

**OPINION NO. 81-013****Syllabus:**

1. Money received by a deputy sheriff employed and paid by a private industry as part of an undercover operation to collect evidence for a criminal prosecution must be paid into the county treasury to the credit of the general county fund.
2. Money received by a deputy sheriff and paid into the county treasury is not properly treated as income to the deputy for the purposes of state income tax liability or as earnable salary or compensation for the purposes of public employee retirement contributions.
3. In the event that a deputy sheriff who is employed by a private industry during the course of an undercover investigation suffers a work-related injury, the county or the private employer or both may be subject to workers' compensation liability depending upon the particular facts involved in his injury.

**To: Arthur M. Elk, Ashland County Pros. Atty., Ashland, Ohio**

**By: William J. Brown, Attorney General, March 25, 1981**

I have before me your request for my opinion on the following question:

How should a county sheriff account for money received by a full-time deputy when, as part of an under-cover operation, to collect evidence for a criminal prosecution, the deputy is employed by a private industry (and paid by that industry), and due to the nature of the investigation, the management personnel of the private industry cannot be made aware of the investigation?

It is settled as part of the common law of this state that a public officer may not demand or receive for services performed by him in the discharge of his official duty any remuneration or reward other than that allowed by law. Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N.E. 641 (1907); Gilmore v. Lewis, 12 Ohio 281 (1843). This common law principle has been codified in R.C. 2921.43(A), which provides that:

No public servant shall knowingly do either of the following:

- (1) Solicit or receive any compensation or fee, other than as allowed by law, to perform his official duties;
- (2) Solicit or receive greater fees or costs than are allowed by law to perform his official duties.

The term "public servant" is defined in R.C. 2921.01(B) to include any public official, and R.C. 2921.01(A) defines "public official" to include law enforcement officers. The definition of "public servant" is, thus, extremely broad, and obviously encompasses a deputy sheriff.

Also relevant to your inquiry is R.C. 325.27, which provides that:

All the fees, costs, percentages, penalties, allowances, and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, or county recorder, shall be received and collected for the sole use of the treasury of the

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county in which such officers are elected, and shall be held, accounted for, and paid over as public moneys belonging to such county in the manner provided by section 325.30 and 325.31 of the Revised Code.

This statute has been construed, and construed correctly in my opinion, to govern the disposition of compensation or perquisites received by deputy sheriffs as well. See 1944 Op. Att'y Gen. No. 7074, p. 442 (reward received by deputy sheriff for apprehending U.S. military prisoners must be paid into treasury of county); 1932 Op. Att'y Gen. No. 4716, p. 1231 (fees received by deputy sheriff must be paid into county treasury even though he serves without compensation). R.C. 325.31 provides that with the exception of fees allowed the county auditor by R.C. 319.54(B), all moneys paid into the county treasury by the officers enumerated in R.C. 325.07 are to be credited to the general county fund.

Accordingly, it is my opinion that money received by a deputy sheriff employed and paid by a private industry as part of an undercover operation to collect evidence for a criminal prosecution must be paid into the county treasury to the credit of the general county fund.

You have also asked me to consider the ramifications of my opinion on this issue with respect to the deputy's state tax liability, workers' compensation coverage, and membership in the public employees retirement system and social security system.

Ohio's income tax laws are keyed to the Internal Revenue Code and other federal income tax statutes. R.C. 5747.01. In the federal statutory scheme, it is well-settled that "[e]conomic gain realized or realizable by the taxpayer is necessary to produce a taxable income." Helvering v. Stuart, 317 U.S. 154, 168 (1942). "If there is no gain, there is no income." Conner v. United States, 303 F.Supp. 1187, 1191 (D.C. Texas 1969). Since in the circumstances about which you inquire, a deputy sheriff is precluded by law from realizing any gain from such money, such money is not income received by him for the purpose of the Ohio income tax laws.

There is no doubt that a deputy sheriff falls within the purview of the Ohio workers' compensation laws while he is acting within the scope of his employment and discharging his official duties. See R.C. 4123.01(A)(1). In the situation about which you inquire, however, the deputy would also qualify as an employee of the private employer for the purposes of R.C. Chapter 4123. See R.C. 4123.01(A)(2). The obvious question is, therefore, which employer would be liable in the event that the deputy suffers an injury while he is simultaneously acting on the behalf of both employers.

The question anticipated in your request has no precedent in Ohio law. The Ohio Supreme Court has, however, addressed the issue of dual employee status for the purpose of workers' compensation in a somewhat similar context. In Daniels v. MacGregor Co., 2 Ohio St.2d 89, 206 N.E.2d 554 (1965), the court spoke to the question in the context of the "loaned servant." The court held that where an employer employs an employee with the understanding that the employee is to work for the customer of the employer and where it is understood that the customer is to have the right to control the manner or means of performing the work, such employee in doing that work is an employee of the customer within the meaning of the Workers' Compensation Act, R.C. Chapter 4123.

While the Daniels case is distinguishable from the instant situation since there is no prior agreement or express understanding between the two employers, it is my opinion that the right to control test would be applicable in these circumstances as well. I cannot, however, anticipate the outcome of applying such test in the latter circumstance, since both employers may simultaneously be exercising some control over the manner in which the employee performs the work. For example, assume that at the time of his injury the deputy was performing a

task assigned by his private employer upon its premises and using the tools provided by the private employer. The deputy may have performed the task in a manner different from that intended in order to accomplish some objective relevant to collecting evidence for the criminal prosecution. Thus, where there is dual control, the question of employer liability for workers' compensation is unclear and can be resolved only after a full evidentiary investigation on a case-by-case basis.

You have also inquired whether the deputy's receipt of money from a private industry for which he acts as an employee during the course of an undercover investigation has ramifications under R.C. Chapter 145, which establishes the Public Employee Retirement System. I assume your question arises because of R.C. 145.47, which requires each public employee who is a member of the system to contribute eight per cent of his "earnable salary or compensation" to the employees' savings fund, and R.C. 145.48, which requires each public employer to pay a certain per cent of the member's "earnable compensation" to the employers' accumulation fund. Since I have concluded that a deputy may not retain the money received by him from the private industry, his receipt of such money has no relevance for the purpose of public employee retirement contributions. Just as the money received by him is not to be considered income for the purposes of the state's tax laws, it should not be considered earnable salary or compensation for the purposes of the above-mentioned statutes.

You also ask me to consider the possible social security ramifications as part of my opinion. This I must respectfully decline to do. The social security laws, set forth at 42 U.S.C. §301, are exclusively federal and are, therefore, beyond the scope of my advisory opinions. Any opinion I could offer you in this area would be purely gratuitous.

Accordingly, it is my opinion, and you are advised, that:

1. Money received by a deputy sheriff employed and paid by a private industry as part of an undercover operation to collect evidence for a criminal prosecution must be paid into the county treasury to the credit of the general county fund.
2. Money received by a deputy sheriff and paid into the county treasury is not properly treated as income to the deputy for the purposes of state income tax liability or as earnable salary or compensation for the purposes of public employee retirement contributions.
3. In the event that a deputy sheriff who is employed by a private industry during the course of an undercover investigation suffers a work-related injury, the county or the private employer or both may be subject to workers' compensation liability depending upon the particular facts involved in his injury.