

FORMAL OPINION

those periods when acting within the discharge of their official duties subject to the guidelines about to be promulgated.

Very truly yours,  
WILLIAM F. HYLAND  
*Attorney General of New Jersey*  
By: PETER H. BRENNAN  
*Deputy Attorney General*

1. *App. A:9-33.1* provides that:

(1) "Disaster" shall mean any unusual incident resulting from natural or unnatural causes which endangers the health safety or resources of the residents of one or more municipalities of the State, and which is or may become too large in scope or unusual in type to be handled in its entirety by regular municipal operating services.

(2) "Local disaster emergency" shall mean and include any disaster, or the imminence thereof, resulting from natural or unnatural causes other than enemy attack and limited to the extent that action by the Governor under this act is not required.

(3) "War emergency" shall mean and include any disaster occurring anywhere within the State as the result of enemy attack or the imminent danger thereof.

(4) "Emergency" shall mean and include "Disaster" and "war emergency" as above in this section defined.

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December 1, 1977

HONORABLE BURRELL IVES HUMPHREYS  
*Prosecutor of Passaic County*  
Court House  
Paterson, New Jersey 07505

FORMAL OPINION 1977—No. 25

Dear Prosecutor Humphreys:

You have requested an opinion with respect to three questions which have been posed concerning individuals employed by certain municipal police departments in Passaic County whose salaries are drawn from funds provided by the Federal Comprehensive Employment and Training Act of 1973 (CETA), 29 *U.S.C.A.* §801 *et seq.* The individuals in question have been hired as members of their respective police departments and perform the regular duties of a police officer. However, in accordance with the provisions of CETA, their employment status is not permanent.<sup>1</sup> You have asked whether the identification card badge or other identifying insignia of a CETA-paid individual must clearly distinguish his status from that of a regular and permanent member of the police force in accordance with Chapter 131 of the Laws of 1977, *N.J.S.A.* 40A:14-146.6. Additionally, you have inquired whether and under what circumstances a CETA employee is authorized to carry a firearm. Finally, you have asked whether CETA officers fall within the scope of the Police Training Act, *N.J.S.A.* 52:17B-66 *et seq.* It is our conclusion based upon a review of the pertinent

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statutory provisions, legislative history and case law that a CETA-paid officer falls within the ambit of the newly enacted *N.J.S.A.* 40A:14-146.6, and that his identifying insignia must therefore display his separate status. With regard to the question of firearms, we conclude that a CETA policeman is a "peace officer" within the meaning of *N.J.S.A.* 2A:151-43(f) and that he may, therefore, carry firearms only during his normal and commonly understood duty hours. He, in particular, may not carry a weapon 24 hours a day. Finally, we conclude that CETA officers fall within the intentment of *N.J.S.A.* 52:17B-68 and 52:17B-69 and must, therefore, complete the New Jersey police training course.

Chapter 131 of the Laws of 1977 was approved on June 30, 1977. It is entitled "an act concerning persons who perform special police or law enforcement functions and providing a penalty for violations." Section 1 of the act, codified as *N.J.S.A.* 40A:14-146.6, provides:

Any other law to the contrary notwithstanding, the identification card, badge or other identifying insignia of any person who serves as a special policeman, auxiliary policeman, civil defense worker, or who performs under the law any special police or law enforcement function in the State or any of its political subdivisions, shall clearly state the name of the agency by which any such person is employed and shall clearly distinguish any such person from the members of any regular and permanent State, county or municipal police department.

We conclude that the purpose of this statute is to enable the public to distinguish the permanently employed, regular, professional police officers from other police and quasi-police employees and volunteers. Common canons of statutory construction, together with the act's legislative history, support this view.

Excluded from the act's prescription are "members of any regular and permanent . . . municipal police department." The appearance in the statute of the phrase "regular and permanent" to modify the noun "police department" initially seems redundant, because, as the term "police department" is commonly used, it is hard to envision one which is not "regular and permanent." The law does not favor redundancies in statutory construction, *e.g.*, *County of Monmouth v. Wissell*, 68 *N.J.* 35, 42-44 (1975), and the problem can be eliminated by surmising the obvious legislative intent to exclude regular and permanent *members* of any police department, *i.e.*, the permanently employed professionals. This conclusion is supported by the legislative history. The statement accompanying Assembly Bill No. 1639 (1976), from which the act originated, eschewed the noun "police department" and employed instead the generically interpretable term "police forces":

This bill would facilitate the identification of those who perform special police functions in the State, and would aid in distinguishing them from members of regular and permanent police forces.

Likewise, the statement to the bill as it was released from the Senate Law, Public Safety and Defense Committee stated:

This bill would require the identification of special police or others performing special police functions to clearly state the name of the organization

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with which they are affiliated. The purpose is to facilitate immediate identification of them and to distinguish them from members of regular and permanent police forces.<sup>2</sup>

Included within the statutory prescription is "any person . . . who performs under the law any special police or law enforcement function." The term "special police or law enforcement function" is not defined, but the statute and the statements accompanying the bill from which it originated, *supra*, manifest an intent to dichotomize all police and quasi-police appointments into two categories: those which perform under the law a special police function, and those which are regular and permanent. Accordingly, a person performs under the law a special function if his engagement in police duties is in some sense not regular, or temporary, or both.

The CETA employment contract is in many senses not regular, and it is certainly not permanent. Indeed, under certain circumstances, municipalities are under a federally imposed affirmative obligation to remove CETA policemen from their duties as police officers. In particular, if there is a CETA position and a regular position in which the employees are performing substantially equivalent jobs and the regular employee is laid off, then the CETA employee cannot remain working in that position. He must either be transferred or laid off. In *White v. City of Paterson*, 137 N.J. Super. 220, 225-226 (App. Div. 1975), the court discussed this requirement and many of the other distinctions between CETA employees and those holding regular positions, and demonstrated the tenuous status of CETA employment. For example, CETA-paid policemen have none of the protections against dismissal or demotion that is accorded regular policemen in those jurisdictions which have not adopted civil service. See *N.J.S.A.* 40A:14-147; 40A:14-150. In civil service municipalities, they have none of the protections against dismissal or demotion that are accorded regular civil service employees. Nor do they have the reemployment rights that such employees receive. If a CETA employee desires to secure a permanent municipal job in a jurisdiction which has adopted civil service, he must take the appropriate Civil Service test and achieve appointment in the usual way.

It is these aspects of the CETA work contract which induce our conclusion that CETA policemen are not permanently employed, regular, professional officers. Despite the wide scope of their duties, their function under the law is somewhat akin to that of special policemen (*N.J.S.A.* 40A:14-146) who are temporarily employed and can be terminated without hearing, and who are, moreover, specifically enumerated in *N.J.S.A.* 40A:14-146.6 among those police employees to which the act applies. Because of his distinctive and nonpermanent status, we conclude that the CETA officer performs under the law a special police function and that, in accordance with the act, his identifying insignia must therefore display his separate status.

Additionally, the inquiry poses the question whether and under what circumstances a CETA policeman or policewoman may carry a firearm. New Jersey law generally prohibits the carrying of firearms without a permit. *N.J.S.A.* 2A:151-41. Nevertheless, certain classes of persons such as regularly employed federal, state and local law enforcement officers, members of the armed forces while on duty and others as specified in *N.J.S.A.* 2A:151-43 are exempt from this prohibition.

In particular, *N.J.S.A.* 2A:151-43(d) provides:

Section 2A:151-41 . . . does not apply to . . . [t]he *regularly employed* members, including detectives, of the police department of any county or

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municipality . . . at all times . . . or any special policeman appointed by the governing body of any county or municipality . . . while engaged in the actual performance of his official duties . . . [emphasis supplied]

Thus, only "regularly employed" police officers may carry a firearm 24 hours a day, and the question arises whether a CETA officer is regularly employed. For the reasons previously enumerated in *White v. City of Paterson, supra*, we conclude that CETA officers are not regularly employed. Accordingly, the firearm exemption for CETA policemen must be contained in *N.J.S.A. 2A:151-43(f)*, which provides:

Section 2A:141-41 does not apply to . . . [a]ny jailer, constable, railway police, or *any other peace officer*, when in discharge of his duties. [emphasis supplied]

It is our conclusion that CETA police officers are "peace officers" within the meaning of *N.J.S.A. 2A:151-43(f)*. Thus, a CETA officer may carry firearms only during his normal and commonly understood duty hours. He, in particular, may not carry a weapon 24 hours a day. See *McAndrew v. Mularchuk*, 33 *N.J.* 172, 177 (1960); *State v. Suarez*, 144 *N.J. Super.* 98 (Law Div. 1976); *State v. Nicol*, 120 *N.J. Super.* 503 (Law Div. 1972).

Finally, the question is posed whether CETA officers must be provided with the New Jersey police training course in accordance with the Police Training Act, *N.J.S.A. 52:17B-66 et seq.* In previous informal opinions from the Attorney General, it has been advised that police officers hired pursuant to CETA and pursuant to its predecessor, the Emergency Employment Act of 1971, *Pub. L. No. 92-54*, 85 *Stat.* 146, fall within the ambit of the Police Training Act and must receive the instruction therein set forth. We continue to affirm this view. The definition of "police officer" to which the act applies is very broad and on its fact encompasses CETA employees:

"Police officer" shall mean any employee of a law enforcement unit, including sheriffs' officers, other than civilian heads thereof, assistant prosecutors and legal assistants, special investigators in the office of the county prosecutor as defined by statute, persons appointed pursuant to the provisions of *R.S. 40:47-19*, persons whose duties do not include any police function, court attendants and county corrections officers. [*N.J.S.A. 52:17B-67*]

CETA officers are "employees of a law enforcement unit," and they do not fall into any of the enumerated exceptions.

Thus *N.J.S.A. 52:17B-68* becomes applicable. It provides that "[e]very municipality shall authorize attendance at an approved school by persons holding a probationary appointment as a police officer . . ." Although the act's definition of "police officer" precludes any dispute that CETA employees are not "police officers" within the meaning of this language, the question nevertheless arises whether a CETA officer is capable of holding a "probationary appointment" as that term used in *N.J.S.A. 52:17B-68*. This issue is posed because the term "probationary appointment" is frequently associated with the Civil Service statutes in regard to employees for whom permanent employment is envisioned, e.g., *N.J.S.A. 11:22-6*, and as previously noted, a CETA position cannot be permanent.

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The term "probationary appointment" is not defined in the Police Training Act, but we have no difficulty in concluding that CETA officers, like regular officers, do receive a "probationary appointment." A previous formal opinion of the Attorney General held:

In our opinion the probationary appointment of police officers pursuant to the Police Training Act is separate from and supplementary to the probationary period provided for in R.S. 11:22-6 of the Civil Service law. [Atty. Gen. F.O. 1963, No. 6].

Moreover:

It is clear that the probationary appointment under the Police Training Act is for the purpose of training and educating local police officers; it was not intended to preclude or take the place of the probationary period used to evaluate the conduct of a police officer on the job before his permanent, Civil Service appointment becomes final. [*Id.*].

Thus the inapplicability of the Civil Service statutes to CETA employees does not relieve municipalities of their obligation imposed by *N.J.S.A.* 52:17B-68 to provide CETA officers with the New Jersey police training course.

Similarly, it may be asserted that there is an anomaly in that the Police Training Act establishes the course of instruction as a condition precedent for appointment to a permanent police position, *N.J.S.A.* 52:17B-68 and 52:17B-69, and CETA employees are precluded from permanent employment at least until they pass the civil service examination or regularly enter the police department of municipalities without civil service. *DeLarmi v. Borough of Fort Lee*, 132 *N.J. Super.* 501 (App. Div. 1975), certif. den., 68 *N.J.* 135 (1975). However, the completion of a police training course was not established as a guarantee to a permanent police position. *DeLarmi, supra* at 510. Rather, it was, in part, established in order to "improve . . . the administration of local and county law enforcement" and "to better protect the health, safety and welfare of [New Jersey's] citizens," and in the realization that "police work . . . is professional in nature, and requires proper educational and clinical training . . ." *N.J.S.A.* 52:17B-68.

Nevertheless, there is little doubt that the completion of a police training course will enhance the marketability of CETA officers who later seek permanent police employment through regular channels. In this regard, it may be noted that federal law imposes upon CETA employing agencies the obligations to enhance the job opportunities of program participants and to act towards the transfer of CETA workers into regular employment unsubsidized by the federal funds. *E.g.*, 29 *C.F.R.* §§96.21 (d), 96.23(b) (8), 96.33 (1976). Thus, providing CETA employees with the police training course will serve the dual purpose of fulfilling both State and federal legislative goals.

Moreover, municipalities are strictly obliged to utilize trained personnel in the performance of police duties. The legislative authorization to "create and establish a police department . . . and to provide for the maintenance, regulation and control thereof . . ." *N.J.S.A.* 40A:14-118, carries with it the concomitant duty to furnish public security and to provide for the safety of the citizenry. In particular, this requires that police officers be trained. See also *N.J.S.A.* 52:17B-66.

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The obligation to train police officers is enforceable, *inter alia*, by means of the law of torts. The common law of New Jersey held a municipality liable for its negligence in permitting an officer to go on duty without proper training or experience in handling firearms. *E.g.*, *McAndrew v. Mularchuk*, 38 *N.J.* 156 (1962); *Peer v. Newark*, 71 *N.J. Super.* 12 (App. Div. 1961), certif. den. 36 *N.J.* 300 (1962); see also *Corridon v. City of Bayonne*, 129 *N.J. Super.* 393 (App. Div. 1974). Moreover, a municipality was liable under the doctrine or *respondeat superior* for the negligent actions of its police, who were obligated to employ "extraordinary" care in the handling and using of loaded revolvers. *McAndrew v. Mularchuk, supra*. These principles of the common law are probably carried forth in the New Jersey Tort Claims Act. *N.J.S.A.* 59:2-2 and accompanying comment. No reason suggests itself why liability would be less stringent for a CETA than a regular police officer.

In summary, it is our opinion that the identifying insignia of a CETA officer must display his separate status in accordance with the provisions of *N.J.S.A.* 40A:14-146.6. Moreover, we conclude that CETA policemen are permitted by the Gun Control Law, *N.J.S.A.* 2A:151-41 *et seq.*, to carry firearms only during their normal and commonly understood duty hours. Finally, we conclude that municipalities are under an obligation imposed by *N.J.S.A.* 52:17B-68 to provide CETA officers with the New Jersey police training course.

Very truly yours,

WILLIAM H. HYLAND

*Attorney General of New Jersey*

By: LARRY ETZWEILER

*Deputy Attorney General*

1. This opinion does not address the propriety under New Jersey law of hiring CETA-paid individuals to perform all the regular duties of a police officer. Admittedly, such hiring is not violative of the Civil Service provisions of the State Constitution or the relevant Civil Service statutes. *White v. City of Paterson*, 137 *N.J. Super.* 220 (App. Div. 1975). Nevertheless, it is at least arguable that the legislature intended that only persons who are or who, after a probationary period, will become permanently employed professionals should perform all the usual and regular duties of a police officer. See *N.J.S.A.* 40A:14-118; 40A:14-122 (previously *R.S.* 40:47-3); 40A:14-128 (previously *R.S.* 40:47-5); 40A:14-146.6; 40A:14-147 (previously *R.S.* 40:76-6); *Sprague v. Seaside Park*, 9 *N.J. Misc.* 305, 153 *A.* 641 (Sup. Ct. 1931), *aff'd o.b.*, 109 *N.J.L.* 347 (E. A. 1932); *Kinnard v. Geiler*, 15 *N.J. Misc.* 42, 188 *A.* 670 (Sup. Ct. 1937); *Travaline v. Borough of Paulsboro*, 121 *N.J.L.* 453 (Sup. Ct. 1938); *Sastokas v. Borough of Freehold*, 134 *N.J.L.* 305 (Sup. Ct. 1946); *Caronia v. Civil Service Comm'n*, 6 *N.J. Super.* 275 (App. Div. 1950); *State v. Jones*, 4 *N.J. Super.* 599, 608 (Law Div. 1949), *rev'd on other grounds*, 4 *N.J.* 207 (1950), petition for reargument denied, 4 *N.J.* 374 (1950); *cf. DeLarmi v. Borough of Fort Lee*, 132 *N.J. Super.* 501 (App. Div. 1975), certif. den., 68 *N.J.* 135 (1975). Exceptions to this principle exist for emergent circumstances; for officers appointed only for certain parts of the year (such as during the summer at resort areas); for officers appointed temporarily to fulfill the duties of another officer on leave of absence; or, possibly, for special police officers whose terms encompass at most one year (but see *State v. Jones, supra*, stating that even special officers should not perform all the usual and regular duties of a regular police officer). *N.J.S.A.* 40A:14-122 (previously *R.S.* 40:47-3); 40A:14-144; 40A:14-145; 40A:14-146; *Freas v. Cape May*, 77 *N.J.L.* 164 (Sup. Ct. 1908); *Siebke v. Township Committee of Chester Tp.*, 4 *N.J. Misc.* 226, 132 *A.* 341 (Sup. Ct. 1926); *Kinnard v. Geiler, supra*; *Sastokas v. Borough of Freehold, supra*; *Clifton v. Civil Service Comm'n*, 1 *N.J. Super.* 269 (App. Div. 1949). An argument can be made, however, that these exceptions are exhaustive, and that CETA police officers fall into none of these categories.

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2. The first sentence of the textual statement by the Senate Law, Public Safety and Defense Committee, *supra*, noted only the requirement that the identification of persons performing special police functions must state their organizational affiliation. Although the second sentence went on to explain that the purpose of the statute is to facilitate the public's ability to distinguish such persons from regular and permanent police forces, nevertheless the statement did not explicitly acknowledge the further requirement imposed by the statute that persons performing special functions must also "clearly distinguish" their separate status. This omission should not be interpreted as the Committee's belief that the mere listing of organizational affiliation will always suffice to "clearly distinguish" such separate status. For example, the special policeman is arguably affiliated with his local police department, even though he is not a member thereof, by virtue of his obligations to obey the local police department rules and to subject himself to the supervision of the chief of police. *N.J.S.A. 40A:14-146*. Nevertheless, his separate status must clearly be distinguished on his identifying insignia.

Accordingly, the Committee's statement, *supra*, should certainly not be interpreted as an endorsement of the proposition that mere affiliation with a police department automatically removes an officer from the ambit of the statute.

December 23, 1977

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FRED G. BURKE, *Commissioner*  
*Department of Education*  
225 West State St.  
Trenton, New Jersey 08625

## FORMAL OPINION 1977—No. 26

Dear Commissioner Burke:

The question frequently arises whether the Commissioner of Education and the State Board of Education have the authority under the Public School Education Act of 1975, *N.J.S.A. 18A:7A-1 et seq.* (hereafter Act), to direct a local board of education to undertake a capital project after the voters of a school district have rejected referenda for the issuance of bonds to finance such a project. In particular, the issue arises in circumstances where it has been administratively determined that the school district does not offer a thorough and efficient education to its students and that nothing short of capital improvement would bring the district into compliance with the Education Clause of the 1947 New Jersey Constitution.

Initially, it is clear that the courts of this State have always considered the Commissioner of Education to have broad powers to effectuate constitutional and statutory goals. For example, in *Booker v. Plainfield Bd. of Educ.*, 45 N.J. 161 (1965), the court held that where the Commissioner determined that a local board had taken insufficient action to correct *de facto* segregation, it was within his power to remand the matter to the local board and order that it submit a remedial plan or prescribe a plan of his own. He could take that action notwithstanding that no statute specifically provided him with such authority. The court referred to his broad responsibility to decide controversies under the school laws pursuant to *N.J.S.A. 18A:6-9* and New Jersey's strong policy against racial segregation expressed in Article I, paragraph 5 of the 1947 New Jersey Constitution and in the education laws.