

RESERVE OFFICER PROGRAMS -- *Are You Doing It Right or, at Least, Legally?*

By Gene King, LEAF Coordinator

Newspaper headlines that read, "The State of Michigan is Experiencing Financial Problems," tell the state's municipal leaders something they already know. Every governmental entity has had to revisit budgets to find ways of improving efficiencies or making outright reductions. Thus, it is no surprise that the Michigan's financial problems have adversely affected the state's police services greatly. In some areas, there are times when no police services are available. In response to this problem, municipal officials and law enforcement executives are looking for ways to stretch their budgets to provide more service, and many are adopting or expanding their reserve officer programs.

The decision to operate a reserve officer program requires careful consideration and is one that the governmental entity's top management must make. The decision involves weighing the benefits of having a volunteer program against its risks. Top managers often decide that the municipality can save a lot of money by using volunteers or minimally paid reserves to fill in for licensed police officers. In the short run, this may be true. However, management needs to consider the other aspects of the reserve issue, including their expectations for performance. To illustrate, if a municipal manager has a medical emergency, does he want the person who treats him in the emergency room to be a volunteer who, during the day, works in the local body shop? Not likely. He expects the treating physician to be an educated and licensed professional in the practice of emergency medicine. Why, then, do many governmental officials think that the public does not have the same expectations about trained professionals when they call the police?

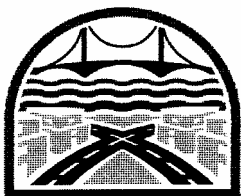
MML Risk Management understands that governmental entities need volunteers to help with various services. For example, volunteers are helpful when police need to handle special events that attract crowds that are well beyond the ability of existing services to manage. However, management must consider whether volunteers should dress like police officers, or if they can be unarmed volunteers that assist in areas that do not require the specific expertise of a licensed police officer.

Michigan's law on a governmental entity's ability to form a reserve unit under specified circumstances and on when peace officers must have licenses is very clear. This LEAF newsletter seeks to expand on this law, thereby helping top management avoid the pitfalls that exist in not managing the use of volunteers correctly. Mismanagement can lead to significant costs and, possibly, embarrassment for the entity.

THE DECISION ON RESERVES

In 1996, LEAF published a newsletter, *RESERVES: Boon or Bother?*, which is available under the resource section of Chapter 16, "Auxiliary-Reserve Officer Program" in the Manual for Law Enforcement Risk Control (www.mml.org under the Insurance tab). The newsletter offers a very good analysis of the issues that management needs to address when determining whether to start a volunteer program. It outlines the pros and cons of reserves and lays out the need for trained and well-supervised participants. I strongly recommend that you review the newsletter, whether you have a long-standing reserve program, or you are contemplating implementing one.

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From a risk management perspective, the major issue in forming a reserve program is safety for the reserve and for the public. Although reserve officers may receive some training, its duration is short compared to the training that licensed officers receive. Moreover, reserves lack experience. Regular officers develop intuition and gain experience when they regularly participate in real life emergencies and tragedies. They rapidly learn the survival and safety techniques that come into play when they face an emergent or dangerous situation or individual. In contrast, reserves generally are not time tested and lack the instincts that experience provides. The profession has long recognized this problem, and MCOLES is contemplating it as it grapples with how to define "regularly employed" as it relates to their administration of the licensing of part-time officers.

Reserve officers have less exposure to emergencies and tragedies than even part-time officers have. Additionally, the reserves' ability to act independently is very limited. Since the reserves have no police authority, other than that of a private citizen, they must exercise their police powers through a licensed officer. If an entity has a reserve program, it is asking its licensed officers to supervise police reserves in the field. During a shift, licensed officers must recognize a critical situation so they can protect themselves. They also must ensure that their reserves understand the criticality of the situation and are reacting appropriately, so that both officers and reserves can survive and handle the incident correctly. Licensed officers have to give direction, maintain control, and provide authoritative instruction to reserves, if reserves are to have the police authority to take action. This places a significant burden on the officer, who is not a supervisor, and on the reserve that has to follow the officer's directions. The potential risk of confusion and misinterpretation exposes officers and the citizens to the risk of injury or mistake.

ISSUES OF THE LAW

Few Michigan statutes speak to the issue of reserve police officers, particularly to the ability of municipal entities to form or operate reserve units. A review of the law and observations of municipalities' use of reserves raise the question, "Has the use of reserve units become a practice that the law does not support"? **If that is the case, then either the laws must undergo change to meet the needs of the entities or the practice of the entities must change to meet the law.** Most of the regulatory information concerning the use of police reserves comes from interpretations of the law in opinion papers by the Michigan Attorney General.

In Michigan, townships, fourth-class cities, villages, and county sheriffs have the power to have law enforcement "reserves," including special deputies or posses. The municipalities may not regularly employ the reserves or swear and authorize them to be responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state unless they have an MCOLES License.

While performing their duties, the reserves must be under the direction of the sheriff or police department. Actually, the legislature wrote MCLA 28.609 (1), which is the waiver of certification requirement provision under MCOLES rules, to allow Mayors of fourth-class cities, Presidents of Villages, and Sheriffs to appoint temporary police officers or special deputies for handling emergencies or specific tasks. Years ago, the Michigan State Police also had the authority to create a stand-by force during emergencies.

In OAG #5265, former Michigan Attorney General Frank Kelly acknowledged that the legislature had created an exception to MLEOTC's (now MCOLES) training requirements when a person acts as a temporary peace officer. The law authorized governmental entities to use these temporary officers in carefully defined circumstances. In Kelly's opinion, the statute that established this ability anticipated the use of temporary police officers in particular emergencies, which by nature are irregular and intermittent. He went on to explain that the term "temporarily engaged" means the person is available for call on an ad hoc basis. It does not mean the person is a temporary employee for a given period or that the person serves on a part-time basis.

In OAG #6235, Mr. Kelly addressed Lincoln Park's formation of an emergency police reserve force that, when performing its duties, had the same powers as full-time regular police officers. Eventually, the emergency reserves -- once used only in emergencies -- became a permanent part-time police force. An association represented the reserve officers and negotiated wages and benefits for them. The reserve officers received monthly written assignments requiring the regularly scheduled performance of police patrol duties, including citations and arrests. When working, the reserves were under the supervision of a regularly employed supervisory officer. They did not work in conjunction with a licensed officer.

It will not shock you that Mr. Kelly opined that duties of the Lincoln Park's emergency reserve officers meant that they had to be MLEOTC certified. He cited *People v Bissonette*, 327 Mich 349; 42 NW2d 113 (1950) as the source of the

definition of a peace officer. Interestingly he did say that, absent any legislation prohibiting it, a home rule city could use reserve or part-time police officers who meet 1965, PA 203 (MCOLES) because the law mandates that each city charter provide for the public peace and health and for the safety of persons and property, MCL 117.3 (j). It is important to note that the official or customary job tasks of these officers affect whether they must meet the MCOLES requirements for licensing.

In fact, that is the point. Many police agencies, over time, have undermined the adoption and use of unlicensed reserve officers from the original definition of scope and responsibility established in the law. LEAF believes this trend has arisen from necessity. For many years, municipal management and the public have placed demands on law enforcement to provide specialized service beyond its general focus on public safety and crime reduction. Couple the demand for specialized services with a reduction of staffing levels due to a loss of available dollars, and the environment is ripe for the formation of shadow police. Research on the many opinions on this topic by the Attorneys General who have analyzed the law gives the impression that no level of government wants to tackle this issue. While there is an obvious need for assistance in policing our society, we seem to have accepted the police reserves as an employee classification even if its legal foundation may be murky.

In Michigan, the need for civilian volunteer programs is at an all time high while funding for public services is dropping rapidly. This may be the time to pressure the legislature to address the issue of police reserves. The legislature can pass laws that will allow the graduated MCOLES licenses through a reserve officer program. This provides for training and experience requirements for police reserves. It may even be possible to extend licensing to retired law enforcement officers if they earn CEU's, so that they can return to some level of volunteer service. Although MCOLES has a full plate, the recognition of an increasing need for reserves as well as an adequate funding source might drive the establishment of a recognized graduated licensing process that starts with a reserve officer category.

HOW DOES YOUR RESERVE PROGRAM MEASURE UP AGAINST THE LAW?

MML Loss Control Consultants visit both Pool and Fund members regularly. In many police departments, they find reserve police officers dressed and armed just like the regular officers of the entity. These reserves ride in a police patrol vehicle, most of them with a licensed officer, and they perform the same job tasks as a licensed officer. The reserve's role is to support and be the immediate back up to the licensed officer. Yet the department expects reserves to take action should the need arise. Many departments also have the reserves LEIN authorized, so they can access and view the confidential information intended for those charged with the job of enforcing the law. We can only hope that the reserves receive adequate training. In officer safety incidents, the licensed officer expects the reserve to act independently to the benefit of them both.

In a number of the Attorneys General opinions, there is reference to the MCOLES waiver of training requirements at MCL 28.609 (1). This statute addresses sheriffs' posses or police auxiliaries temporarily engaged in the performance of their duties while under the direction of the sheriff or police department. Many governmental entities hang their hat on the waiver as a way to have reserve programs. If that is the case, then the entities need to look to a plain word analysis of what it says.

It is important to understand that, in OAG # 6490, Frank Kelly acknowledged that MLEOTC, now MCOLES, does not cover officers with restricted or special police officer powers because they are not responsible for the enforcement of the general criminal laws of the state. In OAG #6620, the former Attorney General said there is a clear distinction between police officers under MLEOTC and those who have restricted or special police officer powers. Mr. Kelly explained his opinion on this and several other issues in a March 18, 1992 letter to Michael D. Thomas, ESQ., Saginaw County Prosecuting Attorney:

"It is my opinion, therefore, that there is a clear distinction between a police officer as defined by the MLEOTC Act (MCOLES) and an uncertified reserve police officer who has no greater authority to make an arrest than a private citizen unless it may be clearly shown that such person qualifies for this specific waiver contemplated by MCL 28.609 (1) (d) (iv) (current law is 28.609 (1))."

In the letter, Kelly went on to opine that, based on OAG #5265, the MCOLES statutes and those that allow for the appointment of reserves anticipate the use of temporary police officers in a particular emergency situation. He said that the legislature allowed the exception to training requirements only for temporary, untrained officers in carefully defined circumstances. The use of such temporary officers is by nature irregular and intermittent and the person is available for call on an ad hoc basis.

The question then becomes, if reserves are dressed and armed like police officers, have a regular schedule that enables them to supplement the force and increase the enforcement ability of a police department, why do we not expect them to become qualified for MCOLES licensing?

RESERVE INDEPENDENT ACTIONS

OAG #5265 also defined "while under the direction of" to mean providing an experienced officer's guidance to the untrained person in the absence of formal training. Furthermore, in OAG #4559, Kelly defined "direction" as we accept this term in common usage and left the impression that the directions do not require personal presence. In OAG #5265, he modified his opinion to say that the phrase "under the direction of", taken in the legislature's intended context, means any method of communication that provides the guidance necessary for an untrained person to execute his duties.

One must look at the legislature's intent to ensure experienced guidance to the reserve who is generally an untrained person when it comes to police experience, intuition, and street savvy. It is not likely that reserves will know when they are facing a sensitive situation or one with the potential to escalate, let alone be able to communicate the circumstances so that an experienced officer or supervisor gets the true feel of the emerging situation. MML Risk Management believes that the former Attorney General's opinion in this area is that the person supervising the reserve officer must be in the general vicinity of the reserve. In this way, the supervisor is able to know what the situation is before giving instructions. For that reason, Loss Control Consultants recommend that the reserves generally must be within sight distance of the licensed officer who is supervising them. Reserves generally should not patrol by themselves and should have no authority to take any action without the licensed officer being able to assess the situation and give legitimate and informed directions to the reserves.

As the discussion over reserves and their limitations progressed, the U. S. Supreme Court decided *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). In *Canton*, at page 1206, footnote 10, the court established when liability would be imposed under a policy of deliberate indifference. The Court's example was armed police officers who had received no training in deadly force. The decision highlights that there is an expectation that if a person will perform a particular job task then they must receive training to do that job task. The issue of appropriate training becomes even more important when you are talking about unlicensed reserve officers, with very little practical job experience, whose departments are asking them to function as licensed police officers. Deliberate indifference is a very high threshold of the law to meet. However, evidence of no training or supervision in an incident involving bad circumstances could very well cause a jury or judge to find that way.

HOW TO COMPLY

Given the former Attorney General's opinions and the changes in the law, public entities should evaluate the actual job functions they have established as well their application in their reserve program to make sure the program complies with the law.

1. Evaluate your reserve officer program and make sure that you do not regularly employ reserve officers or require them to take an oath of office that swears and authorizes them as being responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state.
2. Determine what role the reserves will have and how and when the department uses them.
3. Review the Reserve Officer Policy and Rules and look for any regulations that require that the officer, after a training period, work a specific number of hours during a week or month.
4. Develop a job description that outlines the reserve officer duties and responsibilities. Be sure to assign specific tasks and lines of supervision.
5. Include a statement in the policy or rules of the program that the reserve serves at the pleasure of management and is a civilian with no police powers.
6. Based on an identification of job tasks, develop a program that train reserves in the requirements of the tasks.

7. Maintain a record of all training that the department provides to each member of the reserve unit and any that they obtain on their own.
8. Maintain accurate records of the individual hours that reserves work and what their assignments were.
9. Ensure that the reserve officer program requires that the supervising licensed officer generally must be within sight distance when supervising an on duty reserve officer.
10. Train licensed officers who are supervising reserve officers in their responsibilities and duties.
11. Document all training and discipline given reserves.
12. If the department compensates reserves any way, they have job rights to their position like any regular employee, so the department must maintain personnel files on all reserve officers, even volunteers.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. You can find [The Manual for Law Enforcement Risk Control](#) at mml.org under the Insurance tab. Pick LEAF from the pop menu. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-0626, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.