

Notice Number

Date

LOCAL FINANCE NOTICECHRISTINE TODD WHITMAN
GOVERNORJANE M. KENNY
COMMISSIONERULRICH H. STEINBERG, JR.
DIRECTOR**Managing and Accounting for Outside Employment of Police Officers**

The Division has recently received a number of inquiries on certain practices regarding Off-Duty, or Outside Employment, by Police Officers. This Notice serves to define the issues and provide recommendations that will ensure the municipality's compliance with the Attorney General's opinions, the Fair Labor Standards Act, and statutory law. If your organization engages in these practices, please share this Notice with your Police Chief and other appropriate individuals in your organization as soon as possible.

Defining the Issues

Throughout the State, municipal police officers, during their off-duty hours, engage in police related activities for private persons or entities, such as serving as patrolmen to direct traffic at shopping centers, construction sites, or office complexes, as well as serving as security at construction projects and in other environments. Attorney General Formal Opinion 1997-No. 23, made it clear that such activities are permissible for regular members of a police department only **if** an arrangement has been made between the private persons or entities and the employing municipality.

The word "if" in the previous sentence is purposely highlighted to emphasize the importance of the relationship between the private person or entity and the municipality. A police officer is a police officer **only** when he or she is paid for services rendered through the payroll of the police agency – the municipality. Therefore, private persons or entities must contract directly with, and remit payment directly to, the municipality for the services of police officers during their off-duty hours. Any attempt by private persons or entities to contract directly with, and make payments directly to, a police officer, is in violation of the Attorney General's opinion and could jeopardize the police officers' pension and health and accidental death benefits, as well as represent a potential liability on the part of the municipality.

To sum up this principle, a police officer cannot act as a police officer unless he or she is being paid directly by the municipality through the payroll system.

Existing Practices

Since the 1997 Opinion, many municipalities have developed internal administrative systems to collect fees from the private persons or entities desiring the use of police officers. Most often, they involve collecting a flat rate fee for services, which often include a service charge based on a fixed amount or percentage of hourly salary to cover the municipality's expense in administering the program. Unfortunately, in many cases, the fees have been collected after the work had been done, and payment not made to the officers until after the fees have been collected.

Director's Office
(609) 292-6613Local Government
Research
(609) 292-6110Financial Regulation
and Assistance
(609) 292-4806Local Finance
Board
(609) 292-0479Local Management
Services
(609) 292-7842Authority Regulation
(609) 984-0132Fax
(609) 984-7388

While this practice ensures an accurate accounting of the cost to the private person or entity, it often delayed overtime payments, and created difficulties if the fee were found to be uncollectible. Further complicating this issue is the fact that municipalities cannot expend funds for wages for which there is no budget appropriation without incurring the deferred charge of an expenditure without an appropriation.

This issue recently came to a legal head, when a federal lawsuit (Vincent Cahill, et al., v. City of New Brunswick), was resolved and concerned the timing of wages paid to police officers for Off-Duty and Outside Employment. In this case, the police officer plaintiffs cited information from a bulletin issued in 1972 from the U.S. Department of Labor which states that as a general rule, overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which the workweek ends.

Further, under the U.S. Fair Labor Standards Act, employers are required to pay excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonable necessary for the employer to compute and arrange for the payment of the amount due, and in no event may the payment be delayed beyond the next payday after such computation can be made.

If your organization uses these practices, you are at risk of an FLSA violation and violation of State budgeting law.

In addition to these practices, the Division has found that some municipalities inappropriately use “contra” accounting methods, where officers were paid through the normal salary and wage budget line item. When revenues are received from the users of police services, the revenues served as a reimbursement to the salary account. Under this system though officers were paid on time, if funds were not collected, taxpayers absorbed up the loss. This practice is not authorized and is contrary to State law and regulations regarding use of public funds, anticipation of revenue, purpose of expenditures, and disclosure of financial activities.

Resolving the Issue – Best Practices

After review of the issues related to off-duty and outside employment of municipal police officers, the Division offers the following recommendations to ensure full compliance with all federal, statutory, and regulatory law, as well as current judicial cases and Attorney General opinions.

First and foremost, each municipality should adopt a formal policy related to the off-duty or outside employment of its police officers. The policy should provide for the exercise of the municipality’s authority to regulate outside employment and to set hourly compensation rates consistent with the provisions of the Fair Labor Standards Act.

In addition to setting fair wage rates, the municipality may establish fees to recoup the costs associated with the administration of the Off-Duty or Outside Employment Program. These may include employers’ share of social security, administrative costs of maintaining time sheets, payroll processing, and billing vendors, and any additional liability insurance costs associated with the services provided. The municipality cannot set rates or fees that are onerous to private persons or entities contracting for services or result in using the program as a revenue-generating device. These rates or fees must be tied directly to the cost of administration. Like all fees, they should be set by ordinance.

Under regulations previously promulgated by the Local Finance Board, municipalities are permitted to establish a dedicated by rider trust fund for the receipt of fees collected from private persons or entities for the payment of wages to police officers for off-duty or outside employment services.

To address the issue of timely payment of wages to police officers for these services and to meet the requirements of the Fair Labor Standards Act, the Division is recommending that the administration of this fund be handled in the same manner as the Developers' Escrow Fund. In other words, the Division recommends that private persons or entities requesting the services of police officers be required to submit payment, based on estimates of the work to be done, in advance of services rendered. The municipality would "escrow" the moneys in the dedicated fund to ensure timely payment to the police officers.

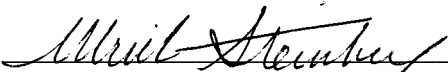
Those private persons or entities which require continuous service would have to maintain a minimum balance in an amount equal to the average amount paid to the police officers within a specified time, such as monthly, semi-annually, or annually, and would be billed as necessary to ensure a sufficient balance at all times. If there are insufficient funds, services could be cut off until the fund is replenished.

Conversely, the municipality would return any moneys in the fund in excess of the cost of the services to private persons or entities within a reasonable period. The Developer Escrow provisions related to interest earnings do not apply to this process, as they are specifically authorized in the Municipal Land Use Law.

While this practice may require additional administrative effort, the municipality's cost could be recouped in fees or rates established for this purpose.

Finance officers are also reminded that the use of the contra accounting practice is not permitted. Auditors should be including a review of these practices as part the audit and internal controls review.

Because these issues may affect labor contracts with police unions, you may wish to seek advice from your labor counsel on the issue. In addition, copies of the legal opinions and cases related to off-duty or outside employment of police officers can be obtained from the Division and are also posted on the Local Finance Notice section of the Division web site. Questions and requests for copies of the opinion can be directed to the Bureau of Financial Regulation and Assistance at 609-292-4806.


Ulrich H. Steinberg, Jr., Director
Division of Local Government Services

Distribution: Municipal and County Chief Financial Officers, Registered Municipal Accountants