

OPINION NO. 87-015

Syllabus:

1. A person who is appointed as an agent by the Director of the Department of Agriculture to investigate the illegal sale of food stamps is not a peace officer as defined by R.C. 109.71(A).
2. A person who is appointed as an agent by the Director of the Department of Agriculture to investigate the illegal sale of food stamps is not a law enforcement officer as defined by R.C. 2901.01(K).
3. Pursuant to R.C. 2923.12(B), a person who is appointed as an agent by the Director of the Department of Agriculture to investigate the illegal sale of food stamps is not prohibited from carrying a concealed weapon so long as the person is authorized by the Director of the Department of Agriculture to do so, and the person is acting within the scope of his duties.

To: Steven D. Maurer, Director, Ohio Department of Agriculture, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 2, 1987

I have before me your request for my opinion concerning the status and authority of persons who are appointed as agents by the Director of the Department of Agriculture to investigate the illegal sale of food stamps. In particular you state that pursuant to Executive Order 85-22, the Governor has transferred the authority to conduct food stamp trafficking investigations from the Department of Human Services to the Department of Agriculture. Such investigations are required under the Food Stamp Act, 7 U.S.C. Sec. 2024 (Supp. 1986). You also state that these investigations often require the agents to take part in undercover investigations in dangerous situations. In subsequent conversations, your staff has indicated that due to these conditions, the Department of Agriculture would like to authorize food stamp trafficking investigators to carry a concealed weapon for personal protection. The Department also wishes to send these investigators to Peace Officer Training as provided for by R.C. 109.79. In light of this additional information, I have rephrased your questions as follows:

1. Are the criminal investigators in the Food Stamp Trafficking Section of the Ohio Department of Agriculture either peace officers under R.C. 109.71(A) or law enforcement officers under R.C. 2901.01(K)?
2. Are the criminal investigators in the Food Stamp Trafficking Section of the Ohio Department of Agriculture permitted to carry concealed weapons?

Your first question concerns whether persons employed by the Department of Agriculture to investigate the illegal sale of food stamps are peace officers so as to permit them to participate in peace officer training under R.C. 109.79 or law enforcement officers so as to exempt them from certain prohibitions with regard to the carrying of concealed weapons

under R.C. 2923.12. Whether the persons in question qualify as peace officers or law enforcement officers is dependent upon whether their duties fall within the statutory definitions of those terms. R.C. 109.71(A) defines a "peace officer" as:

(1) A deputy sheriff, marshal, deputy marshal, member of the organized police department of a municipal corporation, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, or township constable, who is commissioned and employed as a peace officer by a political subdivision of this state or by a metropolitan housing authority, and whose primary duties are to preserve the peace, to protect life and property, and to enforce the laws of Ohio, ordinances of a municipal corporation, or regulations of a board of county commissioners or board of township trustees, or any such laws, ordinances, or regulations;

(2) A policeman who is employed by a railroad company and appointed and commissioned by the governor pursuant to sections 4973.17 to 4973.22 of the Revised Code;

(3) Employees of the department of taxation engaged in the enforcement of Chapter 5743. of the Revised Code, and designated by the tax commissioner for peace officer training for purposes of the delegation of investigation powers under section 5743.45 of the Revised Code;

(4) An undercover drug agent;

(5) Liquor control investigators in the enforcement division and the intelligence division of the department of liquor control engaged in the enforcement of Chapter 4301. of the Revised Code;

(6) An employee of the department of natural resources who is a park officer designated pursuant to section 1541.10, a forest officer designated pursuant to section 1503.29, a game protector designated pursuant to section 1531.13, or a state watercraft officer designated pursuant to section 1547.521 of the Revised Code;

(7) An employee of a park district who is designated pursuant to section 511.232 or 1545.13 of the Revised Code.

(8) An employee of a conservancy district who is designated pursuant to section 6101.75 of the Revised Code;

(9) A police officer who is employed by a hospital that employs and maintains its own proprietary police department or security department, and who is appointed and commissioned by the governor pursuant to sections 4973.17 to 4973.22 of the Revised Code.

As noted above, in order to qualify as a peace officer for purposes R.C. 109.79, a person must hold one of the positions specified by R.C. 109.71(A). The Department of Agriculture's food stamp trafficking investigators do not, however, hold any of the enumerated positions. Therefore, I conclude that such persons are not peace officers as defined by R.C. 109.71(A).

Similarly, in order for a person to be classified as a law enforcement officer, his duties must fall within the definition of that term, as provided by R.C. 2901.01:

(K) "Law enforcement officer" means any of the following:

(2) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of such statutory duty and authority.

Under R.C. 2901.01(K)(2), an agent or employee of the state may qualify as a law enforcement officer if, within the scope of his duty to conserve the peace or to enforce all or certain laws, the person is given the authority to make arrests.¹

R.C. 901.27 specifies the duties and authority of the Department of Agriculture's investigators, providing:

For the purpose of making any investigation with regard to any company, firm, corporation, person, association, or copartnership, subject to the laws which the department of agriculture is required to administer, the director of agriculture may appoint, by an order in writing, an agent whose duties shall be prescribed in such order. In the discharge of his duties such agent shall have every power of an inquisitorial nature granted to the director and the same powers as a notary public with regard to the taking of depositions.

Thus, while such persons may conduct investigations and have the same powers as a notary public with regard to the taking of depositions, R.C. 901.27 does not empower them to make arrests. Neither does R.C. 901.27 state that investigators are authorized to exercise the police powers of the state, which has been interpreted by one of my predecessors to include the authority to make arrests. See 1974 Op. Att'y Gen. No. 74-084 (R.C. 955.12 confers upon the county dog warden the same police powers held by the sheriff and police officers in the performance of their duties, and therefore the county dog warden may make arrests for certain offenses). Thus, since I am unable to locate any provision giving these persons the authority to make arrests, I conclude that the Department of

¹ I conclude that this language refers to authority to make arrests other than those arrests which every person is authorized by statute to make. All persons are authorized by statute to make arrests under certain circumstances. See R.C. 2935.04-.041. However, were R.C. 2901.01(K)(2) interpreted to include arrests made pursuant to statutory provisions such as R.C. 2935.04-.041, the requirement that the officer, agent or employee of the state be authorized to make arrests under R.C. 2901.01(K)(2) would be rendered mere surplusage. Cf. State v. Reiner, 58 Ohio St. 2d 67, 388 N.E.2d 1226 (1979) (it is a general rule of construction that every portion of a sentence should be given effect); 1986 Op. Att'y Gen. No. 86-103. Therefore, it is apparent that the requirement in R.C. 2901.01(K)(2) that a person must be authorized to make arrests refers to a grant of authority to make arrests other than those arrests which every person is permitted to make.

Agriculture's investigator's are not law enforcement officers under R.C. 2901.01(K)(2).

Your second question concerns whether the Department of Agriculture's food stamp trafficking investigators are permitted by law to carry concealed weapons. The General Assembly has chosen not to statutorily authorize persons holding specified positions to carry a concealed weapon. Thus, there are no statutory provisions stating that persons who hold specific positions are permitted to carry a concealed weapon.² However, R.C. 2923.12 provides that:

(A) No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance.

(B) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to law enforcement officers, authorized to carry concealed weapons or dangerous ordnance, and acting within the scope of their duties. (Emphasis added.)

Pursuant to this section, law enforcement officers and agents or employees of this or any other state or the United States are exempted from the prohibition against carrying concealed weapons if they are authorized to carry a concealed weapon or dangerous ordnance and are acting within the scope of their duties. As concluded above, the investigators in question do not qualify as law enforcement officers. However, they are agents or employees of the state, and presumably would be carrying the weapons only within the scope of their duty, if "authorized" to do so.

The requirement that the person be authorized to carry a concealed weapon presents an additional difficulty. R.C. 2923.12 is silent as to whether the authorization to carry a concealed weapon or dangerous ordnance must be made by statute or whether it may be conferred by the chief officer of the person's department or agency. Since, as noted previously, I have found no statutes which authorize a person holding a specified position to carry concealed weapons or dangerous ordnances, I must conclude that the General Assembly intended through R.C. 2923.12(B) to allow the chief officer of a state department or agency to authorize agents or employees to carry a concealed weapon.³

² I have found only one statute which specifically mentions concealed weapons with regard to the authority of a given position. Pursuant to R.C. 5743.45, persons employed by the Tax Commissioner to investigate violations of state and federal cigarette tax laws have "the power of a police officer to carry concealed weapons." (Emphasis added.) However, police officers are not specifically authorized by statute to carry a concealed weapon. Therefore it would appear that the General Assembly did not intend that R.C. 5743.45 constitute an independent grant of authority to carry a concealed weapon, but rather reflects the legislature's intention that such investigators should have the same authority as that customarily accorded police officers.

³ Although previous opinions have not directly addressed the issue of whether the authority to carry a concealed weapon must be conferred by statute or by the chief officer

It remains unclear, however, whether the Director of the Department of Agriculture possesses the authority to allow food stamp trafficking investigators to carry concealed weapons. The Department of Agriculture is a creature of statute, whose Director is granted only limited statutory powers. See e.g., R.C. 901.05 (the Director of the Department of Agriculture may confer and meet with the officers of other states and the United States); R.C. 901.29 (the Director of the Department of Agriculture may require the production of certain documents by order of subpoena). Pursuant to R.C. 901.27, the Director of the Department of Agriculture is authorized to appoint agents to investigate any "company, firm, corporation, person, association, or copartnership, subject to the laws which the department of agriculture is required to administer...." Thus, it must be determined whether the authority to appoint such persons under R.C. 901.27, implies that the Director of the Department of Agriculture may authorize the investigators to carry concealed weapons.

As a general matter, where the director of a department of the state is authorized by statute to perform certain functions, but no statutory direction is given as to the manner in which the functions are to be performed, the director may perform the functions in a reasonable manner. See State ex rel. Hildebrandt, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), aff'd, 241 U.S. 565 (1916) (where no direction has been given, an officer "has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method" of performing his duties). Thus, the Director of the Department of Agriculture is given discretion to determine whether persons appointed as investigators under R.C. 901.27 may carry concealed weapons. His decision must, however, be a reasonable one.

I am not authorized to exercise on behalf of another officer or entity of the government discretion that has been bestowed by statute on that officer or entity. See generally 1985 Op. Att'y Gen. No. 85-007; 1984 Op. Att'y Gen. No. 84-098; 1984 Op. Att'y Gen. No. 84-067. Further, it is inappropriate for me to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals. See generally 1986 Op. Att'y Gen. No. 86-039; 1983 Op. Att'y Gen. No. 83-087; 1983 Op. Att'y Gen. No. 83-057. In light of those limitations upon my authority I must interpret your request as asking whether the Director of the Department of Agriculture may, in carrying out his duties under R.C. 901.27, authorize investigators to carry concealed weapons. In addressing this question, I am considering whether the statutory interpretation proposed by the Director of Department of Agriculture is reasonable. I am not considering

of the department or agency, they have not found the absence of express statutory authority to bar a person from carrying a concealed weapon when that person would otherwise be permitted to do so. See e.g., 1984 Op. Att'y Gen. No. 84-008 (both a deputy sheriff and a court constable are law enforcement officers under R.C. 2901.01(K), and therefore may be authorized to carry a concealed weapon when acting within the scope of their duties); 1979 Op. Att'y Gen. No. 79-029 (county probation officers may carry a concealed weapon when acting within the scope of their duties).

whether other interpretations of the statute might also be reasonable.

As noted above, R.C. 901.27 provides that the Director of the Department of Agriculture may appoint agents for the purpose of investigating, inter alia, persons subject to the laws which the Department is required to administer. Pursuant to this section, the Department of Agriculture may appoint agents to investigate not only trafficking in food stamps, but also a broad range of other activities. See e.g., R.C. 901.17(D) (the Department of Agriculture's division of markets shall investigate the practice and methods of "commission merchants"). Thus, whether the authorization of an investigator to carry a concealed weapon is a reasonable exercise of the Director's discretion may differ depending upon the type and nature of the investigation being carried out. However, you state in your letter of request that the persons investigating food stamp trafficking are "part of covert investigations which often require contact with violent criminals in dangerous situations." Therefore, in this context it would seem reasonable for such persons to be authorized to carry a concealed weapon.⁴

⁴ R.C. 2923.12(C) is also of interest in this context, providing in pertinent part:

It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon himself or a member of his family, or upon his home, such as would justify a prudent man in going armed.

While in the present case this provision is not directly applicable, it is analogous and suggests one possible mode of analysis for determining whether the authorization of department personnel to carry a concealed weapon is a reasonable exercise of the director's authority. Since the information which you have included in your letter of request suggests that the investigators in question are engaged in a lawful activity, which is carried on at such a time and place as to render the department's investigators susceptible to criminal attack, and the investigators do have reasonable cause to fear a criminal attack upon themselves, it would appear that such authorization would be reasonable in the present instance.

In conclusion, it is my opinion and you are hereby advised that:

1. A person who is appointed as an agent by the Director of the Department of Agriculture to investigate the illegal sale of food stamps is not a peace officer as defined by R.C. 109.71(A).
2. A person who is appointed as an agent by the Director of the Department of Agriculture to investigate the illegal sale of food stamps is not a law enforcement officer as defined by R.C. 2901.01(K).
3. Pursuant to R.C. 2923.12(B), a person who is appointed as an agent by the Director of the Department of Agriculture to investigate the illegal sale of food stamps is not prohibited from carrying a concealed weapon so long as the person is authorized by the Director of the Department of Agriculture to do so, and the person is acting within the scope of his duties.