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STATE CAPITOL  
PHOENIX, ARIZONA

January 7, 1966

DEPARTMENT OF LAW OPINION NO. 66-4 (R-35)

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REQUESTED BY: HONORABLE D. L. GREER  
Apache County Attorney

QUESTION: Does a County Sheriff have a duty to patrol streets and maintain law and order in an incorporated city where the city fails to budget adequate funds for such purposes in its annual budget?

ANSWER: No, as qualified.

The Arizona statutes do not define the territorial limits within the county of the performance of the duties of the county sheriff. The duties of the sheriff are set forth in A.R.S. § 11-441. He must serve process and notices, maintain the county jail, attend all courts other than justice and police courts, preserve the peace, arrest and take before the magistrate all persons who attempt to commit or who have committed a public offense, and prevent breaches of the peace and riots which may come to his knowledge. It seems reasonably clear that the sheriff is not limited in his powers as a peace officer to make arrests and to maintain law and order to only the unincorporated territory within the county. In practice we understand sheriffs have performed various duties and functions within and without the incorporated territory of their counties, but, as a practical matter, primary responsibility is

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assumed by the sheriffs in patrolling the unincorporated areas. This office has ruled that all peace officers of the state, cities and counties have concurrent jurisdiction within city limits in enforcing the uniform act regulating traffic on highways (Op. 65-37-L), and in investigating accidents on interstate highways (Op. 65-14), and in enforcing the water code regulations (Op. 65-28-L).

It is clear that the Legislature intended that even the smallest incorporated cities and towns in the state would provide police protection. Thus ARS § 9-201 provides that in cities and towns of less than 600 voters, the only officers are the mayor, councilmen, and a marshall or chief of police. ARS § 9-204 includes a chief of police, and a police judge as mandatory officers in cities and towns of from 600 to 850 voters.

For towns incorporated under common council government, ARS § 9-237 requires appointment of a town marshall. In addition the common council is granted various police powers, as well as the power to establish and regulate the police of the town, to appoint and remove policemen and prescribe their powers and duties.

As further evidence of Legislative concern with police in cities and towns, ARS § 9-902 establishes a minimum wage for salaried policemen in cities and towns of over 7,000 inhabitants; ARS § 9-912 establishes a mandatory police pension fund in incorporated cities and towns of more than 20,000 inhabitants.

McQuillen on Municipal Corporation, 3d ed., § 24.33 states the general rule as follows: "Generally there is a duty upon duly constituted municipal authorities to exercise the police power where there is a public need for it,

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but it is within their sound discretion to determine both the need and the measure to meet it. Courts will not interfere except for abuse of their discretion, and violation of their duty subjects them only to political consequences and not civil liability." Thus it is unlikely that either the city or the sheriff could be compelled in a suit for a writ of mandamus to furnish any particular police protection or services.

On the other hand, there is the possibility of a suit in tort against a municipal corporation which fails to provide police protection and which results in injury to the plaintiff. However, on this point, McQuillen observes in § 53.51 that, ". . . the failure to provide, or the inadequacy of, police protection usually does not give rise to a cause of action in tort against a city." In the cumulative supplement note on § 53.51, McQuillen adds that, "Independent of sovereign immunity, a municipality is not liable for failure to supply general police protection. Motya v. Amsterdam, 15 N.Y.2d 134, 256 N.Y.S.2d 595, 204 N.E.2d 635."

The court in the Motya case observed that the violation of a duty of a municipality to provide police or fire protection gives rise to an action in tort only if the intent of the statutory enactment is to protect an individual against an invasion of a property or personal interest. The result in this case is criticized in a comment in 44 Cornell L.Q. 441.

It would seem in view of the decision of Stone v. Arizona Highway Commission, 93 Ariz. 385, abolishing the doctrine sovereign immunity in this state and despite the statement in McQuillen quoted above, that any incorporated city or town which fails or refuses to provide police pro-

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tection for its inhabitants should give careful consideration to the possible implications of the Stone decision insofar as tort liability is concerned.

In light of the foregoing, it is our opinion that the primary duty to supply police protection in incorporated areas is that of the city itself; the sheriff has a duty to enforce the criminal law on a county-wide basis, which might include incorporated territory in a city without a police force and to the extent of the sheriff's administrative and budgetary limitations. In our opinion there is no mandatory duty of a county sheriff to patrol streets of a city in order to maintain law thereon.

Respectfully submitted,



DARRELL F. SMITH  
The Attorney General

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