MEMORANDUM OF LAW

DATE: November 8, 1988

TO: Sergeant Fred A. Hoyle, San Diego Police Department

FROM: City Attorney

SUBJECT: Use of Firearms by Off-duty Officers

Reference is made to those issues raised by a memorandum from Sergeant D. Knoll, San Diego Police Department to Lieutenant C.R. Resch, San Diego Police Department dated April 20, 1988, and by an oral request from Sergeant F. Hoyle, San Diego Police Department of September 22, 1988, regarding the regulation of the off-duty use of firearms by San Diego police officers.

The first issue concerns municipal liability for the off-duty use of firearms by San Diego police officers. This issue has been litigated extensively under 42 U.S.C. section 1983 of the "Civil Rights Act."

Municipal liability for section 1983 violations was analyzed in Monell v. Department of Social Services of the City of New York. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978).

The Supreme Court in Monell examined the statutory language in 42 U.S.C. 1983 which is as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The Supreme Court thus held that a municipality is subject to section 1983 liability when it unconstitutionally "Implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. . . ." Id., 436 U.S. at 690. Subsequent decisions of the Supreme Court have added little to the Monell court's formulation beyond reaffirming that the municipal policy must be "the moving force of the constitutional violation." Oklahoma City v. Tuttle, 471 U.S. 808, 820 85 L. Ed.2d 791, 802 (1985) citing Polk Co. v. Dodson, 454 U.S. 312, 326, 70 L. Ed.2d 509,

102 S. Ct. 445 (1981).

The Monell test of a city's liability was restated in Pembaur v. Cincinatti, 475 U.S. 469, 89 L. Ed.2d 452, 106 S. Ct. 1292, (1986) where the Court concluded that municipal liability can be imposed for a single decision by municipal policymakers if the decision to adopt a particular course of action is directed by those who established governmental policy. A city is subject to liability for acts which it has officially sanctioned or ordered. Id., 475 U.S. at 470.

An illustrative case using the Monell test is Turk v. McCarthy, 661 F. Supp. 1526 (E.D.N.Y. 1987). The facts reveal that an off-duty officer visiting a New York amusement park with his family, was forced to leave after being repeatedly warned that no beer drinking was allowed on park grounds. The security guard escorted the officer off the park grounds to the parking lot. The officer became enraged and shot the security guard in the neck, leaving him permanently disabled. The security guard brought suit against the City of New York and the police officer, and the police officer sought indemnification from the city.

The issue of municipal liability turned on whether the off-duty officer was acting within the scope of his employment under the "color of law." The district court applied the test established in Monell and held the City of New York was not liable for the off-duty officer's actions for the following reasons:

(1) The City of New York's policies in no manner caused or otherwise were responsible for the alcohol-related shootings including the case at bar.

(2) The off-duty officer's actions constituted an abuse of the privilege allowing police officers to carry their weapons when off-duty.

(3) There was absolutely no evidence presented that might supply a causal connection between inadequacies of the city's policies and the unjustifiable use of force by the officer.

(4) The off-duty officer was not acting within the "scope of his employment" under the "color of law," rather he was engaged in strictly private conduct, outside the scope of his employment. (See, e.g., La Rocco v. City of New York 468 F. Supp. 218 (E.D.N.Y. 1979); Stavitz v. City of New York, 98 A.D.2d 528, 471 N.Y.S.2d 272 (1984).)

The second issue involves the City's liability for failure to properly train and supervise the off-duty use of firearms by police officers. Liability could be based on the breach of a statutory duty. California Penal Code section 832 requires that

every police officer shall satisfactorily complete an introductory course of training in the carrying and use of firearms. Section 832.3 requires that each police officer employed after January 1, 1975, shall successfully complete a course of training prescribed by the Commissioner on Peace Officers Standards and Training before exercising the powers of a peace officer. See also, California Penal Code sections 832.4, 832.6, 13500, and 13510.

The moment a police officer draws his firearm off-duty to carry out a law enforcement function for the city the issue of potential city liability for damages is raised. There is a real danger of city liability unless it can be clearly shown that the off-duty use of the firearm involves strictly private conduct outside the scope of the police officer's employment. In a sense a police officer goes from an off-duty to an on-duty status the moment he draws a firearm to carry out a law enforcement function for the city. Clearly, the department is empowered to regulate the use of firearms under those circumstances.

The final issue is whether the San Diego Police Department is required to "meet and confer" pursuant to California Government Code section 3505 prior to application of the requirements and restrictions for weapons carried on-duty to those allowed off-duty. Sergeant Hoyle advised that the San Diego Police Department wants to regulate and supervise the use of off-duty weapons because of the increase in accidental discharges of these weapons. The San Diego Police Officer's Association considers the change in policy to be a "meet and confer" issue.

The case law supports the position taken by the Police Officers' Association. In Solano County Employees' Association v. County of Solano, 136 Cal. App.3d 256 (1982), the county adopted a rule prohibiting county employees from driving motorcycles on county business without the permission of the county administrator. The Court of Appeals held that the rule was subject to the "meet and confer" requirements of Government Code section 3505 because it involves a safety rule and it results in a change in practice or enforcement. Safety rules are a mandatory subject of bargaining. Id. at 260. "One test for determining whether a rule is subject to meet and confer is whether there has been a change in practice or enforcement." Id. at 265.

The increase in the number of accidental shootings by police officers, while off-duty, has prompted the proposed change designed to apply the requirements and restrictions on weapons carried on-duty to weapons carried off-duty. The proposed change is subject to "meet and confer" because (1) it relates to a

safety rule and (2) it results in a change in practice.

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