Note from the Attorney General's Office:

1985 Op. Att'y Gen. No. 85-056 was modified by
1991 Op. Att'y Gen. No. 91-063.

OPINION NO. 85-056

Syllabus:

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.

To: Gary L. Van Brocklin, Mahoning County Prosecuting Attorney, Youngstown, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 17, 1985

I have before me your request for an opinion on the question whether a county has any exposure to potential legal liability for wrongful acts committed by uniformed, off-duty regular or reserve deputies of the county sheriff while such deputies are employed by private individuals or firms. Your question arises in light of the recent Ohio Supreme Court case, Zents v. Board of Commissioners, 9 Ohio St. 3d 204, 204, 459 N.E.2d 881, 883 (1984), which held that, with certain limitations, "the doctrine of governmental immunity will no longer operate to insulate counties from liability for their tortious acts." The syllabus to the Zents case states:

> No tort action will lie against a county for those acts or omissions involving the exercise of an executive or planning function or involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, a county will be held liable, the same as private corporations and persons, for the negligence of its employees and agents in the performance of their activities.

The Zents case thus indicates that, once a county has decided to undertake a certain function, it will be liable for the negligence of its employees and agents in the performance of that function. The issue raised by your question is, therefore, whether regular or reserve deputies of the county sheriff, who wear official uniforms but are employed by private individuals or firms, may, even though they are designated as being off duty, be considered to be employees or agents of the county in the performance of their activities, so as to impose upon the county liability for their negligence.

I note, first, that there is no express statutory authority for the designation of a sheriff's deputy as "regular" or "reserve." R.C. 311.04, which authorizes the appointment of deputies by a sheriff, states simply: "The sheriff may appoint, in writing, one or more deputies." It has, nonetheless, been recognized that a sheriff may appoint deputies for general purposes or for special purposes, and that he may define and limit the duties and powers of certain deputies, consistent with their assignments. See R.C. 3.06; State ex rel. Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294 (Allen County 1946); 1977 Op. Att'y Gen. No. 77-027. It has, further, been specifically recognized that a sheriff may appoint deputies who are to be employed by private individuals or firms for the purpose of preserving the peace and protecting the property of such individuals or firms. See, e.g., State ex rel. Geyer v. Griffin; 1958 Op. Att'y Gen. No. 1645, p. 40.

The question whether a sheriff's deputy who is employed by a private body is acting in his public capacity was considered by my predecessor in 1958 Op. No. 1645. When that opinion was issued, the doctrine of governmental immunity insulated a county from liability for the torts of its employees and agents, see, e.g., Board of Commissioners v. Mighels, 7 Ohio St. 109 (1857); 1982 Op. Att'y Gen. No. 82-007; 1980 Op. Att'y Gen. No. 80-102, but R.C. 311.05 provided expressly that the sheriff would be responsible for the neglect of duty or misconduct in office of his deputies. Thus, the question presented then was not whether the county faced

possible liability for the acts of deputy sheriffs who served private employers, but whether the sheriff faced possible liability. R.C. 311.05 currently states:

> The sheriff shall only be 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.

This provision prevails over the older and more general language of R.C. 3.06(A): "The principal is answerable for the neglect or misconduct in office of his deputy or clerk." See R.C. 1.51. Under existing law, then, the sheriff is not generally liable for the acts of his deputies, but the county may be. See Zents v. Board of Commissioners. The conclusions reached in 1958 Op. No. 1645 must be reconsidered in light of these changes in the law, but the general principles set forth therein are nonetheless instructive.

1958 Op. No. 1645 directly addressed the matter of special deputy sheriffs who were employed by private bodies for the purpose of providing security services. That opinion considered a number of court cases concerning liability for the acts of such deputies and concluded, in the third paragraph of the syllabus: "Whether the negligence or other misconduct of a deputy sheriff imposes civil liability upon the sheriff depends on whether the deputy's act was committed in his capacity as a public officer, which in turn is a question of fact to be decided by the trier of fact, subject to the rebuttable presumption that he was so acting." I believe that the principles discussed in that opinion with respect to liability of the sheriff are now applicable to liability of the county.

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) 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.

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).

A statement of the distinction between acts performed by a deputy sheriff for a private employer and acts performed on behalf of the public appears in Republic Steel Corp. v. Sontag, 21 Ohio L. Abs. 358, 361 (App. Mahoning County 1935) (quoting Charles J. McKain v. Baltimore & Ohio Railroad Company, 23 L.R.A., N.S., p. 289), as follows:

> [S]uch appointees, although paid for all their services by the persons at whose instances they are appointed, are not servants of such persons in respect to all the acts they perform by virtue of their offices; but only in respect to services rendered the company, such as defending or preserving its property. The line of distinction, sometimes hard to recognize under the circumstances of the particular case, marks the point at which the act ceases to be one of service to the employer, and becomes one of vindication of public right or justice, the apprehension or punishment of a wrongdoer, not for the injury done to the employer, but to the public at large.

In light of the authorities discussed above, I believe that, although it may be difficult to define with precision the lines of potential liability, it must be concluded that a county may suffer liability for wrongful acts committed by uniformed, off-duty regular or reserve deputy sheriffs while such deputies are employed by private individuals or firms. Whether liability exists in a particular situation will depend upon the facts of that situation.

It is, therefore, my opinion, and you are hereby advised, 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.