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September 27, 1982

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ATTORNEY GENERAL OPINION NO. 82- 215

Gregory O. Clark  
Chief of Police  
Ness City Police Department  
Ness City, Kansas 67560

Re: State Departments; Public Officers, Employees --  
Kansas Tort Claims Act -- Liability of a City for  
Volunteer Reserve Police Officers

Synopsis: A city would be liable to reserve police officers for injuries sustained by them while on duty under the provisions of the Workmen's Compensation Act, and such liability cannot be waived. Because a city's reserve police officers are employees of the city for purposes of the Tort Claims Act, the negligent or wrongful conduct of a reserve police officer may subject the city to liability under that Act, unless such conduct is circumscribed by one of the exemptions from liability provided therein. Cited herein: K.S.A. 44-501, 44-505, 44-508, K.S.A. 1981 Supp. 75-6101, 75-6102 (as amended by L. 1982, ch. 374, §1), 75-6103, 75-6104.

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Dear Chief Clark:

You request an opinion regarding potential liability of a city for injuries arising from the actions of reserve police officers. You state that Ness City has a reserve police unit comprised of four adults who

volunteer their time to provide back up assistance to regular police officers while on patrol. We understand that these reserve officers receive no compensation for their services. You specifically ask whether the city may adopt a procedure to protect itself from civil liability in the event that one of the reserve officers is injured while he is on patrol, and secondly, whether the city would be liable to a member of the public who is injured by a reserve officer while said officer is assisting a regular police officer in the performance of his or her duties.

We first consider whether the city may adopt a procedure to protect itself from liability for injuries incurred by reserve officers while performing their official duties in light of K.S.A. 44-501 et seq, the Kansas Workmen's Compensation Act. K.S.A. 44-501 provides in pertinent part:

"If in any employment to which the workmen's compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, his or her employer shall be liable to pay compensation to the employee in accordance with the provisions of the workmen's compensation act."

K.S.A. 44-508(a) defines "employer" as including "any city, county, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof." K.S.A. 44-505 mandates that the act shall apply to all "employments" not specifically exempted. Boyd v. Barton Transfer & Storage, 2 Kan.App.2d 425, 249 (1978). Employment as a reserve police officer has not been so exempted. To the contrary, K.S.A. 44-508(b) defines "workman" or "employee" as including "persons serving on a volunteer basis as duly authorized law enforcement officers . . . but only to the extent and during such periods as they are so serving in such capacities."

Therefore, construing these provisions together, we conclude that volunteer reserve police officers are employees of the city who are covered by the provisions of the Workmen's Compensation Act while they are on patrol or are performing other official duties. Hence, the city would be liable for any injuries sustained by reserve officers within the course of their employment in accordance with the provisions of the Workmen's Compensation Act. That act provides the exclusive remedy for an employee to seek redress from his or her employer for injuries suffered in the scope of the employee's employment and arising out of such employment. Davidson v. Hobart Corp., 643 F.2d 386 (10th Cir. 1981); Yocum v. Phillips Petroleum Co., 228 Kan. 216, 224 (1980). Moreover, it has long been held that public policy precludes an employer from requiring an employee to

waive his rights to workmen's compensation. Red Rover Copper Co. v. Industrial Commission, 118 P.2d 1102 (1941); Industrial Commission of Arizona v. J. & J. Construction Co., 231 P.2d 762 (1951). Accordingly, we also are of the opinion that the city may not secure waivers from reserve police officers which would remove the officers from coverage under the Workmen's Compensation Act.

We now consider whether the city would be liable to members of the public who may be injured by a reserve police officer while that officer is on patrol. The Kansas Tort Claims Act, K.S.A. 1981 Supp. 75-6101 et seq., sets forth the circumstances in which a municipality may be sued for the tortious actions of its employees. In our opinion, because K.S.A. 1981 Supp. 75-6102(d), as amended by L. 1982, ch. 374, §1, defines "employee" as "any officer, employee or servant . . . including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation," reserve police officers while on duty must be considered to be employees of the city for purposes of the Tort Claims Act. This view is consistent with Kansas case law which discusses when a master-servant relationship is said to exist.

"[A] master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. (Evans v. Board of Education of Hays, 178 Kan. 275, 278, 284 P.2d 1068.) It is not the exercise of direction, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control. (Bowler v. Elmdale Developing Co., 185 Kan. 785, 787, 347 P.2d 391; Schroeder v. American Nat'l Bank, 154 Kan. 721, 121 P.2d 186; Davis v. Julian, 152 Kan. 749, 756, 107 P.2d 745.) The necessity of the control element was also recognized in Henderson v. Sutton's Food City, 191 Kan. 145, 379 P.2d 300." Atwell v. Maxwell Bridge Co., 196 Kan. 219, 224 (1966).

See, also, Chasteen v. Childers, 218 Kan. 519, 530 (1976).

The right to control the actions of another is the primary test in determining whether a master-servant relationship exists, and payment of compensation is not a necessary factor. In re Read's Petition,

224 F.Supp. 241 (S.D. Fla. 1963); Bollman v. Kark Rendering Plant, 418 S.W.2d 39 (Mo. 1967); Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736 (Maine, 1942); Lowry v. Kneeland, 117 N.W.2d 207 (Minn. 1962). The city would have the right to control the actions of reserve police officers while on duty as it would the actions of regular police officers. Therefore, we believe a city's reserve police officers must be regarded as employees of the city for purposes of the Kansas Tort Claims Act.

As to the city's liability under the Tort Claims Act, K.S.A. 1981 Supp. 75-6103 states in pertinent part:

"Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

Thus, the liability of the city would be limited to those instances in which a court determined that a reserve police officer had acted negligently or wrongfully within the scope of his employment. The rule for determining whether an employee is acting within the scope of his employment was stated in Hollinger v. Stormont Hospital and Training School for Nurses, 2 Kan. App.2d 302, 311-12 (1978), thusly:

"An employee is acting within the scope of his authority when he is performing services for which he has been employed or when he is doing anything which is reasonably incidental to his employment. The test is not necessarily whether the conduct was expressly authorized or forbidden by the employer, but whether such conduct should have been fairly foreseen from the nature of the employment and the duties relating to it. The liability of an employer for the acts of his employees depends not upon whether the injurious act of the employee was willful and intentional or was unintentional, but upon whether the employee, when he did the wrong, was acting in the prosecution of the employer's business and within the scope of his authority or had stepped aside from that business and had done an individual wrong. The now generally recognized rule is that the employer is liable for the reckless, willful, intentional, wanton, or malicious acts of his employee as well as for his heedless and careless acts if they are committed while the employee is acting in

the execution of his authority and within the course of his employment, or with a view to the furtherance of his employer's business, and not for a purpose personal to the employee. Williams v. Community Drive-In Theater, Inc., supra. See also, Beggerly v. Walker, 194 Kan. 61, 397 P.2d 395 (1964) . . . If an assault by an employee is motivated entirely by personal reasons such as malice or spite or by a desire to accomplish some unlawful purpose, and does not have for its purpose the furtherance of the employer's business, it will be considered personal to the employee and not such as will make the employer answerable. Williams v. Community Drive-In Theater, Inc., supra."

However, the Tort Claims Act prescribes a number of instances where a governmental body is exempted from tort liability, even though its employee was acting within the scope of his or her employment.

K.S.A. 1981 Supp. 75-6104 provides in pertinent part:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . . .

"(c) enforcement of or failure to enforce a law, whether valid or invalid, including but not limited to, any statute, regulation, ordinance or resolution;

"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee whether or not the discretion be abused;

. . . .

"(m) failure to provide, or the method of providing, police or fire protection. . . ."

Therefore, even though alleged negligent or wrongful conduct of a city's reserve police officer occurs during the course of such officer's employment, the city may be exempt from liability, if such conduct is circumscribed by any of the foregoing exemptions. In this regard, we are enclosing a copy of Attorney General Opinion No. 81-98, which concluded that no tort

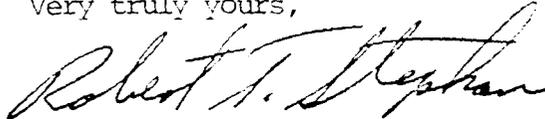
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liability resulted from the discretionary acts of a probation officer in carrying out his duties under a work restitution program. Also, for a discussion of the exemption within the Tort Claims Act for discretionary actions of police officers, see the recent decision of the Kansas Supreme Court in Robertson v. City of Topeka, et al. (No. 53, 613, decided May 8, 1982).

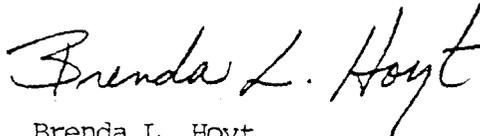
In light of the foregoing authorities and provisions of the Tort Claims Act, it is apparent that a precise answer cannot be provided to your second inquiry. Whether the city would be liable in tort for the actions of a reserve police officer cannot be determined in the abstract. That issue must be resolved on a case by case basis, by applying the relevant statutory and case law to all the facts and circumstances of each case, as determined by the ultimate trier of fact.

In conclusion, a city would be liable to reserve police officers for injuries sustained by them while on duty under the provisions of the Workmen's Compensation Act, and such liability cannot be waived. Because a city's reserve police officers are employees of the city for purposes of the Tort Claims Act, the negligent or wrongful conduct of a reserve police officer may subject the city to liability under that Act, unless such conduct is circumscribed by one of the exemptions from liability provided therein.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



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RTS:JEF:BLH:may