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ARIZONA ATTORNEY GENERAL
April 4, 1983

INTERAGENCY

The Honorable Paul R. Messinger
Arizona State Representative
State Capitol, House Wing
Phoenix, AZ 85007

Re: I83-034 (R83-028)

Dear Representative Messinger:

We are writing in response your letter of January 17, 1983, in which you asked several questions regarding the ability of a private corporation to provide law enforcement personnel and services to a municipality.

This issue has been discussed in two prior opinions of this office, both of which are attached for your information. In Ariz. Atty. Gen. Op. 172-19, we said that a duly commissioned deputy sheriff may be paid with private funds, so long as the officer is fully controlled by and answerable only to the sheriff. In Ariz. Atty. Gen. Op. 176-42, we said that a town's attempt to contract with a private corporation for police services constitutes an illegal delegation of its authority to establish a police force. These opinions remain valid.

The Legislature has granted the control of law enforcement exclusively to specific governing bodies, such as the state, counties, cities, towns and designated agencies. Only a designated body can appoint or commission peace officers. State v. Ovens, 4 Ariz. App. 591, 422 P.2d 719 (1967); Ariz. Atty. Gen. Ops. 180-169, 172-16. Any attempt by the body to delegate its control, direction and supervision would be

The Honorable Paul R. Messinger
April 4, 1983
Page 2

illegal.^{1/} See, e.g., Godbey v. Roosevelt Sch. Dist. No. 66,
131 Ariz. 13, 638 P.2d 235 (Ct.App. 1981).

Sincerely,



BOB CORBIN
Attorney General

BC:lm

1. In connection with this issue, we note the Legislature's treatment of privately controlled security guard services. A.R.S. §§ 32-2601 et seq., permit the establishment of security guard services by private persons or organizations. However, A.R.S. § 32-2634 specifically and unambiguously withholds peace officer status from a security guard. Thus, although the Legislature will permit private security forces, it specifically has reserved the management of public law enforcement to public governing bodies of this state.

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

June 29, 1972

DEPARTMENT OF LAW OPINION NO. 72-19 (R-51)

REQUESTED BY: JAMES J. HEGARTY
Secretary-Treasurer, Arizona Law
Enforcement Officers Advisory Council

QUESTION: Does the source of funding affect the peace officer status of an otherwise duly appointed and full time deputy sheriff?

ANSWER: No. See body of opinion.

In Department of Law Opinion No. 70-24, the Attorney General responded to a similar question from the Arizona Law Enforcement Officers Advisory Council in regard to the status of a civil deputy sheriff as a peace officer. The conclusion reached there was as follows:

. . . [I]t is the opinion of this office, because of the aforementioned authorities, any title or position involving the use of the term "Deputy Sheriff" is required to be occupied by a properly trained and qualified peace officer.

That opinion further noted that the term "peace officer" contemplates some regular assignment to arduous and hazardous duty. A.R.S. § 38-842.10. Police Pension Board of City of Phoenix v. Warren, 97 Ariz. 180, 398 P.2d 892, rehearing denied, 97 Ariz. 301, 400 P.2d 105 (1965).

Since Opinion No. 70-24 did not speak directly to the source of funding, particularly funding by non-governmental agencies, some further discussion is needed. Initially, we should note several other statutory definitions bearing upon this problem.

§ 1-215. Definitions

In the statutes and laws of the state, unless the context otherwise requires:

* * *

20. "Peace officers" mean sheriffs of counties, constables, marshals and policemen of cities and towns.

§ 38-1001. Definitions

In this chapter [Chapter 7.--Merit Systems], unless the context otherwise requires:

* * *

4. "Law enforcement officer" means:

(a) A regularly appointed and paid deputy sheriff of a county.

§ 9-901. Definitions

In this article [Article 1. Minimum wages, Chapter 8.--Police and Fire Departments], unless the context otherwise requires:

* * *

3. "Peace officers" include regularly salaried deputy sheriffs, policemen and police officers of duly organized police departments.

In connection with A.R.S. § 9-901, we should also take note of A.R.S. § 9-903, as follows:

This article shall not be construed to apply to a person holding a courtesy or honorary commission in the police, peace officers or fire forces of a city or town, or to persons not appointed in accordance with the rules, regulations, ordinances, charter provisions or statutes concerning appointments to the police, peace officers or fire department to which appointment is claimed, or to those officers employed in part time service.

(All emphasis added.)

It seems that two of the three definitions quoted above, i.e., A.R.S. §§ 38-1001 and 9-901, contemplate regular salary as well as regular appointment. Thus, for the purposes of the merit system and for minimum wages of police departments, the source of funding would affect at least the economic status of the peace officer. However, this is probably not true as a general proposition. A.R.S. § 1-215.20 includes

sheriffs as "peace officers" for general purposes of Arizona law, but deputies are not specifically mentioned. Nevertheless, as noted in Opinion No. 70-24, deputy sheriffs are "generally thought to be possessed with full authority to perform every act the sheriff, his principal, could perform. [Citing authorities.]"

The Arizona Law Enforcement Officers Advisory Council is concerned about the status of deputy sheriffs because of the provisions of A.R.S. § 41-1822, which states that the Council shall prescribe "reasonable minimum qualifications for officers to be appointed to enforce the laws of this state and the political subdivisions thereof." A.R.S. § 11-409 provides the methods by which deputy sheriffs are appointed:

The county officers enumerated in § 11-401 may, by and with the consent of, and at salaries fixed by the board, appoint deputies, stenographers, clerks and assistants necessary to conduct the affairs of their respective offices. The appointments shall be in writing, and filed in the office of the county recorder. (Emphasis added.)

But even where a written appointment was not recorded, our Supreme Court has held that a deputy sheriff is not deprived of de facto status as a public officer. State v. Stago, 82 Ariz. 285, 312 P.2d 160 (1957).

In State v. Stago, supra, Ernest Dillon charged the defendant with resisting and obstructing a public officer. Dillon had been appointed by the Sheriff of Navajo County as a deputy sheriff and issued a card confirming the appointment. However, Dillon was not paid by the county nor was his appointment recorded. He was paid by the Pinetop Merchant Patrol and wore a police officer's uniform. Since the appointment had not been properly filed, the Court held that Dillon was not a de jure public officer. However, for the purposes of the offense of resisting or obstructing a public officer, he was held to be a de facto public officer. This conclusion seems to have been based on two major points: (1) The statute requiring filing of written appointment was directory; and (2) the Navajo County Board of Supervisors had accepted a \$1,000.00 bond executed by Dillon to faithfully perform the duties of a deputy sheriff.

It should also be noted that in the context of the offense of resisting or obstructing a public officer, a police officer is a public officer. State v. Kurtz, 78 Ariz. 215, 279 P.2d 406 (1954); State v. Arce, 6 Ariz.App. 241, 431 P.2d 681 (1967).

State v. Kurtz, supra, is another case that aids in answering the Council's main question. There the Court was concerned with the issue of whether duly appointed and acting city policemen, when privately paid and employed during off duty hours, as special officers to maintain order and keep the peace at a dance hall, were "public officers" within the obstructing a public officer statute. The Court decided that the turning point for this issue was whether the officers were "performing mere acts of service for their private employer" or "were acting in vindication of the public right in apprehending a wrongdoer." 78 Ariz. at 219.

State v. Owens, 4 Ariz.App. 591, 422 P.2d 719 (1967), is another case involving the status of a deputy sheriff paid by someone other than the sheriff as a peace officer. There the Court noted that a person must be a peace officer to be authorized to serve a warrant. A.R.S. §§ 1-215.20 and 13-1407. The Court held that two county attorney investigators who had been appointed by the county attorney as deputy sheriffs were not de facto deputy sheriffs nor peace officers. Neither the holding of a deputy sheriff card nor inclusion in a false arrest rider on the county's public liability insurance policy were sufficient to accomplish this either. The Court also made the following relevant comment:

It is our opinion that one of the vital elements in relation to being a de facto deputy sheriff is the matter of instructions from and control by the sheriff or by some law enforcement or security organization or agency. . . .
4 Ariz.App. at 596.

This same idea of instruction and control is carried out to some extent in still another statutory definition of the term "peace officer" as follows:

§ 41-1701. Definitions

In this chapter [Chapter 12.--Public Safety], unless the context otherwise requires:

* * *

5. "Peace officer" means any personnel of the department designated by the director as being a peace officer under the provisions of this chapter.

Although this definition does not have specific application to deputy sheriffs, it is interesting to note that the statutes relating to the Arizona Law Enforcement Officer Advisory Council appear in this same chapter, thus making the definition applicable to those statutes.

The above statutes and cases, reviewed in light of the facts here, where private corporations seek to assist a county in funding another law enforcement officer which they could not otherwise afford, and where said officer is otherwise a duly appointed and fully controlled, regular deputy sheriff, responsible only to the sheriff for his work direction, clearly indicates that such a deputy is a "peace officer" and must meet the minimum standards.

As was alluded to earlier, this opinion does not cover any other relationship which might be governed by the source of salary, i.e., merit system, retirement system, or insurance benefits or coverage. The only question posed and answered is as to the "peace officer" status of a deputy so employed.

Respectfully submitted,

Gary K. Nelson
by F. S.

GARY K. NELSON
The Attorney General

GKN:SJ:ell



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

B75-795

BRUCE E. BABBITT
ATTORNEY GENERAL

February 11, 1976

~~76-32~~
76-42

The Honorable Walter L. Henderson
Attorney, Town of Oro Valley
220 East Speedway Blvd.
Tucson, Arizona 85705

Dear Mr. Henderson:

The question put forth in this opinion request is as follows:

By authority of Title 41, Article 8, Arizona Revised Statutes, is the Arizona Law Enforcement Officer Advisory Council authorized to deny certification of a duly commissioned law enforcement officer solely upon the basis that the officers are paid by a private corporation and are not on the payroll of the State of Arizona or a political subdivision thereof?

The question results from action taken by the Arizona Law Enforcement Officer Advisory Council (hereafter "Council") on October 6, 1975. The Council had been asked to issue peace officer employment standards certification for six individuals employed by the Metropolitan Fire Department, Inc., and assertedly commissioned as peace officers by the Town of Oro Valley (hereafter "Town"). On October 6, 1975, the Council declined to issue such certifications and stated: "In reviewing the applicable statutes and rules as they apply to Oro Valley's contractual arrangements for police officers, we have concluded that the men listed on the enclosure are, in fact, employees of a private corporation. Therefore, we cannot pursue the A.L.E.O.A.C. certification procedures for them."

Because the Town of Oro Valley improperly commissioned and appointed the six individuals, the question above need not be answered. The Council cannot consider the certification of the six individuals because they are neither peace officers nor police officers, and the Council thus lacks authority to certify, qualify, regulate, or govern them in any way.



I. FACTS:

The Town of Oro Valley was incorporated in 1974, pursuant to Ariz.Rev.Stat.Ann. § 9-101 (as amended 1973).

On July 16, 1975, the Town entered into a contract with the Metropolitan Fire Department, Inc. (hereafter "Metropolitan"), an Arizona corporation, wherein Metropolitan agreed to provide police services for the Town of Oro Valley. The Town has authority to provide for policing per A.R.S. § 9-240(B)(12).

By resolution adopted on July 20, 1975, the Town Council then "appointed" and "commissioned" Stephen L. Hermann as Chief of Police in and for the Town of Oro Valley, Arizona, ". . . to enforce the laws of the State of Arizona and the ordinances of the Town of Oro Valley, and to exercise all of the powers of commissioned police officer in and for the Town of Oro Valley, and to take all actions required by law to exercise the police function of the Town."

Subsequently, the Town Council "appointed" and "commissioned" six full-time employees of Metropolitan to serve as regular members of the Town's Police Department. (The Chief of Police is also a full-time employee of Metropolitan.) Apparently all seven "members" of the Town's Police Department were placed on the Town's payroll at the rate of \$1.00 per year, and were issued checks in that amount. The Town has paid them no further stipends, but Metropolitan apparently does pay them salaries.

II. DISCUSSION:

There is no shortage of definitions of "peace officer" and "law enforcement officer" in the Arizona Revised Statutes. A.R.S. § 1-215 states that:

In the statutes and laws of the state,
unless the context otherwise requires

* * *

20. "Peace officers" means Sheriffs of counties, constables, marshals, and policemen of cities and towns.

A.R.S. § 9-901 sets out the following:

In this article [chapter 8, Police and Fire Departments; article 1, Minimum Wages], unless the context otherwise requires:

* * *

3. "Peace officers" include regularly salaried deputy sheriffs, policemen and police officers of duly organized police departments.

A.R.S. § 38-1001 says:

In this chapter [chapter 7, Merit Systems], unless the context otherwise requires:

* * *

4. "Law enforcement officer means:

* * *

- (b) A regularly employed police officer in a city or town.

[NOTE: This definition also applies to the statute mandating overtime compensation for "person(s) engaged in law enforcement activities". A.R.S. § 23-392]

While neither term is defined in the statutes regarding the Council [Title 41, Article 8], the Council by regulation defines "peace officer" as a "member of a law enforcement unit who is employed to enforce the criminal laws of, and is commissioned by, a city . . ." [A.C.R.R. R 13-4-01(2)].

The Arizona appellate tribunals have not had occasion directly to determine who can and cannot be denominated a "peace officer." However, the term "public officer" in A.R.S. § 13-541 and its predecessor has been construed, and the constructions are important because State v. Arce, 6 Ariz.App. 241, 245 (1967), has held that a police officer is a public officer. In State v. Kurtz, 78 Ariz. 251 (1954), the Supreme Court held that in undertaking certain off-duty actions, several city police officers were indeed acting as "public officers" and not as private citizens.

The Court posited this test: "[W]ere the officers acting in vindication of public right and justice, or were they merely performing acts of service to their private employer?" 78 Ariz. at 218. In applying the test, the Court found it significant that "it manifestly appear[ed] from the record that at the time of the incident in question the [private employer] had no right of supervision over these officers, nor did he attempt any such control." Id. And in State v. Ovens, 4 Ariz.App. 591 (1967), the Court of Appeals held that county attorney's investigators were not peace (ergo, public) officers. The Court found that although the investigators had been administered oaths as deputy sheriffs and had been given cards that stated they were "regularly appointed" deputy sheriffs, they were not bona fide deputies and thus not public officers. The Court stated:

It is our opinion that one of the vital elements in relation to being a defacto deputy sheriff is the matter of instructions from and control by the Sheriff or by some law enforcement or security organization or agency. 4 Ariz.App. at 596.

It is within these statutory and judicial pronouncements that the peace officer status vel non of six "members" of the Town's police department must be decided. It is the conclusion of this office that under the circumstances, the six individuals do not enjoy peace officer status.

No reported case has discussed the manner in which towns may exercise the authority "to establish and regulate the police of the town, to appoint watchmen and policemen, and to remove them and to prescribe their powers and duties." A.R.S. § 9-240(B)(12). This authority--along with the authority to undertake 28 other categories of activity set out in the statute--is permissive: "The common council shall have the power . . ." A.R.S. § 9-240(B). But there are compelling reasons for concluding that once a town opts to exercise power in compliance with subsection 12, it must exercise the power fully, and may not cede authority to a private organization. What the Town seeks to do is to "establish" its police force, and to "appoint policemen"--but then to permit Metropolitan to "regulate the police", and to "remove them", and to "prescribe their powers and duties." Such a grant of authority must be voided for contravening public policy.

The discursive opinion of the Court of Appeals in Board of Education v. Scottsdale Education Association, 17 Ariz. App. 504 (1972) was vacated by the Supreme Court, for reasons not pertinent to this issue, at 109 Ariz. 342 (1973). In that

opinion, the Court concluded a School Board could not validly give up the responsibility of controlling and managing school district affairs, nor could the Board surrender its discretion in the exercise of that responsibility. The Court thereupon voided a collective bargaining agreement that effectively had done both. The Court grounded its view on highly persuasive authority from other jurisdictions:

'[T]he employer-employee relationship in government is a legislative matter which may not be delegated. Such [collective bargaining] contracts if permitted to stand would result in taking away from a municipality its legislative power to control its employees and vest such control in an unelected and uncontrolled private organization . . . ' 17 Ariz.App. at 510, quoting *Fellows v. Latronica*, 377 P.2d 547, 550 (Colo. 1962).

'Under our form of government, public . . . employment never has been and cannot become a matter of bargaining and contract. * * * This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. * * * ' 17 Ariz. App. at 510, quoting *City of Springfield v. Clouse*, 206 S.W.2d 539, 545 (Mo. 1947).

The Court of Appeals also cited Arizona authority:

'A public office is considered a public agency or trust, created in the interest and for the benefit of the people, i.e., public officers are servants of the people. * * * A public officer may not agree to restrict his freedom of action in the exercise of his powers, 43 Am. Jr. Public Officers § 295, and an agreement which interferes with his unbiased discharge of his duty to the public, in the exercise of his office, is against public policy and unenforceable.' * * * *School District No. 69 v. Altherr*, 10 Ariz. App. 333, 338 (1969).