

OPINION NO. 85-060**Syllabus:**

1. A county may suffer liability for wrongful acts committed by a special constable, appointed under R.C. 1907.201 and 1907.211, who is employed by private persons, if it is determined as a matter of fact that the special constable performed such acts in his capacity as a public officer.
2. A county court judge who appoints a special constable under R.C. 1907.201 and 1907.211 is exposed to potential liability for wrongful acts committed by the constable if the judge fails to exercise ordinary care in selecting or instructing the constable, or if he cooperates in the wrongful acts.
3. While there is no requirement that formal policies and procedures be adopted for the governance of special constables appointed under R.C. 1907.201 and 1907.211, a county court judge who appoints such constables has a general responsibility for exercising ordinary care in their selection and instruction.
4. Special constables appointed pursuant to R.C. 1907.201 and 1907.211 are not included in the definition of peace officer set forth in R.C. 109.71(A)(1) and, therefore, need not receive certification from the Ohio Peace Officer Training Council. (1984 Op. Att'y Gen. No. 84-008, syllabus, paragraph one, approved and followed in part.)

To: Gary L. Van Brocklin, Mahoning County Prosecuting Attorney, Youngstown, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, September 17, 1985

You have requested an opinion on several questions involving "special constables," who are appointed by county court judges under R.C. 1907.201 and R.C. 1907.211. Your questions are as follows:

1. Does the County have any exposure to potential legal liability for wrongful acts committed by "special constables" while they are employed by private individuals or firms?
2. Do the County Court Judges who appoint "special constables" have any exposure to potential legal liability for wrongful acts committed by their appointees while they are employed by private individuals or firms?
3. In the event the County and/or the County Court Judges do have exposure to legal liability for wrongful acts committed by "special [c]onstables" while they are employed by private individuals or firms, who is responsible for developing formal policies and procedures to avoid the commission of such wrongful acts?
4. Are "special constables" who fail to receive certification from the Ohio Peace Officers Training Council, within one year of

their original appointment, subject to ouster by action in quo warranto?

R.C. 1907.201 authorizes a county court judge to appoint one or more special constables to guard and protect particular property. It states:

Upon the written application of the director of administrative services or of three freeholders of the county in which a county court judge resides, such judge may appoint one or more electors of the county special constables who shall guard and protect the property of this state, or the property of such freeholders, and the property of this state under lease to such freeholders, designated in general terms in such application, from all unlawful acts, and so far as necessary for that purpose, a constable so appointed has the same authority and is subject to the same obligations as other constables.

A constable who is appointed under R.C. 1907.201 upon the application of freeholders of the county to guard their property is to be paid by such freeholders, pursuant to R.C. 1907.211:

The judge of a county court appointing a constable as provided in section 1907.201 of the Revised Code, shall make a memorandum of such appointment upon his docket, and such appointment shall continue in force for one year, unless such judge revokes such appointment sooner. A constable appointed under this section and section 1907.201 of the Revised Code, shall be paid in full for his services by the freeholders for whose benefit he was appointed, and shall receive no compensation except from such freeholders.

For purposes of this opinion, I use the term "special constable" to refer only to constables appointed pursuant to R.C. 1907.201 and R.C. 1907.211.

Your first question is whether the county is exposed to potential legal liability for wrongful acts committed by special constables while they are employed by private individuals or firms. In 1985 Op. Att'y Gen. No. 85-056, I considered a similar question concerning the potential legal liability of the county for wrongful acts committed by deputy sheriffs while they are employed by private bodies, and I believe that the principles discussed in that opinion are directly applicable to the first of your questions concerning special constables. Under Zents v. Board of Commissioners, 9 Ohio St. 3d 204, 459 N.E.2d 881 (1984), a county is, with certain limited exceptions, liable for the negligence of its employees and agents in the performance of their activities. It has been recognized that a peace officer may be found to be serving in a public capacity, even though he is paid by a private employer. See, e.g., Darden v. Louisville & Nashville R. R. Co., 171 Ohio St. 63, 64, 167 N.E.2d 765, 766 (1960) ("[t]he fact that the police officers were acting in the interest of their employer, the defendant railroad, or at its request or authorization did not render their acts any the less official"); Pennsylvania R. R. Co. v. Deal, 116 Ohio St. 408, 156 N.E. 502 (1927); New York, Chicago & St. Louis R. R. Co. v. Fieback, 87 Ohio St. 254, 100 N.E. 889 (1912); Duff v. Corn, 84 Ohio App. 403, 87 N.E.2d 731 (Lawrence County 1947); Republic Steel Corp. v. Sontag, 21 Ohio L. Abs. 358 (App. Mahoning County 1935); 1958 Op. Att'y Gen. No. 1645, p. 40. It follows that a county may, in the appropriate factual situation, be found liable for wrongful acts of one of its peace officers who is paid by a private employer.

I am aware of no authority which has considered whether a special constable, appointed under R.C. 1907.201 and 1907.211, may be found to serve in a public capacity even though, under R.C. 1907.211, he is paid by private persons. I believe, however, that special constables are peace officers who come within the general rules outlined above. I note, in particular, that both the Deal and Fieback cases, cited above, involved special policemen appointed by the Governor to be compensated by and serve in the employ of railroad companies under G.C. 9150-9156 (now R.C. 4973.17-.23). Those policemen are, in many respects, similar to special constables appointed and serving under R.C. 1907.201 and R.C. 1907.211. Both may be appointed for the express purpose of serving a particular private employer, with the understanding that they will be compensated by that employer. The Ohio Supreme

Court found that, in spite of the private nature of their service, special railroad policemen come within the general rule that police officers are regarded as public or state officers, and there is a presumption that they are acting officially and in the line of duty. New York, Chicago & St. Louis R. R. Co. v. Fieback. Accord, Pennsylvania R. R. Co. v. Deal. It appears that the same general principles are applicable to special constables. Since a special constable is appointed by a county court judge and serves within a designated area of the county, see, e.g., R.C. 1907.011; R.C. 1907.201; 1974 Op. Att'y Gen. No. 74-041, he may, for at least some purposes, be considered an agent or employee of the county. Cf. 1966 Op. Att'y Gen. No. 66-171 (a special constable is responsible to the judge who appoints him, and the county may be nominally termed the employer of a special constable in a general sense; however, for purposes of workers' compensation and certain other employment benefits or obligations, the private firm or petitioning group of freeholders should be considered the employer). It follows that a county may suffer liability for wrongful acts committed by a special constable who is employed by private persons if it is determined as a matter of fact that the special constable performed such acts in his capacity as a public officer. See Op. No. 85-056.¹

Your second question concerns the potential liability of a judge who appoints a special constable for wrongful acts committed by that constable while he is

¹ It appears that, since the governmental immunity of counties has been abolished by judicial action, see Zents v. Board of Commissioners, 9 Ohio St. 3d 204, 459 N.E.2d 881 (1984), a county may now purchase liability insurance to protect itself from liability which may result from the negligence of its employees and agents. See Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 30, 442 N.E.2d 749, 752 (1982) (abolishing the defense of governmental immunity for a municipal corporation engaged in the operation of a sewage treatment plant and stating: "[a] municipality is able to obtain liability insurance"); Schenkolewski v. Cleveland Metroparks System, 67 Ohio St. 2d 31, 38, 426 N.E.2d 784, 788 (1981) (abolishing the defense of governmental immunity for a board of commissioners of a park district engaged in a proprietary function and stating: "fees [charged by the park district] may be adjusted to meet extra expenses incurred as a result of procuring liability insurance"); 1979 Op. Att'y Gen. No. 79-084 at 2-268 (stating that the authority of a board of county commissioners to purchase liability insurance is limited by the rationale that "where there is no liability to be insured against, there can be no implied authority to use public funds to purchase [liability] insurance"); 1979 Op. Att'y Gen. No. 79-025 (finding that, in light of judicial action which exposed townships to possible liability under 42 U.S.C. §1983, a board of township trustees had authority to purchase liability insurance to protect the township against such liability); 1972 Op. Att'y Gen. No. 72-007 at 2-44 (public funds may not be expended for liability insurance when no such liability exists"); cf. Carbone v. Overfield, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983) (abolishing the defense of governmental immunity for a board of education and indicating that the authority granted by R.C. 3313.203 to purchase liability insurance covering members and employees of the board permitted the board to purchase liability insurance to protect the board itself; dissenting opinion by J. Holmes challenged this point and the statute has since been amended, see S.B. 288, 115th Gen. A. (1984) (eff. July 4, 1984)). But see Mathis v. Cleveland Public Library, 9 Ohio St. 3d 199, 203, 459 N.E.2d 877, 881 (1984) (Holmes, J., dissenting in part) (stating that "[p]ublic libraries, as entities, do not possess statutory authority to purchase liability insurance" and suggesting that such authority may not be implied). See generally R.C. 307.44 (authorizing a board of county commissioners to purchase liability insurance insuring county officers and employees against liability resulting from the operation of motor vehicles); R.C. 307.441 (authorizing a board of county commissioners to purchase liability insurance insuring various county officers and employees against liability resulting from the performance of their official duties); R.C. 307.442 (authorizing a board of county commissioners to establish and maintain a county or joint-county self-insurance program to cover liability of various county officers and employees resulting from the performance of their official duties).

employed by a private body. It is a general rule that "public agents. . . are not responsible for the omissions, negligence, or misfeasance of those employed under them, if they have employed trustworthy persons of suitable skill and ability, and have not co-operated in the wrong." Conwell v. Voorhees, 13 Ohio 523, 543 (1844). The rule was set forth in Martina v. Stone, 20 Ohio Op. 85, 86 (C.P. Hamilton County 1941), as follows:

While I have no Ohio cases directly in point, *Corpus Juris Secundum*, No. 20, p. 952, Par. 139, states as follows:

"County officials exercising ordinary care in selection of subordinates, whose reliability they have no reason to question, properly instructing them and exercising ordinary care to see that they perform their duties properly, are not liable under the rule of respondent superior for their negligence."

More recently, my predecessor stated: "in the absence of any statute imposing such liability, public officers are not liable for acts or omissions of their subordinates." 1981 Op. Att'y Gen. No. 81-060 at 2-241. See also 1984 Op. Att'y Gen. No. 84-011. No statute imposes upon a county court judge liability for acts of a special constable. Cf. R.C. 3.06(A) ("[a] deputy, when duly qualified, may perform any duties of his principal. . . . The principal is answerable for the neglect or misconduct in office of his deputy or clerk"); R.C. 2101.11 (a probate judge is personally liable for the default, malfeasance, or nonfeasance of his appointees, but where a bond is required the liability of the judge is limited to the amount by which the loss exceeds the bond); R.C. 2151.13 (a juvenile judge is not personally liable for the default, misfeasance, or nonfeasance of any employee from whom a bond has been required); note 2, *supra*. Thus, under the rule outlined above, a county court judge who appoints a special constable under R.C. 1907.201 and R.C. 1907.211 is exposed to potential liability for wrongful acts committed by the constable only if the judge fails to exercise ordinary care in selecting or instructing the constable, or if he cooperates in the wrongful acts.

It might be argued that, under the doctrine of judicial immunity, a judge should be absolutely immune from any possible liability for negligence of a constable whom he appoints.² The doctrine of judicial immunity extends, however, only to acts performed in the exercise of judicial functions, see Wilson v. Neu, 12 Ohio St. 3d 102, 465 N.E.2d 854 (1984), and it appears that the act of appointing a peace officer does not constitute a judicial function. See Stump v. Sparkman, 435 U.S. 349 (1978) (in determining whether an act is judicial it is appropriate to consider whether the function is one which is normally performed by a judge and whether the parties deal with the judge in his judicial capacity); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). Compare R.C. 1907.201 (appointment of special constables by county court judges) with R.C. 4973.17 (appointment of special policemen by the Governor). The fact that there are limits to the scope of judicial

² An exception to this general rule exists for matters involving public funds, for on those matters a public official will be held personally liable for any loss, even if the loss occurs while the funds are, at his direction, in the custody of another person. See, e.g., State ex rel. Village of Linndale v. Masten, 18 Ohio St. 3d 228, ___ N.E.2d ___ (1985); 1980 Op. Att'y Gen. No. 80-074. I assume, for purposes of this opinion, that you are not concerned with questions involving the handling of public funds.

³ It has been held that the doctrine of judicial immunity does not bar an award of attorney fees against a judge under 42 U.S.C. §1983 when injunctive relief is granted against the judge under that provision. Pulliam v. Allen, 104 S. Ct. 1970 (1984). It does not, however, appear that this principle would expose a county court judge to liability for the actions of a special constable because the doctrine of respondent superior is inapplicable in actions brought under 42 U.S.C. §1983. See Monell v. New York City Department of Social Services, 436 U.S. 658, 694 n. 58 (1978); Knipp v. Weikle, 405 F. Supp. 782 (N.D. Ohio 1975). See generally Wilson v. Neu, 12 Ohio St. 3d 102, 104 n. 2, 465 N.E.2d 854, 856-57 n. 2.

immunity is evidenced by the fact that R.C. 307.44(I), as enacted by H.B. 241, 116th Gen. A. (1985) (eff. Oct. 17, 1985), will authorize a board of county commissioners to purchase insurance insuring the judges of the court of common pleas and any county court in the county against liability arising from the performance of their official duties.

Your third question asks, if the county or a county court judge is exposed to liability for wrongful acts committed by special constables while they are employed by private bodies, who is responsible for developing formal policies and procedures to avoid the commission of such wrongful acts. The Revised Code nowhere expressly imposes upon any person or body the responsibility for developing formal policies and procedures for the governance of special constables. As discussed above, however, the county court judge who appoints special constables has certain responsibility for their selection and instruction. Martina v. Stone, 20 Ohio Op. at 86 (quoting 20 C.J.S. Par. 139, p. 952), set forth the rule that county officials should exercise ordinary care in selecting subordinates "whose reliability they have no reason to question, properly instructing them and exercising ordinary care to see that they perform their duties properly." R.C. 1907.201, by the use of the word "may," grants a county court judge discretion in determining whether to appoint special constables and, if so, whom to appoint. See generally Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). R.C. 1907.211 provides that the appointment of a special constable "shall continue in force for one year," unless it is sooner revoked by the judge who made the appointment. This provision recognizes that the judge has a continuing responsibility to make certain that a special constable serves within the authority granted him pursuant to statute. See Op. No. 66-171 at 2-365 ("the county judge is the appointing body and the special constable is responsible to him").

In response to your third question, I conclude that, while there is no requirement that formal policies and procedures be adopted for the governance of special constables, a county court judge who appoints such constables has a general responsibility for exercising ordinary care in their selection and instruction. Cf. Op. No. 66-171 (the petitioning group of freeholders has certain control over the constable, in such matters as determining his hours, defining his work area, and fixing his remuneration).

Your fourth question concerns the possible ouster of special constables who fail to receive certification from the Ohio Peace Officer Training Council (OPOTC) within one year of their original appointment. I assume that this question is based upon 1967 Op. Att'y Gen. No. 67-029, which stated, in the syllabus: "A special constable, who is . . . appointed pursuant to [R.C. 1907.201 and 1907.211], is a 'peace officer', and, as such, must be certified by the executive director of the Ohio Peace Officer Training Council as having satisfactorily completed a basic training course within one year of his original appointment." I note, however, that the provisions governing the OPOTC have been amended since the issuance of Op. No. 67-029 and that, as a result, the conclusion reached in that opinion was overruled by 1984 Op. Att'y Gen. No. 84-008.

Under existing law, certain peace officers are required to complete a training program and be awarded a certificate by the Executive Director of the Ohio Peace Officer Training Council. See R.C. 109.77. The definition of "peace officer" in effect for such purposes appears in R.C. 109.71(A), as follows:

As used in sections 109.71 to 109.77 of the Revised Code:

(A) "Peace officer" means:

(1) A deputy sheriff, marshal, deputy marshal, member of the organized police department of a municipal corporation, member of a

⁴ R.C. 307.44(I), as enacted by H.B. 241, 116th Gen. A. (1985) (eff. Oct. 17, 1985), will also authorize a board of county commissioners to purchase insurance insuring the employees of the court of common pleas and any county court in the county against liability arising from the performance of their official duties. See generally note 1, supra.

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.

See also [1981-1982 Monthly Record] Ohio Admin. Code 109:2-1-02 through 109:2-1-18 at 381-85.

I considered this definition in Op. No. 84-008, and I concluded, in the first paragraph of the syllabus:

In order for a person to be a peace officer as defined in R.C. 109.71(A)(1), three criteria must be met. First, the person must be appointed to one of the specific positions enumerated therein. Second, the person must be commissioned or employed by a political subdivision of this state. Third, the person's primary duties must be to preserve the peace, to protect life and property and to enforce laws, ordinances or regulations.

Accord, 1984 Op. Att'y Gen. No. 84-020. In Op. No. 84-008, I expressly overruled Op. No. 67-029 and stated, at 2-25: "Court constables appointed pursuant to R.C. 1907.201 . . . are not included in the definition of peace officer set forth in R.C. 109.71(A)(1), since these positions are not specifically enumerated therein." It follows that such constables are not required to receive certification from the Ohio Peace Officer Training Council. Consequently, the lack of such certification would provide no basis for an attempt to oust such constables. I note further, as a practical matter, that, under R.C. 1907.211, the appointment of such a special constable continues in force for only one year, unless revoked sooner. Thus, unless a new appointment is made, a special constable shall cease to hold his position after one year has passed.

It might be argued that the language of R.C. 1907.201 which states that, "so far as necessary for [the purpose for which he is appointed], a constable [appointed pursuant to R.C. 1907.201] has the same authority and is subject to the same obligations as other constables," operates to require a special constable to meet the OPOTC training requirements that are applicable to other constables. See, e.g., R.C. 109.71(A)(1) (including a "township constable" as a peace officer); R.C. Chapter 509. For the reasons discussed in Op. No. 84-008, however, I believe that the certification requirements of R.C. 109.77 must be applied only to persons who are specifically enumerated in R.C. 109.71(A). This conclusion is consistent with the conclusion reached by my predecessor in 1958 Op. Att'y Gen. No. 3061, p. 703,

that the language of R.C. 1907.201 did not subject a special constable to bonding requirements appearing in R.C. 509.02, but, rather, that those requirements applied only to constables who were elected as provided in R.C. 509.01 or were specifically made subject to R.C. 509.02 by statute.⁵ See generally Op. No. 74-041 at 2-178 ("a special constable has the same powers as other constables so far as they are necessary to the performance of his duties").

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

1. A county may suffer liability for wrongful acts committed by a special constable, appointed under R.C. 1907.201 and 1907.211, who is employed by private persons, if it is determined as a matter of fact that the special constable performed such acts in his capacity as a public officer.
2. A county court judge who appoints a special constable under R.C. 1907.201 and 1907.211 is exposed to potential liability for wrongful acts committed by the constable if the judge fails to exercise ordinary care in selecting or instructing the constable, or if he cooperates in the wrongful acts.
3. While there is no requirement that formal policies and procedures be adopted for the governance of special constables appointed under R.C. 1907.201 and 1907.211, a county court judge who appoints such constables has a general responsibility for exercising ordinary care in their selection and instruction.
4. Special constables appointed pursuant to R.C. 1907.201 and 1907.211 are not included in the definition of peace officer set forth in R.C. 109.71(A)(1) and, therefore, need not receive certification from the Ohio Peace Officer Training Council. (1984 Op. Atty Gen. No. 84-008, syllabus, paragraph one, approved and followed in part.)

⁵ Township constables are no longer elected. They are now designated by the board of township trustees. R.C. 509.01.