

Opinion No. 57-83

April 29, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: Honorable Edwin L. Mechem, Governor, State of New Mexico, Santa Fe, New
Mexico

QUESTIONS

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Can a sheriff issue an effective commission to a full-time law enforcement officer employed by a municipality, the Navajo Tribe or Federal Government?

CONCLUSION

Yes.

OPINION

ANALYSIS

It is the opinion of this office that a sheriff can commission as a special deputy sheriff a full-time law enforcement officer employed by a municipality, the Navajo Tribe or the Federal Government. The applicants, of course, would have to secure the appointment from the sheriff of the county in which they wish to act and qualify in accordance with §§ 15-40-10, 39-1-9 and 15-40-12, N.M.S.A., 1953 Comp., and any other statutes of the State of New Mexico pertaining to the qualification of deputy sheriffs.

It is assumed that the purpose of issuing the commission is to assist the sheriff in maintaining and preserving the peace in his county by enlisting the aid of the above law enforcement officers and that they, at the direction of the sheriff, will patrol the highways, enforce traffic safety rules, apprehend violators of the law, disturbers of the peace and any other acts deemed necessary by the sheriff in maintaining the public peace. It is our understanding that these duties will be limited generally to the above and that other duties ordinarily associated with the office of sheriff, such as issuing civil and criminal writs, working at weighing stations, etc., will be performed by general sheriff's deputies, and the commissions granted will be in the form of "special deputy sheriff."

At common law, a sheriff could appoint an under-sheriff and as many general or special deputies as the public service may have required. (See **State ex rel. Geyer v. Griffin**, 76 N.E. 2d 294.) Such right, we believe, exists in New Mexico subject to the statutory

restrictions placed upon the right of the sheriff to appoint general and special deputies. § 39-1-9, supra, authorizes the appointment of special deputy sheriffs to preserve the public peace and to prevent and quell public disturbances. It requires that such special deputy sheriff be a citizen of the State of New Mexico and that no person shall assume or exercise the functions, powers, duties and privileges incident and belonging to the office of special deputy sheriff without first having received his appointment in writing from the lawfully constituted authorities of the State of New Mexico. It should be noted that this section does not apply in times of riots or unusual disturbances and when so declared by the public proclamation of the Governor of the state. Section 15-40-12 authorizes any sheriff at any time to appoint a respectable and orderly person as a special deputy sheriff **to serve any particular order, writ or process or when in the opinion of any sheriff the appointment of special deputies is necessary and required for the proposition of preserving the peace and it shall not be necessary to give or file any notice of such special appointment.**

Without so holding, we admit the possibility that the above provision allowing the sheriff to appoint special deputies for the purpose of preserving the peace may be limited to one particular act and in order to avoid such restriction being placed upon a special deputy, it is our recommendation that the commissions contemplated be secured in conformance with §§ 39-1-9, 15-40-10 and 15-40-12, supra.

Section 15-40-12 provides that no person shall be eligible to appointment as a deputy sheriff unless he is a legally qualified voter of the State of New Mexico. The section requires the commission issued to be filed by the sheriff in the form of a notice of appointment to the clerk of his county and that the special deputies shall file their oath in accordance with constitutional Art. 20, § 1, in the office of the county clerk.

In Opinion No. 6305, 1955-1956 Opinions of the Attorney General, we held that a tribal peace officer of the Mescalero-Apache Tribe could be appointed a deputy sheriff if he qualified as set forth above. We also feel that a full-time municipal law enforcement officer could qualify and that the office of deputy sheriff and a municipal police office would not be incompatible. Incompatibility between offices was stated in **Haymaker v. State**, 22 N.M. 400, 163 P. 249, as follows:

"Incompatibility between offices is an inconsistency between functions thereof, as where one is subordinate to the other, or where a **contrariety** and **antagonism** would result in the attempt by one person to faithfully and impartially discharge the duties of both."

(Emphasis supplied).

An examination of the cases indicates that the doctrine of incompatibility of offices rests on public policy. See **Perkins v. Manning**, 122 P. 2d 857, 59 Ariz. 60, and the case of **People v. Rapsey**, 107 P. 2d 388, 16 Cal. 2d 636.

In our opinion no antagonism should exist between the two offices, and public policy certainly supports the maintenance and preservation of the public peace. In a previous

opinion we have stated that a person could not receive a salary or a fee from the State in the performance of a state office, in that case a constable, if he is paid for performing a similar duty in his regular occupation as municipal city police. We do not anticipate that such problem would arise but if a full-time municipal officer should perform an act in the position of special deputy sheriff for which he would be paid as a city officer, he would not be entitled to any fee as a special deputy.

We can see no reason why any full-time federal law enforcement officer could not be appointed a special deputy sheriff.

In conclusion, it is our feeling that a special deputy commission could be issued to the persons treated in this opinion. It is possible that they could be appointed special deputy sheriffs to preserve the public peace under § 15-40-12 without a written appointment or otherwise qualifying as indicated in the opinion. In order that there may be absolute continuing authority, however, it is suggested that they be qualified by written appointment by the sheriff, with certification to the county clerk of his appointment and by taking an oath or affirmation that he will support the constitution of the United States and the laws of this State and that he will faithfully and impartially and to the best of his ability discharge all the duties of his office. Although § 15-40-5, N.M.S.A., 1953 Comp., states that sheriffs may take bond for faithful performance of his duties from any deputy, such language seems to be permissive and, in this case should be left to the discretion of the sheriff.