control.

In *Birmingham v. Benson,* 631 So.2d 902 (Ala. 1993), the city of Birmingham was sued because of the actions of an officer who was working as an off-duty security guard at a bar. The officer was wearing full police uniform, with radio, gun, nightstick, flashlight, handcuffs and mace. In accordance with the rules and regulations of the Birmingham Police Department, the officer had notified his supervisor that he was working as a security guard at the bar. On the night of December 14, the officer was aware of growing tension in the bar between Blair and Billy Weidler.

The evidence indicated that Blair was threatened by Weidler and that afterwards Blair asked the officer to escort him and three minors who were with Blair to their car. The officer repeatedly told them that they could not fight inside the bar. He escorted the four, including Blair, outside. A large crowd followed them out the door. As Blair and his three friends crossed

22nd Street, the officer stood on the sidewalk; Weidler asked him what he was going to do. He replied: "I don't care what you do, I am going back inside."

At that time, a group of people (at least 15), including Weidler and Sean Brooks, chased the four and pulled Blair, who was halfway in the car, out of the car and beat him for 5 to 10 minutes. Blair was knocked down, kicked, and run over by the car in which his friends were trying to leave. Blair died; the cause of his death was "asphyxiation, shock, and cardiac arrest as complications of severe multiple blunt force trauma." Weidler and Brooks were convicted of manslaughter as a result of Blair's death.

The city investigated and concluded that the officer had violated rules and regulations of the department, that he had neglected his duties, that he had failed to take appropriate action, that he could have intervened, that had he done so "things might have turned out differently." The city's investigator also said that a reasonable police officer should have tried to stop the hostilities leading to Blair's death. As a result of this case, the officer was fired and a jury awarded the plaintiff a verdict of $1.6 million.

One of the key issues in the case was the extent of the city's control over the off-duty employment of the officer. The court ruled that there was a sufficient amount of control by the city to find that the officer was acting in the line and scope of his duties. The court pointed to a document entitled "Conduct and Responsibility of Police Officers Working Police Related Off -Duty Jobs," and stated:

"Pursuant to these rules and regulations, any police officer who wanted to work police-related off-duty jobs was required to submit a request for extra work to the officer's commanding officer for approval, specifying the location of the extra job, the hours, the employer, the duties involved, whether the job was a one-time event or would be continuous, and whether the job was to be worked in uniform. The rules and regulations specifically stated that 'any outside police activity will be considered to be regular police work insofar as conduct, performance of duty and compliance with the Rules and Regulations are concerned' and 'will be under the direction of the superior officer on duty in the district where the police work is being performed.' Furthermore, the rules and regulations state that at least once during the shift of the precinct supervisor, the supervisor shall inspect the police officer working extra duty jobs in uniform to ensure compliance with the rules and regulations."

This, the court held, amounted to a great extent of control over the officer's off-duty work, and justified holding the municipality liable when the officer was confronted with a duty to act as a certified officer.

The court also refused to extend the protection in this case even though the actions of police officers are generally cloaked by substantive immunity, stating that:

"There is no way, under the facts in this case, that the imposition of liability can be reasonably calculated to materially thwart the city's legitimate efforts to provide public services. Policy considerations supporting immunity do not come into play when a policeman is, in fact, on the scene and in a position to control an aggressor. The question then becomes one of whether the officer acted reasonably or acted negligently."

Fortunately, in a later appeal the court ultimately held that the $100,000 cap on the tort liability of municipalities also applies in actions that seek to have municipalities indemnify their negligent employees. *Benson v. Birmingham,* 659 So.2d 82 (Ala. 1995).

In 1994, the legislature attempted to address some of the concerns of police officer liability by enacting Section 6-5-338, Code of Alabama 1975, which extends tort immunity protection to police officers. Specifically, Section 6-5-338 extends state agent immunity to on-duty police officers. *Blackwood v. City of Hanceville*, 936 So.2d 495 (2006). Although Act 2025-423 repeals Ala. Code Section 6-5-338, immunity under Section 36-1-12 remains available to law enforcement officers as defined by the act. See Section Ala. Code Section 6-5-338.2(c). Because Section 6-5-338 simply extended state agent immunity codified in Section 36-1-12 to municipal peace officers; practically speaking, the immunity provided by Section 6-5-338 remains available pursuant to Section 36-1-12 despite the repeal of Section 6-5-338. See Ex parte City of Montgomery, 402 So. 3d 810, 813 (Ala. 2024) ("The restatement of State-agent immunity as set out by this Court in Ex parte Cranman ... governs the determination of whether a peace officer is entitled to immunity under § 6-5-338(a)."); see also Ex parte Pinkard, 373 So. 3d 192 (Ala. 2022) (noting Section 36-1-12(c) essentially codified the Cranman restatement of state-agent immunity).

Section 6-5-338.4, Code of Alabama 1975, also requires private employers of off-duty police officers to obtain $500,000 of liability insurance coverage to indemnify the officer against claims. Despite these protections, it is clear that municipalities remain liable for the actions of their off-duty officers, if the nature of the duty they are performing is related more to their responsibilities as police officers rather than as private employees. This includes areas where any police officer may become subject to liability. A few of these areas include those listed below.

Liability for Omissions

The general rule is that a municipality is not liable for the nonfeasance of police officers in the performance of governmental duties in the absence of other evidence to indicate negligence. McQuillin, Municipal Corporations, Section 53.80.20. For instance, a municipality is generally not liable for the failure of an officer to search someone for dangerous weapons after arresting him or for failing to investigate a reported crime. However, where sufficient evidence exists to show that a duty was performed negligently, a municipality may be held liable. Thus, where the police received notice of a dangerous situation and failed to respond, causing a death, liability was attached to the municipality. McQuillin, Municipal Corporations, Section 53.80.20

In *Luker v. Brantley*, 520 So.2d 517 (Ala. 1987), for instance, the Alabama Supreme Court held the City of Brantley liable when its police officers turned a vehicle over to a person they should have realized was intoxicated and the driver struck and killed someone. But, in *Tyler v. Enterprise,* 577 So.2d 876 (Ala. 1991), the Alabama Supreme Court affirmed a summary judgment in favor of Enterprise in a case where it was alleged that a police officer allowed an intoxicated driver to drive home and the driver subsequently died in an accident. The court held that the plaintiff's contributory negligence barred the suit. And, in *Wright v. Bailey*, 611 So.2d 300 (Ala. 1992), the Alabama Supreme Court held that even assuming police officers were negligent in permitting a drunk driver to leave a tavern, mere negligence was not enough to implicate the due process concerns of Section 1983. Further, in *Flint v. Ozark*, 652 So.2d 245 (Ala 1994), the Alabama Supreme Court held that it was not negligence for police officers to fail to arrest underage persons at a party where alcohol was available, even though one of the underage persons was later determined to be driving under the influence when he left the party and struck and killed another individual.

Also, in *Stokes v. Bullins*, 844 F.2d 269 (5th Cir. 1988), the Fifth Circuit found that the failure of municipal officials to fully investigate the background of an applicant for a job as a police officer did not justify holding the municipality liable under Section 1983 for injuries resulting from the officer's shooting of a citizen. Note, however, that this case was decided before the U.S. Supreme Court decided City of Canton, *Ohio v. Harris,* 489 U.S. 378 (1989), where the Court held that the inadequacy of police training may serve as the basis for municipal liability under Section 1983 if the failure to train amounts to deliberate indifference to right of persons with whom the police come into contact and the deficiency identified in the training program is closely related to the ultimate injury incurred.

Failure to Provide Adequate Police Protection

Courts are very reluctant to impose liability upon a municipality for the failure to provide adequate police protection. Comments, Municipal Liability: The Failure to Provide Adequate police Protection – The Special Duty Doctrine Should be Discarded, 1984 WIS. L. REV. 499 (1984). This area is usually protected by the substantive immunity rule, discussed in the article on tort liability. Note, though, that the court in the Benson case held that substantive immunity does not apply where the officer is on the scene, available to help.

Assault and Battery

Ordinarily, a municipality is not responsible for an assault and battery committed by one of its police officers. McQuillin, Municipal Corporations, Section 53.80.40. However, when the assault and battery occurs in the course of the officer's duties, the municipality may be held liable. See, *Lexington v. Yank*, 431 S.W.2d 892 (Ky.1968). Remember, too, that a municipality may be held liable for off-duty actions, if they are performed in furtherance of the municipality's interest.

In Alabama, Section 11-47-190, Code of Alabama 1975, states that a municipality can only be held liable for the actions of its agents or employees which occur due to negligence, carelessness or unskillfulness. A municipality cannot ordinarily be held liable for the intentional torts of its employees, pursuant to Section 11-47-190. *Wheeler v. George,* 39 So.3d 1061 (Ala.2009). However, in *Birmingham v. Thompson*, 404 So.2d 589 (Ala.1981), the Alabama Supreme Court held that in some instances, even intentional torts may be committed due to a lack of skill. If so, then the municipality may be held liable. Municipalities in Alabama, therefore, may be sued for assault and battery.

In a suit filed in federal court pursuant to Section 1983, a municipality can be found liable if a plaintiff can establish, first, that the assault and battery deprived him of his federal constitutional or statuary rights, and second, that it occurred pursuant to a municipal policy or custom. In an unjustified assault case, there is no question concerning the deprivation of rights. The key question in these cases is whether the police officer acted pursuant to a municipal policy.

Generally, of course, there will not be an articulated policy favoring or promoting assaults. Therefore, a plaintiff must establish either that the city policymakers intervened to cause the abuse or that there is such a pervasive pattern and practice of abuse as to indicate a municipal policy favoring such behavior. Seng, Municipal Liability for Police Misconduct, 51 Miss.L.J. 1 (1980). Municipal inaction, such as failure to train or supervise, might demonstrate a tacit approval. Similarly,

failure to discipline others guilty of similar conduct may establish a pattern. Finally, the municipality may be shown to have ratified the officer's action by consistently condoning such behavior or ignoring citizen complaints.

Use of Excessive Force

A police officer may use reasonable force in order to effectuate an arrest, even to the point of taking a life. In Alabama, Section 13A-3-27, Code of Alabama 1975, sets out the degrees of force an officer may use in various situations. Section 13A-3-27(a) states a law enforcement officer is justified in making any use of physical force if the use of force is conduct performed within the law enforcement officer's discretionary authority and the use of physical force does not violate that person's rights, under the Constitution of Alabama of 2022 or the Constitution of the United States, to be free from excessive force. Conduct performed within a law enforcement officer's discretionary authority is any governmental conduct by a law enforcement officer performing a legitimate job-related function or pursuing a job-related goal through means that were within the law enforcement officers' plausible power to utilize. Ala. Code Section 13A-3-20. In determining whether governmental conduct was performed within a law enforcement officers' discretionary authority, a court must temporarily put aside that the conduct may have been committed for an improper or unconstitutional purpose, in an improper or unconstitutional manner, to an improper unconstitutional extent, or under improper or constitutionally inappropriate circumstances. Id. The court must determine whether, if done for a proper purpose, the conduct was within, or reasonably related to, the outer perimeter of a law enforcement officers' governmental discretion in performing his or her official duties. Id.

Section 13A-3-27 was held unconstitutional to the extent that it authorizes the use of deadly force in circumstances where such force is not necessary to prevent death or bodily harm in *Ayler v. Hopper,* 532 F.Supp. 198 (M.D.Ala. 1981). In Tennessee v. Garner, 471 U.S. 1 (1985) the U.S. Supreme Court held, "Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous, so as to justify the use of deadly force in effectuating his apprehension." Similarly, in *Pruitt v. Montgomery*, 771 F.2d 1475 (11th Cir.1985), the court held, where a police officer had no probable cause to believe that an unarmed burglary suspect posed a physical threat to the officer or others, the City of Montgomery was held liable for his use of deadly force.

In *Morton v. Kirkwood*, 707 F.3d 1276 (11th Cir.2013) the court held that using deadly force without warning on an unarmed, non-resisting suspect who poses no danger is excessive. E.g., *Morton v. Kirkwood*, 707 F.3d 1276 (11th Cir.2013); *Mercado v. City of Orlando*, 407 F.3d 1160 (11th Cir. 2005) (noting that it is a "clearly established principle that deadly force cannot be used in non-deadly situations"). In *Salvato v. Miley,* 790 F.3d 1286 (11th Cir. 2015), the court held that Eleventh Circuit Court precedents and those of the Supreme Court made clear that "[u]sing deadly force, without warning, on an unarmed, retreating suspect is excessive." Salvato, 790 F.3d at 1286) (citing Garner, 471 U.S. 1). Thus, the officer in Salvato had "fair warning" that she acted unconstitutionally in July 2012 when she used deadly force against a suspect who, although he had previously resisted arrest and struck the officers multiple times, was apparently unarmed and outside of striking distance, and the officer failed to warn the suspect before shooting him. Id. at 1293–94.

A municipality will only be held liable for injuries caused by the excessive force used by an officer. If circumstances justify the officer's use of some force but he goes beyond what is justified, the municipality will be liable only for injuries caused by the excessive force. In *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir.2002) the court held that the use of deadly force against a suspect who, though initially dangerous, has been disarmed or otherwise become non-dangerous, is conduct that lies "so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [is] readily apparent." *Lee v. Ferraro*, 284 F.3d 1188, 1199 (quoting *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)); see also Salvato, 790 F.3d at 1294. It is up to a jury to decide at what point the force used became excessive, just as it must determine what injuries the excessive force caused.

In addition, Sections 13A-3-27(c) and (d) place a duty upon a private citizen to aid an officer. If this private individual were to use excessive force while acting pursuant to the officer's directions, the municipality may be held liable for the individual's actions as well.

In federal court, the ordinary Section 1983 principles govern. In *Montoute v. Carr*, 114 F.3d 181 (11th Cir. 1997), for example, the court held that in a Section 1983 action against a police officer for excessive force, an arrestee has the burden of proving that no reasonable officer could have believed that the arrestee either had committed a crime involving serious physical harm or that the arrestee posed a risk of serious physical injury to the officer or others. And, in *Jones v. Dothan*, 121 F.3d 1456 (11th Cir.1997), the court held that the actions of a police officer, while rude, would not inevitably lead a reasonable officer to conclude that the amount of force used under the circumstances was excessive. In this case, the plaintiff filed an excessive force claim after the officer yelled at her, twice told her to shut-up, ignored her questions about her husband, and stuck his finger in her face, making contact with her skin.

Search and Seizure

Normally, questions of improper search and seizure arise only where a defendant in a criminal case seeks to prevent his conviction by alleging that a piece of evidence was improperly obtained. However, an officer may become liable if, subsequent to seizing evidence, he misuses it. *Yeager v. Hurt,* 433 So.2d 1176 (Ala.1983). If the property is lost, damaged or destroyed, the officer will be liable if the loss is the proximate result of his failure to exercise due care to preserve it.

While Yeager dealt solely with the officer's individual liability, a municipality might be found liable if it can be determined that the officer acted negligently or carelessly in the course of his duties. In addition, if he acted pursuant to a policy or custom, the municipality might be liable under Section 1983. For instance, the Alabama Court of Civil Appeals held in *Campbell v. Sims*, 686 So.2d 1227 (Ala.Civ.App.1996), that a motorist's claim that she was stopped and searched without probable cause stated a sufficient claim against the police officer and the city. And, in *Lightfoot v. Floyd*, 667 So.2d 56 (Ala.1995), the Alabama Supreme Court held that a police officer was not entitled to qualified immunity after improperly seizing and retaining cash and a vehicle for several months.

Other Causes of Action

While this article has covered only some of the major areas of liability for municipalities which provide police protection, there are many others such as malicious prosecution, improper arrest, mistreatment of prisoners and negligent driving. Any aspect of police protection can result in municipal liability in the proper circumstances. In any of these areas, the tort principles discussed above and in the article on tort liability elsewhere in this publication will apply in determining whether the municipality is liable for the officer's actions in either state court or federal court.

Avoiding Liability

The first step toward avoiding liability for the actions of police officers is training. The better trained an officer is, the less likely he is to perform negligently. An officer should know how to respond in specific situations to avoid charges against him or the municipality.

In Alabama, all officers are required to complete at least 480 hours of training in a recognized police training school in order to comply with the Peace Officers' Standards and Training Act. In addition to this training, the municipality should promulgate a proper written policy which deals with the numerous situations facing a police officer daily and which explains to the officer how he should be required to be familiar with this policy.

Much research and study is necessary to formulate this type of policy. It will be necessary to examine each potential area of liability exposure and develop ways in which to handle the problems. Every aspect of police operations should be investigated, from personnel rules to the operation of vehicles. It may be necessary to appoint a committee to ensure that all police department operations are covered. The municipality must be honest about problems it has and thorough in its resolutions.

In Coverage, a monthly publication of the Texas Municipal League, one city's solution to the liability crisis was described. After researching the complaints and lawsuits filed against its police department, the City of Hazelwood, Missouri, decided to implement preventative measures. The city discovered that the majority of the complaints resulted from a one-on-one confrontation between the officer and the complainant at the time of booking.

The city decided that the best way to deal with the situation was to maintain a record of the interaction between the officer and arrested individuals. The city purchased miniature tape recorders for each officer to attach to his belt or place in his pocket. In addition, they purchased enough video and audio equipment to provide 24-hour television surveillance and recording of the police parking lot, prisoner booking area and all department passageways. The total cost of the system was around $20,000.

In the first six months of use, complaints against the police department dropped by over 75 percent. Of the complaints that were filed, the majority were determined to be unfounded based upon the recorded evidence that existed. While such a system might seem costly to justify for most municipalities in Alabama, it is an example of the type of innovative thinking that will help a municipality avoid complaints against their police departments.

The Ethics Law

The rest of this article is devoted to an examination of the ethical issues that surround a police officer's acceptance of off-duty employment and the use of public equipment in the course of that employment, specifically pursuant to Section 36-25-5(c), Code of Alabama 1975. The hope is that other officers may avoid ethical problems in the future.

Generally speaking, the Alabama Ethics Law prohibits public officials and employees from using their official position or any public equipment to benefit themselves financially. However, Section 36-25-5(c), Code of Alabama 1975, provides:

"(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor,

or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy. Provided, however, nothing in this subsection shall be deemed to limit or otherwise prohibit communication between public officials or public employees and eleemosynary or membership organizations or such organizations communicating with public officials or public employees."

Thus, Section 36-25-5(c) prohibits the use of public equipment or facilities unless another law provides otherwise, or unless an employment agreement or policy permits the use of the equipment. This means that the first step in allowing the off-duty use of public equipment by police officers is the enactment by the municipal governing body of a policy permitting that use. Without a specific policy in place, Section 36-25-5(c) seems to be an absolute prohibition against the use of public equipment during off-duty employment.

Although this section does not prohibit an officer from taking off-duty employment, officials should be aware that the municipality may have a policy in place that prohibits officers from taking off-duty jobs. This would be perfectly valid. This is a policy issue that the municipality must weigh before deciding to allow off-duty employment.

Even where the municipality decides that the positive effects of having officers work off-duty jobs outweigh the potential liability, the municipality must then decide whether to allow the use of public equipment and, if so, should retain some control over what municipal equipment may be used during the off-duty employment.

Although the municipality will want to address the issue of off-duty employment in more detail than can be done in this article, to allow officers to work off-duty jobs the policy should at a minimum state something similar to the following:

"Police officers of the City/Town of _____ may accept off-duty employment subject to the restrictions and guidelines set out herein. Any officer seeking to accept outside employment must file with the chief of police a request for approval of outside employment. This request shall include the location and nature of the outside employment; the date and hours to be worked; the name of the outside employer; the duties of the outside employment; whether the job is a one-time event or is continuous; whether the job is to be worked in uniform; a list of any public equipment that may be used during the job; and any other information required by the chief of police. The chief of police shall approve or disapprove of any outside employment in writing. The chief of police may place conditions not inconsistent with this policy upon the acceptance of any outside employment. Public equipment may be used only as approved by the chief of police."

This policy should be adapted to meet local needs and requirements. To avoid ethical problems under Section 36-25-5(c), the policy must include a statement permitting the use of public equipment during the off-duty employment. The municipality may want to specifically list the types of equipment that an off-duty officer may use. The municipality should retain a written copy of the approval or disapproval of outside employment, which should include a list of equipment that the officer has been authorized to use on the off-duty job.

Additional issues to consider included in the policy are a definition of off-duty employment; requiring the private employer to sign a hold-harmless agreement; whether all officers will be allowed to work off-duty jobs (for instance, the municipality may want to restrict some supervisors from accepting off-duty jobs due to the hours they will be expected to be on-duty); the type employment that will be allowed; the number of off-duty hours an officer may work; whether the officer should file a statement following the employment as to the duties he or she performed; and how far outside the municipality the officer may work, among other issues.

Compensatory Time

One aspect of off-duty employment that seems blatantly obvious but has created problems in the past is that outside employment must take place when the officer is not on duty. An officer may not draw pay from both a private employer and the municipality at the same time.

Closely related to this issue is the use of compensatory time. Comp time is time off from work that is granted either by federal or local law or ordinance in return for extra on-duty hours worked. Although the municipality may in its policies grant comp time for regular hours worked, generally comp time is given only for hours above the normal hours a person is required to work. This operates in a manner similar to overtime pay. As an example, under the Fair Labor Standards Act (FLSA), police officers may be required to work up to 43 hours in a 7 day work period (or 171 hours in a 28 day pay period). Once an officer works more than 43 hours (or other hours, based on the pay period), the municipal employer must either give the officer comp time or overtime pay. Under the FLSA, payment for overtime pay or comp time is at time-and-a-half.

Hours that are used to compute both the number of regular hours worked and comp time used are time spent on-duty. That is, a municipality can only compensate an employee for time worked for the municipality. Outside employment time

does not enter into the computation.

Continuing to follow the above example, if a police officer works 45 hours in a week (assuming a pay period of one week), the officer would be entitled to three hours of comp time – that is, one-and-one-half-hours for every hour of overtime worked – or overtime pay at time-and-a-half. Depending on the municipal policy in place, comp time can be used similar to leave time. The officer is not on the clock when he or she uses comp time. Because of this, if the municipal policy allows outside employment, the officer may use comp time to work outside employment.

Bear in mind that the above rule applies only to officers who are subject to the FLSA. If a municipality employs fewer than five law enforcement personnel, the municipality is excused from the overtime and comp time provisions of the FLSA as to those employees. Additionally, certain employees are exempt from these provisions of the FLSA because of the jobs they hold. This may include supervisory police officers. The FLSA includes tests to determine if an individual is an exempt employee and, if so, that employee is not entitled to any overtime pay or comp time.

Despite this, the municipality may decide that it wants to grant comp time to these employees. This action must be taken by the municipal governing body through the adoption of a policy allowing the use of overtime pay. This step is extremely important. While an employee who is exempt from the FLSA may be entitled to leave time, and may – if allowed by municipal policies – use this off-duty time to work a second job, these employees are not entitled to comp time unless the municipality adopts a policy providing for it. From the point of view of the Ethics Commission, a municipal policy establishing a written comp time program for employees who are not covered by the FLSA is mandatory before they can have time off from work (other than pursuant to regular leave time) to work an off-duty job.

Other Requirements

No municipal employees may use on-duty time for purposes related to off-duty employment. This rule extends, not only to the officer but also to employees who are not being hired by the outside employer. For instance, a secretary may not use time at work to schedule off-duty work for police officers. Of course, the secretary may use work time for purposes related to on-duty work. For instance, it will probably be necessary to maintain a record of officers working off-duty jobs, where they are working and the hours they are at the off-duty location.

Additionally, supervisors should not receive pay or any other benefit for assigning or approving off-duty work for officers.

Conclusion

The municipal governing body has the power to decide whether municipal police officers may work off-duty jobs. If the council elects to allow this type work, it must establish a written policy to this effect. The League encourages municipalities to work closely with the municipal attorney, police chief and liability insurance carrier in the drafting and implementation of a policy on off-duty employment. If public equipment will be used on the off-duty job, this must be spelled out in the policy pursuant to Section 36-25-5(c).

In addition to a policy allowing off-duty employment, the council must pass a policy granting comp time to officers who are exempt from the FLSA, if these officers will be allowed to use comp time to work off-duty. All off-duty work must be performed on the officer's own time. Finally, bear in mind that on-duty municipal employees may not use their time to help in any way with the off-duty employment, and supervisors should not accept payment for assigning officers.

Note: The portions of this article related to the Ethics Law have been reviewed and approved by attorneys for the Ethics Commission.

Ethics Rulings

The Ethics Commission will address any questions regarding officers working off-duty jobs. The commission can be reached at (334) 242-2997. The commission has released the following opinions related to off-duty employment of police officers:

- A law enforcement officer may work for another law enforcement agency on his or her day off. AO NO. 1995-105.
- A law enforcement officer may not provide information obtained in the course of his public employment to a family member employed by a bail bonding company, if that information would be used in a manner that would benefit the officer, the family member, or the business with which the family member is associated. AO NO. 1996-03.
- A deputy sheriff may purchase and operate a wrecker service provided that all work done for the service is done on his or her own time, whether annual leave or after hours; that no public equipment, facilities, time, materials, labor or other public property will be used to assist him with the wrecker services; that he doesn't use his or her public position to benefit him or her in his or her private business; and that no confidential information gained while on his or her public

job is used in the operation of the wrecker service AO NO. 1998-06.

- A deputy may not serve civil papers for attorneys during off-duty hours because this is one of the deputy's functions as an employee of the sheriff's department. AO NO. 1998-25.
- A municipal police detective may work part-time for an attorney investigating civil matters or matters outside the county in which his jurisdiction lies, provided that he does not involve himself in any matters concerning the county while performing this part-time work. The detective may serve civil papers, provided service of the papers is not the normal function of the police department for which he works. Outside employment must comply with any municipal policies or regulations. AO NO. 1998-28.
- A police chief may not practice law in his or her off-duty hours because the police chief is on duty twenty-four hours a day. AO NO. 1998-31
- A municipal chief of police may not practice law during his off-duty hours because the chief is on duty 24 hours a day. AO NO. 1998-32.
- A probation officer may practice law or serve as a municipal prosecutor in his free time, provided all provisions of the Ethics Law are complied with. His or her law practice must not involve individuals he or she supervises and he or she may not practice criminal law in the area in which he or she has jurisdiction as a probation officer. AO NO. 1998-36.
- A police officer may perform security consulting work during his or her off-duty hours, provided that he or she doesn't use his public position to assist him or her in the private work, he or she does not use any public equipment, and that he or she performs the work on his or her own time. The work must comply with municipal guidelines and regulations. AO NO. 1998-37.
- A municipal police dispatcher may not accept employment with a local bonding company because the opportunity arose because of his or her position as police dispatcher and because it would be difficult to separate his or her duties as a dispatcher from those as an agent for the bonding company. AO NO. 1998-39.
- An off-duty state trooper may be paid to serve as an instructor at a police academy, provided that the provisions of the Ethics Law are complied with. AO NO. 1999-01.
- A police officer may not also serve as coroner in the county in which he resides and is employed because it would be difficult to separate the duties of both positions and it would be difficult not to use the public equipment in one position in the performance of another. AO NO. 1999-04.
- A police officer with the City of Huntsville may perform accident reconstruction services for law firms and insurance companies; provided, he does not use any of the City's equipment, facilities, time, materials, human labor or other property under his discretion or control to assist him in performing or obtaining these services. In the alternative, he shall not perform accident reconstruction services with nor within the City of Huntsville or its police jurisdiction. AO NO. 2000-02.
- The chief of police for a city police department may not accept outside employment with a wrecker service that is under contract with the city. AO NO. 2000-31.
- A member of the Jackson Police Department may set up a part-time business filling and inspecting portable fire extinguishers; however, all work conducted in conjunction with his or her off-duty employment must be done on time, whether it is after-hours, on weekends, etc; that there is no use of any public equipment, facilities, time, materials, human labor or other public property under his or her discretion or control to assist him or her in conducting his outside employment or in obtaining opportunities; and further, that the member of the Jackson Police Department not do business with the city with which he is employed or with the various departments or agencies of the city. AO NO. 2000-36.
- A sheriff may receive compensation for teaching law enforcement related subjects provided that teaching these subjects is not part of the normal duties of the office, the teaching is performed when off-duty and no county materials or labor are used to assist the teaching. AO NO. 2004-03.
- A city police officer may run for the position of county constable; provided that, if elected, all activities relating to his position as constable are conducted on his own time, whether after hours, weekends, or annual leave. Further, he may not use any public equipment, facilities, time, materials, labor, or other public property under his discretion and control to assist him in performing the duties of constable or in running for such office. AO NO. 2003-52.
- A municipal police officer may perform accident reconstruction services for law firms and insurance companies; provided, however, that the officer does not use any municipal equipment, facilities, time, materials, human labor, or other municipal property in performing those services. Provided further, that the officer does not perform accident reconstruction services

within the municipal corporate limits or police jurisdiction or on any matters involving the municipality. AO NO. 2004-27.

- A city and a member of the city police department, may enter into a rental agreement allowing the officer to live rent-free in a mobile home owned by the city and located on city property in exchange for the officer providing security for the city property during the officer's off-duty hours, when the arrangement is subject to a rental agreement made a part of the officer's employment contract with the city, and clearly sets out the obligations of all parties concerned; and further, where a public interest is served. AO NO. 2007-06.
- A copy of a contract to provide services entered into by a public official, public employee, member of the household of the public official/public employee or a business with that person is associated, which is to be paid in whole or in part out of state, county or municipal funds must be filed with the Ethics Commission within ten (10) days after the contract has been entered into, regardless of the amount of that contract, or whether or not the contract was obtained through competitive bid. AO NO. 2009-10.
- A police officer may work an off-duty job as security for a private business so long as they did not use their position as leverage to obtain the opportunity or to create the opportunity and they are performing the work on their own time and not on public time. If the use of equipment is pursuant to a lawful employment agreement regulated by agency policy, an off-duty officer may use equipment, facilities, time, materials, human labor, or other public property under their discretion or control in an off-duty job with a private business. Absent that agreement, it would be a violation of Ala. Code §36-25- 5(c) for an off-duty officer to use any equipment available to him as a public employee while working for a private business. AO NO. 2018-08.

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- City council may allow off-duty police officers access to city police equipment where officers are performing services which could be provided by officers on duty. AGO 1982-477 (to Hon. Earl F. Hilliard, July 27, 1982).
- In the absence of an ordinance prohibiting it, a police officer can be authorized to use city uniforms and equipment while working off-duty as a security guard in certain limited cases. The police officer has full arrest powers while on or off-duty. The question of workmen's compensation liability depends upon who the officer was employed by when the injury occurred. If an off-duty officer using city equipment and acting within the line and scope of his or her duties causes injury to another, the city may be held liable for damages. AGO 1984-318 (to Hon. Steve Means, June 14, 1984).
- Section 11-43-16, Code of Alabama 1975, authorizes municipalities to hire deputy sheriffs as part-time police officers. Absent a county personnel rule prohibiting such service, a deputy sheriff may serve as a part-time police chief while he or she is off duty from the county. AGO 1994-023.
- A deputy sheriff may not obtain outside employment to investigate criminal matters during his or her off-duty hours. AGO 1994-159.
- Off-duty police officers employed by a community college have immunity pursuant to Act No. 94-640 when performing duties as set out in that act. AGO 1995-059.
- In instances where other exemptions are not applicable, off-duty sworn peace officers are required to obtain a state license and/or certification from the Alabama Security Regulatory Board (Board). The Alabama Security Regulatory Act is codified at Section 34-27C-1, et seq., of the Code of Alabama. This Board was created to regulate security guards, armed security guards, and the companies that employ such persons. Pursuant to section 34-27C-18(b) of the Code of Alabama, a City may not continue to regulate security officers who work for companies that are exempt from state regulation. AGO 2010-028.
- The town council may, by ordinance, permit or require the police department to escort funerals. Police vehicles may use flashing blue or red lights during the escort. AGO 2015-061.

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