

**OPINION NO. 91-063****Syllabus:**

1. A deputy sheriff or township police officer, during the hours that he or she is not required to be on duty for work as a deputy sheriff or police officer, may use his or her county or township owned uniforms, equipment, and firearms, provided the county sheriff or township chief of police authorizes that use.
  2. A county or township may be liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of a uniformed deputy sheriff or township police officer who is employed by a private entity during the hours that he is not required to be on duty for work as a deputy sheriff or police officer only in those factual situations described in R.C. 2744.02(B), and only if it is determined as a matter of fact that the deputy sheriff or police officer was authorized to act and was acting within the scope of his or her employment for the county or township. (1985 Op. Att'y Gen. No. 85-056, modified.)
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**To: David P. Joyce, Geauga County Prosecuting Attorney, Chardon, Ohio**  
**By: Lee Fisher, Attorney General, December 31, 1991**

You have requested an opinion concerning the use of county and township owned uniforms, equipment, and firearms by off-duty deputy sheriffs and township police officers. Specifically, you ask:

1. May an off-duty Deputy Sheriff or Township Police Officer use the uniform, equipment or firearm owned by the County or Township while working outside of [his] public employment?
  2. May a County or a Township be legally liable for wrongful acts committed by uniformed Deputy Sheriffs or Township Police Officers while they are employed by private individuals?
- I. Off-Duty Deputy Sheriffs And Township Police Officers May Use County And Township Owned Uniforms, Equipment, And Firearms**

No section of the Ohio Revised Code or rule set out in the Ohio Administrative Code expressly sanctions the use of county or township owned uniforms, equipment, or firearms by a deputy sheriff or township police officer during the hours that he is not required to be on duty for work as a deputy sheriff or police officer. It is, therefore, necessary to determine whether certain, well-recognized principles of law addressed to the provision of police protection services by county and township law enforcement agencies impliedly permit a deputy sheriff or township police officer to use county or township owned uniforms, equipment, and firearms during the hours that he is not required to be on duty for work as a deputy sheriff or police officer.

**A. County Sheriff's Office And Township Police Departments**

A county sheriff elected under R.C. 311.01(A) is the chief law enforcement officer of a county. *In re Sulzmann*, 125 Ohio St. 594, 597, 183 N.E. 531, 532 (1932) (per curiam); *State v. Rouse*, 53 Ohio App. 3d 48, 52, 557 N.E.2d 1227, 1231 (Franklin County 1988). R.C. 311.04 empowers a county sheriff to appoint deputy sheriffs. *See also* R.C. 325.17. The primary duty of a county sheriff and his deputy sheriffs is the provision of police protection services to the citizenry of the county that elects or employs them. *See* 1990 Op. Att'y Gen. No. 90-091 at 2-391; *see also* R.C. 311.07; R.C. 2935.03. *See generally* R.C. 3.06(A) ("[a] deputy, when duly qualified, may perform any duties of his principal").

R.C. 505.48 authorizes a board of township trustees to create a township police department. *See generally* R.C. 5705.19(J). A board of township trustees also may appoint and employ a chief of police and police officers. R.C. 505.49. A township chief of police and township police officers provide substantially the same police protection services to the inhabitants of a township that a county sheriff and his deputies furnish to county residents. *See generally* R.C. 2935.03; 1991 Op. Att'y Gen. No. 91-037 at 2-204 ("[t]he inhabitants of a township are furnished police protection by persons appointed or employed as township police officers or constables"); 1960 Op. Att'y Gen. No. 1309, p. 310 at 311 ("[t]he legislature has assigned to political townships a specific responsibility for law enforcement").

**B. Off-Duty Deputy Sheriffs And Township Police Officers Are Authorized To Make Warrantless Arrests**

More specifically, pursuant to R.C. 2935.03(A), a deputy sheriff or township police officer is required to "arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the political subdivision ... in which [he] is appointed, employed, or elected, a law of this state, an ordinance of a municipal corporation, or a resolution of a township." The section, however, "makes no distinction as to the 'duty status' of an officer." *State v. Clark*, 10 Ohio App. 3d 308, 309, 462 N.E.2d 436, 438 (Paulding County 1983); *see also* 1974 Op. Att'y Gen. No. 74-094 (syllabus, paragraph two) (overruled in part on other grounds by 1986 Op. Att'y Gen. No. 86-065) ("[a]n off-duty municipal police officer may, pursuant to

R.C. 2935.03, arrest for a misdemeanor without a warrant only within the territorial jurisdiction in which he is appointed" (emphasis added)). It follows, therefore, that a deputy sheriff or township police officer, regardless of duty status, may arrest and detain, until a warrant is obtained, an individual found violating a law of this state, an ordinance of a municipal corporation, or a resolution of a township. *See State v. Clark; State v. Glover*, 52 Ohio App. 2d 35, 367 N.E.2d 1202 (Franklin County 1976); *Village of Brookville v. Louthan*, 3 Ohio Misc. 2d 1, 441 N.E.2d 308 (Montgomery County Ct. 1982); Op. No. 74-094; *see also State v. Maxwell*, 60 Ohio Misc. 1, 395 N.E.2d 531 (Miamisburg Mun. Ct. 1978). Deputy sheriffs and township police officers are, thus, upon being commissioned, entitled to exercise their police powers at all times. *See State v. Clark; State v. Glover; Village of Brookville v. Louthan*; Op. No. 74-094; *see also State v. Maxwell*.

**C. Off-Duty Deputy Sheriffs And Township Police Officers Are Subject To The Regulations Of The Law Enforcement Agency That Employs Them**

County sheriffs and township chiefs of police are charged with the organization and administration of their respective law enforcement agencies. *See generally* R.C. 3.06(A) (a "principal is answerable for the neglect or misconduct in office of his deputy"); R.C. 311.05 (a sheriff is "responsible for the neglect of duty or misconduct in office of any of his deputies if he orders, has prior knowledge of, participates in, acts in reckless disregard of, or ratifies the neglect of duty or misconduct in office of the deputy"); R.C. 505.49(A) ("[t]he township trustees may include in the township police district and under the direction and control of the chief of police, any constable"); *Pembaur v. Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) ("we believe that the duties of the Sheriff, as enumerated in OHIO REV.CODE ANN. § 311.07, and his responsibility for the neglect of duty or misconduct in office of each of his deputies, *see* OHIO REV.CODE ANN. § 311.05, clearly indicate that the Sheriff can establish county policy in some areas"), *rev'd on other grounds*, 475 U.S. 469, 484 (1986) ("the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here"). Accordingly, county sheriffs and township chiefs of police are responsible for determining the duty status of, and the duties to be performed by, the individuals employed within their law enforcement agency. *See State ex rel. Geyer v. Griffin*, 80 Ohio App. 447, 458, 76 N.E.2d 294, 300 (Allen County 1946) (per curiam) ("[a] sheriff is vested with absolute discretion to determine what deputies shall be employed, the length of their employment, and the duties of his office to be performed by them"); 1965 Op. Att'y Gen. No. 65-177 (syllabus, paragraph four) (a sheriff determines when his deputies are on duty); 1922 Op. Att'y Gen. No. 3741, vol. II, p. 947, 950 (overruled on other grounds by 1965 Op. Att'y Gen. No. 65-150) (a deputy sheriff, when "employed and drawing the emoluments of such appointment, it is at all times under the direction of the sheriff, whose appointee or agent he happens to be"); *see also United States v. Laub Baking Co.*, 283 F. Supp. 217, 220 (N.D. Ohio 1968) (there is implied in the delegation to a county sheriff of the duty to preserve the public peace a grant of the power necessary to perform and accomplish it); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph four) ("[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"), *aff'd sub nom. State ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). *See generally* R.C. 2923.12; R.C. 2923.121; R.C. 2923.17 (prohibiting an individual from carrying certain weapons unless, *inter alia*, the individual is a law enforcement officer authorized to do so *and is acting within the scope of his duties*).<sup>1</sup>

Insofar as county sheriffs and township chiefs of police are charged with the control of the law enforcement officers within their respective law enforcement

<sup>1</sup> R.C. 2923.12, R.C. 2923.121, and R.C. 2923.17 exempt from their provisions only a law enforcement officer who has received an authorization and who is acting within the scope of his duties. Implicit in the language of these sections is the concept that a law enforcement officer's activities and duties are determined and regulated by his superiors.

agencies, it follows that sheriffs and chiefs of police have the implied power and authority to set forth regulations regarding the conduct of the deputies and police officers employed by their agencies. See *United States v. Laub Baking Co.; State ex rel. Hunt v. Hildebrant*. This includes the power and authority to authorize deputies or police officers to use, during the hours that they are not required to be on duty for work as deputies or police officers, their county or township owned uniforms, equipment, and firearms, if the sheriff or chief of police reasonably determines such authorization promotes the provision of police protection services to the citizens of the county or township. See generally *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) (per curiam) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty").

I find, therefore, that a deputy sheriff or township police officer, during the hours that he is not required to be on duty for work as a deputy sheriff or police officer, may use his county or township owned uniforms, equipment, and firearms, provided the county sheriff or township chief of police authorizes that use.

**II. A County Or Township May Be Liable For Wrongful Acts Committed By Off-Duty Uniformed Deputy Sheriffs Or Township Police Officers**

**A. Common Law Principles Of County And Township Liability For Acts Committed by Off-Duty Law Enforcement Officers**

Your second question asks whether a county or a township may be liable for wrongful acts committed by uniformed off-duty deputy sheriffs or township police officers. In the syllabus of 1985 Op. Att'y Gen. No. 85-056, my predecessor concluded that, "[a] county may suffer liability for wrongful acts committed by a uniformed, off-duty regular or reserve deputy sheriff who is employed by a private body, if it is determined as a matter of fact that the deputy performed such acts in his capacity as a public officer." In reaching this conclusion my predecessor relied on the principles set forth previously in 1958 Op. Att'y Gen. No. 1645, p. 40, stating as follows:

The principles applied in 1958 Op. No. 1645 were established by the Ohio Supreme Court in *New York, Chicago & St. Louis R. R. Co. v. Fieback*, 87 Ohio St. 254, 100 N.E. 889 (1912). That case concerned a policeman who was appointed and commissioned by the Governor under G.C. 9150 and 9151 (now R.C. 4973.17-.18)<sup>2</sup> to be employed in the service of a railroad. The court stated that, even though the policeman was appointed at the request of the railroad company and paid by the company, he was a public officer. In the words of the court:

Police officers, by whomever appointed or elected are generally regarded as public or state officers deriving their authority from the sovereignty, for the purpose of enforcing the observance of the law ....

We start then with the clear presumption of the law that the policeman was acting officially and in the line of his duty. The foundation of this rule is that one who is invested with authority by the sovereign, commissioned and sworn to faithfully perform the duties pertaining to such commission, must necessarily be supposed to be acting in conformity thereto; and anyone who claims that the officer was not so acting must show affirmatively that such was the case.

<sup>2</sup> Upon recodification of the General Code into the Revised Code, see 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953), G.C. 9150 and G.C. 9151 were recodified as R.C. 4973.17 and R.C. 4973.18, respectively.

*Id.* at 264-65, 100 N.E. at 891 (citations omitted). *See also Darden v. Louisville & Nashville R. R. Co.*, 171 Ohio St. 63, 167 N.E.2d 765 (1960); *Pennsylvania R. R. Co. v. Deal*, 116 Ohio St. 408, 413, 156 N.E. 502, 503 (1927) (the issue whether a policeman who was employed by a railroad company "was acting by virtue of his office, the same as any peace officer or policeman might have acted, or whether the acts occurred in the performance of an act which was outside the public duties of a policeman and which was authorized or ratified by the railroad company," was found to be a question of fact to be determined by the jury). The *Fieback* case concerned the question of liability of the railroad company, rather than liability of a governmental body, but the principles addressed therein do not appear to have been changed by recent modifications in the doctrine of governmental immunity.

The principles discussed above have been applied directly to cases involving deputy sheriffs who are employed by private industries. *See, e.g., Ayers v. Woodard*, 166 Ohio St. 138, 143, 140 N.E.2d 401, 405 (1957) ("duly commissioned law enforcement officers who are hired and directed in their specific duties by a private person are public officers deriving their authority from the sovereign, whose acts, in the absence of evidence to the contrary, are presumed to have been performed in such capacity"); *Duff v. Corn*, 84 Ohio App. 403, 87 N.E.2d 731 (Lawrence County 1947) (recognizing as a jury question the issue whether a deputy sheriff who was employed by a night club proprietor acted in his public capacity as an officer, as agent of the proprietor, or jointly in both capacities, in quelling a particular disturbance); *Garman v. O'Neil*, 31 Ohio L. Abs. 650 (App. Summit County 1939) (deputy sheriff employed by merchants was not acting in pursuance of his official duties when he visited an automobile salesroom for the express purpose of trading automobiles).

Op. No. 85-056 at 2-208 and 2-209 (footnote added). Under the rationale utilized in Op. No. 85-056, a county or township may suffer liability for wrongful acts committed by a uniformed deputy sheriff or township police officer who is employed by a private entity during the hours that he is not required to be on duty for work as a deputy sheriff or police officer, if it is determined as a matter of fact that the deputy sheriff or police officer performed such acts in his capacity as a public official.

#### **B. Political Subdivision Tort Liability Under R.C. Chapter 2744**

Since the issuance of Op. No. 85-056, however, the General Assembly has enacted R.C. Chapter 2744. *See* 1985-1986 Ohio Laws, Part I, 1699 (Am. Sub. H.B. 176, eff. Nov. 20, 1985). This chapter, in general, sets forth provisions concerning political subdivision tort liability, and immunity therefrom. More specifically, the chapter asserts that, except as provided in R.C. 2744.02(B), "a political subdivision is *not liable* in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a *governmental* or proprietary function." R.C. 2744.02(A)(1) (emphasis added).

For purposes of R.C. Chapter 2744, counties and townships are political subdivisions, R.C. 2744.01(F), and "[t]he provision or nonprovision of police ... services or protection" is a governmental function, R.C. 2744.01(C)(2)(a). Hence, except as provided in R.C. 2744.02(B), neither a county nor a township is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of its law enforcement officers in connection with the provision or nonprovision of police services or protection. *See* R.C. 2744.02(A)(1); *see also* R.C. 2744.01.

Notwithstanding R.C. 2744.02(A)(1) and subject to R.C. 2744.03 and R.C. 2744.05,<sup>3</sup> under R.C. 2744.02(B), a county or township is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an

<sup>3</sup> R.C. 2744.03 enumerates several defenses or immunities that may be asserted by a political subdivision and its employees to defeat claims in those instances where liability would otherwise be imposed under R.C.

act or omission of its law enforcement officers in connection with the provision or nonprovision of police services or protection in the following instances:

(1) Except as otherwise provided in this division,<sup>4</sup> political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority ....

....  
 (3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued. (Footnote added.)

The term "employee," as used in R.C. 2744.02(B), denotes any "officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision." R.C. 2744.01(B). R.C. 2744.02(B), thus, sets forth the specific instances in which a county or township may be found liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of an employee of the county or township in connection with, *inter alia*, the provision or nonprovision of police services or protection.

**C. Liability May Attach If A Deputy Sheriff Or Township Police Officer Is Authorized To Act And Is Acting Within The Scope Of His Employment For The County Or Township**

The liability provisions of R.C. 2744.02 are similar to the common law principles relied upon by my predecessor in Op. No. 85-056. Under both the liability provisions of R.C. 2744.02 and the common law principles set forth in Op. No. 85-056, a county or township may incur liability for acts committed by a uniformed deputy sheriff or township police officer who is employed by a private entity during the hours that he is not required to be on duty for work as a deputy sheriff or police officer, if it is determined *as a matter of fact* (1) that the deputy sheriff or police officer was authorized to act, and (2) was acting within the scope of his employment

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2744.02(B). See R.C. 2744.03(A)(1)-(7). R.C. 2744.05 provides limitations on the damages that may be awarded in an action against a political subdivision to recover damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function.

<sup>4</sup> R.C. 2744.02(B)(1)(a)-(c) sets forth defenses to liability that may be imposed under R.C. 2744.02(B)(1).

for the county or township. Unlike the common law, however, R.C. 2744.02 limits the instances in which a county or township may be liable to those factual situations described in R.C. 2744.02(B). Hence, R.C. 2744.02(B) abrogates the common law principles set forth in Op. No. 85-056 to the extent that those principles do not limit the imposition of liability to certain factual situations. *See* R.C. 2744.02(B)(1)-(5) (setting forth the factual situations in which a political subdivision may be liable).

In light of the foregoing, it must be concluded that a county or township may be liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of a uniformed deputy sheriff or township police officer who is employed by a private entity during the hours that he is not required to be on duty for work as a deputy sheriff or police officer only in those factual situations described in R.C. 2744.02(B), and only if it is determined as a matter of fact that the deputy sheriff or police officer was authorized to act and was acting within the scope of his employment for the county or township. Whether liability exists in a particular instance, however, will depend upon the facts of the particular situation.

### III. Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. A deputy sheriff or township police officer, during the hours that he or she is not required to be on duty for work as a deputy sheriff or police officer, may use his or her county or township owned uniforms, equipment, and firearms, provided the county sheriff or township chief of police authorizes that use.
2. A county or township may be liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of a uniformed deputy sheriff or township police officer who is employed by a private entity during the hours that he is not required to be on duty for work as a deputy sheriff or police officer only in those factual situations described in R.C. 2744.02(B), and only if it is determined as a matter of fact that the deputy sheriff or police officer was authorized to act and was acting within the scope of his or her employment for the county or township. (1985 Op. Att'y Gen. No. 85-056, modified.)