

Code enforcement officer carrying firearm

Number: AGO 2012-14

Date: April 25, 2012

Subject:
Code enforcement officer carrying firearm

Ms. Alison P. Rogers
Escambia County Attorney
221 Palafox Place, Suite 430
Pensacola, Florida 32502

RE: CODE ENFORCEMENT OFFICERS--COUNTIES--LAW ENFORCEMENT OFFICERS--
FIREARMS--code enforcement officer not authorized to carry firearms within scope of duty as
code enforcement officer; however, law enforcement officer designated as a code enforcement
officer may carry firearm in carrying out law enforcement duties. s. 162.21, Fla. Stat.

Dear Ms. Rogers:

You ask the following questions:

1. May Escambia County authorize its code enforcement officers acting pursuant to Chapter 162, Florida Statutes, to openly carry firearms in the scope of their employment?
2. If so, is permission of the sheriff also required?
3. If a code enforcement officer has been trained and registered as a law enforcement officer in the county's "Original Agency Identifier" account, may the county employ them with all the entitlements of a law enforcement officer under Florida law?

In sum:

1. A code enforcement officer is not authorized to carry a firearm within the scope of his or her employment. Should a code enforcement officer also be certified as a law enforcement officer, the carrying of a firearm would be attendant to the individual's status as a law enforcement officer, not as a code enforcement officer.
2. In light of the answer to your first question, no further comment is necessary.
3. A law enforcement officer employed as a code enforcement officer is not acting as a law enforcement officer and would not, therefore, be entitled to the benefits extended to law enforcement officers under Florida Law.

In light of the interrelated nature of your questions, they will be addressed together.

You state that Escambia County is a non-charter county. The Escambia County Board of County Commissioners has a code enforcement division which employs several officers who enforce the county code and provide environmental code enforcement within the unincorporated portion of the county. The county has adopted the procedures in Chapter 162, Florida Statutes, for the enforcement of its code and employs a special magistrate to hear code enforcement cases. The code enforcement officers do not carry firearms at this time, but due to safety concerns, the board wishes to investigate the ability of such officers to do so.[1] According to your letter, the county uses the provisions of Chapter 162, Florida Statutes, particularly sections 162.21–162.30 to enforce its code provisions.

Chapter 162, Part I, Florida Statutes, authorizes cities and counties by ordinance to create code enforcement boards for the enforcement of their local codes.[2] The provisions in that part, however, are a supplemental means of obtaining compliance with local codes and "[n]othing contained in ss. 162.01-162.12 shall prohibit a local governing body from enforcing its codes by any other means." [3] The chapter contemplates a procedure for the enforcement of local codes and ordinances through the imposition of administrative fines and other *noncriminal* penalties.[4]

A "code inspector" is defined as "any authorized agent or employee of the county or municipality whose duty it is to assure code compliance." [5] It is the duty of the code inspector to initiate enforcement proceedings before the code enforcement board.[6] The code inspector notifies a violator of a violation and gives him a reasonable time to correct it. If the violation continues, the inspector notifies the code enforcement board and requests a hearing. The remainder of the enforcement procedure is carried out by the code enforcement board.[7]

Chapter 162, Part II, Florida Statutes, sets forth further procedures for the enforcement of county or municipal codes. Section 162.21(2), Florida Statutes, provides:

"A county or a municipality may designate certain of its employees or agents as code enforcement officers. The training and qualifications of the employees or agents for such designation shall be determined by the county or municipality. Employees or agents who may be designated as code enforcement officers may include, but are not limited to, code inspectors, *law enforcement officers*, animal control officers, or firesafety inspectors. Designation as a code enforcement officer does not provide the code enforcement officer with the power of arrest or subject the code enforcement officer to the provisions of ss. 943.085-943.255. . . ." (e.s.)

The inclusion of law enforcement officers in the list of employees or agents who may be appointed as code enforcement officers indicates that there is a distinction between the positions.[8] Furthermore, the statute makes it clear that designation as a code enforcement officer does not provide such individual with the power of arrest or subject him or her to the requirements of the Criminal Justice Standards and Training Commission.[9]

While this office does not interpret local codes and ordinances, I would note that the Escambia County Code of Ordinances states that a "[c]ode enforcement officer means any designated employee or agent of the county whose duty it is to enforce codes through the issuance of citations as provided in F.S. ch. 162, pt. II." [10]

As you have indicated, certain code enforcement officers employed by the county possess the

qualifications for a law enforcement officer pursuant to section 943.13, Florida Statutes; however, it would appear that the job which they perform is enforcement of the county's code, the violation of which is a civil infraction subject to a civil penalty.[11] This office has recognized that a law enforcement officer is distinguishable from a code enforcement officer since the law enforcement officer is enforcing the criminal laws of this state.[12]

In Attorney General Opinion 97-12, this office was asked whether a city's designation of one of its police officers to also serve as a code enforcement officer authorized the officer to carry firearms and make arrests as a code enforcement officer. While municipalities do not have home rule powers to grant non-law enforcement personnel the power to make arrests, carry firearms, and conduct searches and seizures,[13] the opinion recognized that code enforcement statutes do not prevent a law enforcement officer designated as a code enforcement officer from exercising his or her authority as a law enforcement officer. The opinion noted that if the police officer, while carrying out duties of a code enforcement officer, observes an offense for which an arrest may be made, he or she may make such an arrest. However, since a code enforcement officer has no authority to carry firearms or to make arrests, the officer in making an arrest or carrying a firearm while carrying out code enforcement duties "was doing so as a municipal police officer" and not as a code enforcement officer.[14]

The courts of this state and this office have recognized that the Legislature has preempted the field of firearms regulation.[15] Any ordinance or regulation attempting to regulate firearms is stated to be null and void when enacted by jurisdictions other than the state or the federal government.[16] Thus, the lawful possession of a firearm by a particular officer or employee in performing his or her duties must be authorized by the Legislature.

In light of the foregoing discussion, it is clear that a law enforcement officer employed as a code enforcement officer is not acting as a law enforcement officer when he or she is carrying out the duties of the code enforcement officer. Furthermore, section 162.21(2), Florida Statutes, as noted above, clearly indicates that designation as a code enforcement officer does not entitle the individual to the benefits extended to law enforcement officers under Florida law. I would also note that the Legislature has not included code enforcement officers in those positions specified as "special risk class" under the Florida Retirement System.[17]

Accordingly, it is my opinion that a code enforcement officer is not authorized to carry a firearm within the scope of his or her employment nor participate in benefits extended to law enforcement officers under Florida law. However, a code enforcement officer who is a certified law enforcement officer, carries a firearm attendant to his or her status as a law enforcement officer, not as a code enforcement officer.

Sincerely,

Pam Bondi
Attorney General

PB/tals

[1] You indicate that previously some of the county's code enforcement officers were deputized by the sheriff and were certified law enforcement officers; however, the sheriff revoked the deputy privileges, but the officers continue to maintain their law enforcement training.

[2] See s. 162.03, Fla. Stat.

[3] Section 162.13, Fla. Stat.

[4] See s. 162.02, Fla. Stat.

[5] Section 162.04(2), Fla. Stat.

[6] Section 162.06(1), Fla. Stat.

[7] Sections 162.06–162.08, Fla. Stat.

[8] See *City of North Miami v. Miami Herald Publishing Co.*, 468 So. 2d 218, 220 (Fla. 1985) (in construing legislation, it is not assumed that the Legislature acted pointlessly or enacted useless legislation).

[9] Section 162.21(2), Fla. Stat.

[10] Section 30-4, Escambia County Code of Ordinances.

[11] See s. 30-64, Escambia County of Ordinances, Enforcement by citation, providing:

"The county code or any ordinance may be enforced using the citation procedure. When the citation procedure is used to enforce county codes and ordinances, the following will apply:

(1) A violation of the code or ordinance is deemed a *civil infraction*.

(2) A maximum *civil penalty* not to exceed \$500.00 may be imposed.

(3) A civil penalty of less than the maximum civil penalty established by the board of county commissioners may be imposed if the person who has committed the civil infraction does not contest the citation.

(4) A citation may be issued by a code enforcement officer who has reasonable cause to believe that a person has committed an act in violation of a code or ordinance.

(5) A citation may be contested in county court.

(6) Such procedures and provisions as are necessary to enforce county codes and ordinances." (e.s.)

[12] See Op. Att'y Gen. Fla. 94-40 (1994) (absent legislative authorization for code enforcement officers to possess law enforcement powers or allowing a municipality to delegate such powers to a non-law enforcement agent or employee, a municipality may not grant law enforcement powers to its code enforcement officers). See *also* s. 943.10(1), Fla. Stat., defining "[l]aw enforcement officer" as "any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with the authority to bear arms and make arrests; and whose *primary responsibility is the prevention and detection of*

crime or the enforcement of the penal, criminal, traffic, or highway laws of the state." (e.s.)

[13] See Op. Att'y Gen. Fla. 81-38 (1981) (municipality has no home rule power to grant members of its fire department or its fire officials authority to serve summonses or criminal process, make arrests, carry firearms, and make searches and seizures, or make affidavits necessary to authorize arrests and searches and seizures, as a sheriff or his deputies may do, in connection with the enforcement of its fire prevention code or the enforcement of Ch. 633, Fla. Stat.). *And* see Op. Att'y Gen. Fla. 82-12 (1982) (power to create appointive office does not include power to vest officer with powers of a law enforcement officer).

[14] See *also* Op. Att'y Gen. Fla. 94-40 (1994) (absent legislative authorization for code enforcement officers to possess law enforcement powers or allowing a municipality to delegate such powers to a non-law enforcement agent or employee, a municipality may not grant law enforcement powers to its code enforcement officers).

[15] See *Penelas v. Arms Technology, Inc.*, 778 So. 2d 1042 (Fla. 3d DCA 2011), *review denied*, 799 So. 2d 218 (Fla. 2001); *National Rifle Association of America, Inc. v. City of South Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002); Ops. Att'y Gen. Fla. 11-20 (2011), 11-17 (2011), and 08-34 (2008).

[16] Section 790.33(2)(a), Fla. Stat.

[17] See s. 121.0515(3), Fla. Stat., designating law enforcement officers, firefighters, correctional officers, emergency medical technicians or paramedics, community-based correctional probation officers, select positions which require spending at least 75 percent of time performing duties involving contact with patients or inmates in a correctional or forensic facility or institution, youth custody officers, specified employees of the Department of Law Enforcement in the crime laboratory or the Division of State Fire Marshal in the forensic laboratory, and specified employees (and direct supervisors) of a local government law enforcement agency or medical examiner's office spending at least 65 percent of time performing duties involving the collection, examination, preservation, documentation, preparation, or analysis of human tissues or fluids or physical evidence having potential biological, chemical, or radiological hazard or contamination, or using chemicals, processes, or materials that may have carcinogenic or health-damaging properties in the analysis of such evidence.

However, subsection (4) of the statute provides a procedure for designating a position as "special risk" by the Florida Department of Management Services, when any member of the Florida Retirement System employed by a county, municipality, or special district feels that his or her position meets the criteria set forth for membership in the Special Risk Class; the individual requests the employer to submit an application to the department requesting "special risk" designation. If the employer agrees that the member meets the requirements for Special Risk Class membership, the employer must submit an application to the department on behalf of the employee containing a certification that the member meets the criteria for Special Risk Class membership set forth in s. 121.0515, Fla. Stat., and such other supporting documentation as may be required by administrative rule. The department shall, within 90 days, designate or refuse to designate the member as a special risk member. If the employer declines to submit the member's application to the department or if the department does not designate the member as

a special risk member, the member or the employer may appeal to the State Retirement Commission, as provided in s. 121.23, Fla. Stat., for designation as a special risk member.