



STATE OF ALABAMA ETHICS COMMISSION



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ADVISORY OPINION 2018-08

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A police officer may work an off-duty job as security for a private business so long as they did not use their position as leverage to obtain the opportunity or to create the opportunity and they are performing the work on their own time and not on public time.

If the use of equipment is pursuant to a lawful employment agreement regulated by agency policy, an off-duty officer may use equipment, facilities, time, materials, human labor, or other public property under their discretion or control in an off-duty job with a private business. Absent that agreement, it would be a violation of Ala. Code §36-25-5(c) for an off-duty officer to use any equipment available to him as a public employee while working for a private business.

Dear Mr. Brumlow:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission, and this opinion is rendered pursuant to that request.

FACTS

The facts as have been presented to the Commission are summarized as follows:

It is a widespread practice for law enforcement officers to work for private businesses in their off-time. Police officers with the City of Alabaster frequently work off-duty jobs for various businesses, for example, churches, restaurants, schools, and retail stores.

QUESTIONS PRESENTED

1. Is it permissible for a police officer to accept an off-duty job for a private business that requires the performance of work that could reasonably be performed while on-duty?
2. May a police officer working an off-duty job utilize their official police vehicle and equipment while they are working for a private business?

ANALYSIS

Ala. Code § 36-25-5(c) states:

(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy.

Full-time police officers are public employees¹ and therefore subject to the Ethics Act. The public official or public employee may not use their position as leverage to obtain personal gain. "The Ethics Commission has long recognized that public officials and public employees should not be denied outside business opportunities available to all other members of the public, provided a conflict of interest does not exist."²

¹ See Ala. Code §36-25-1(26).

² See Advisory Opinion 2005-21

“In Advisory Opinion No. 95-113 issued on December 6, 1995, the Ethics Commission stated, ‘Clearly, some public employees, by virtue of their job duties and expertise, would be uniquely qualified for certain secondary employment. These employees should not be denied the opportunity available to all other citizens to acquire and retain private, economic, and other interests; however, they may not use their public positions to obtain the secondary employment, and thereby obtain personal gain.’”³

Police officers occupy a unique position as public employees. They are tasked with patrolling our communities, directing traffic, responding to crime scenes, and responding to emergencies. To perform those tasks, they must possess the necessary equipment (including, but not limited to, a uniform, badge, gun, radio, handcuffs, taser, and a police car outfitted with emergency lights). Police officers’ public duty and expertise likewise make them a logical choice for the private sector to hire as security officers whether for a church, retail store, bar or restaurant.⁴ Further, the security performed at private businesses by off-duty police officers is within the scope of their responsibilities as public employees were they to be on official time. The police departments, however, do not have the budget or personnel to provide individualized security for businesses, churches, or retail stores. Therefore, the businesses hire off-duty officers to perform those jobs and the community benefits as well by having additional officer presence for which the public does not have to pay.

Ala. Code § 36-25-5(a) prohibits a public employee from using their public position as leverage to obtain employment but does not prohibit a public employee from using the skills and expertise developed as a public employee in their private employment.⁵ The police officer cannot trade any favors in their public position with a business for a job with that business or promise any future favorable treatment for a business in their public position in order to get a job. In response to the first question, therefore, a police officer may work an off-duty job as security for a private business so long as they did not use their position as leverage to obtain the opportunity or to create the opportunity and they are performing the work on their own time and not on public time. This opinion does not supplant any personnel restrictions an agency places on outside employment and it is the responsibility of the public employee to abide by those restrictions independent of this opinion.

Regarding the second inquiry, there is a public benefit to an off-duty police officer working as a security officer because that officer retains full arrest powers under Ala. Code § 15-10-3 whether the officer is on duty or off duty. Therefore, were there to be the need for an arrest while an off-duty officer is working as a security officer, that officer could make the arrest

³ See Advisory Opinion 1999-29

⁴ See Advisory Opinion 1995-113

⁵ See Advisory Opinion 2008-21

immediately and eliminate the threat posed by the offender rather than waiting for the officer working that beat to respond and make the arrest.⁶ Public employees, however, are not permitted to use equipment, facilities, time, materials, human labor, or other public property under their discretion or control for their personal benefit or that of a family member or a business with which they are associated unless there is a lawful employment agreement regulated by agency policy allowing that use.⁷ This Commission has never formally addressed this issue, but the Attorney General has in Attorney General Opinion 84-00318. In that opinion, the question asked was whether a municipal police department may allow a police officer to utilize city-owned and issued equipment such as gun, walkie-talkie, motorcycle, motor vehicle, etc., when he is not working for the city but as a security guard for another employer. The Attorney General answered as follows:

[w]hen authorized by the city council such uniforms and police equipment may be used by off-duty police officers in proper cases. Informal opinion of the Attorney General, dated July 27, 1982 addressed to Honorable Earl F. Hilliard, State Senator, 15th District, P. O. Box 11385, Birmingham, Alabama. In that opinion the proper case was said to be one where the city could provide the service by on-duty police and the service involved security and traffic control at a baseball stadium in the City of Birmingham. Under these circumstances this office further held that the wearing of the uniform did not violate Section 94 of the Constitution of Alabama 1901.

The Attorney General opinion did not address whether this use would violate the prohibition in Ala. Code § 36-25-5(c). Rather, it addressed whether the use of the equipment violated Section 94 of the Constitution of Alabama 1901 which prohibits the Legislature from authorizing any county, city, town, or other subdivision of this state to grant a thing of value in aid of or to any individual. This restriction in the Constitution is similar to the restriction in Ala. Code § 36-25-5(c) in that it limits an individual from being permitted to use a thing of value personally that is owned by the government. The Attorney General officially sanctioned the use of the equipment by police officers in off-duty jobs to perform work that could reasonably be performed while on duty as a police officer and determined the use did not violate Section 94 of the Constitution of Alabama 1901.

Similarly, the Ethics Act allows official sanctioning of the use of equipment. In fact, the Act states that the use of equipment, facilities, time, materials, human labor, or other public property under an employee's discretion or control is permitted so long as there is a "lawful employment agreement regulated by agency policy." *Emphasis added.* Therefore, the individual

⁶ See Attorney General Advisory Opinion 84-00318; "In Robinson v. State, 361 So.2d 1113 (Ala. 1978) reversing 361 So.2d 1109 (Ala. Crim. App. 1977) the court clearly recognizes the full authority of an off-duty police officer to arrest."

⁷ See Ala. Code § 36-25-5(c)

agency must establish an agency policy to regulate the use of equipment, materials, or other public property under the control of the officer in order for any police officer to use public equipment on an off-duty job. If the use of equipment is pursuant to a lawful employment agreement regulated by agency policy, an off-duty officer may use equipment, facilities, time, materials, human labor, or other public property under their discretion or control in an off-duty job with a private business. Absent that agreement, it would be a violation of Ala. Code §36-25-5(c) for an off-duty officer to use any equipment available to him as a public employee while working for a private business.

CONCLUSION

A police officer may work an off-duty job as security for a private business so long as they did not use their position as leverage to obtain the opportunity or to create the opportunity and they are performing the work on their own time and not on public time.

If the use of equipment is pursuant to a lawful employment agreement regulated by agency policy, an off-duty officer may use equipment, facilities, time, materials, human labor, or other public property under their discretion or control in an off-duty job with a private business. Absent that agreement, it would be a violation of Ala. Code §36-25-5(c) for an off-duty officer to use any equipment available to him as a public employee while working for a private business.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on August 1, 2018.


Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission