

November 21, 2014 Advisory Letter — Opinion Request - Curry County Detention Center Consulting Agreement

The Honorable Stuart Ingle
New Mexico State Senator
2106 West University Dr.
Portales, New Mexico 88130

Re: Opinion Request - Curry County Detention Center Consulting Agreement

Dear Senator Ingle:

You requested our opinion regarding the legality of a contract between the Curry County Board of County Commissioners (“Commission”) and Curry County Sheriff Matt Murray (“Sheriff”) for the provision of security and safety consulting services to the administrator of the Curry County Detention Center. As discussed in detail below, we conclude that the contract was not awarded in compliance with the Governmental Conduct Act and raises questions under New Mexico laws precluding a public officer from holding two incompatible positions concurrently.

Background

At its January 8, 2013 meeting, the Commission heard from County Attorney Stephen Doerr regarding the employment contract of Curry County Detention Center Administrator Gerry Billy, and was informed that unless the Commission voted at this meeting to alter the employment contract or issue a notice of termination, Mr. Billy’s contract would be extended for two years. January 8, 2013 Commission meeting minutes (“January 8, 2013 minutes”), Book 9, Page 152, lines 23-29. Commissioner Frank Blackburn moved to terminate Mr. Billy’s contract, which motion included: “Until a new Detention Center Administrator can be hired, the County Manager will work with the Sheriff’s Office to handle the administration of the Adult Detention Center and the Juvenile Detention Center.” *Id.*, lines 35-38. The Commission then voted to terminate Mr. Billy’s employment contract.¹ The minutes reflect no discussion prior to the motion.

County Manager Lance Pyle informed me that the Commission did not again discuss the Sheriff’s involvement in the Detention Center’s administration until its May 21, 2013 meeting. At this meeting, Mr. Doerr stated that the Commission had discussed the Detention Center at its January 8, 2013 meeting, specifically, “getting the acting Detention Administrator, the Sheriff, and Manager Pyle *working together to run the Detention Center*, and that has been the arrangement since that time.” May 21, 2013 Commission meeting minutes (“May 21, 2013 minutes”), Book 9, Page 237, lines 41-43 (emphasis added).

Mr. Doerr then presented to the Commission for its approval an Agreement for Consulting Services (“Agreement”), under which the Sheriff would provide “security and safety consulting” to acting Detention Center administrator Tori Sandoval and Mr. Pyle.

Id., lines 39-46. While the Agreement stated that the Sheriff had been assisting Ms. Sandoval with the Detention Center's "security, policies and procedures" since January 8, 2013, the Agreement provided that the Sheriff would be paid \$3,000.00 per month as of April 1, 2013, the Agreement's effective date. Agreement, p. 1. The Agreement made no mention of any payment to the Sheriff for the period between January 8 and April 1, 2013.

As part of the May 21, 2013 discussion, Commissioner Wendell Bostwick expressed his concern that the Agreement authorized the Sheriff to be paid monies beyond his statutorily-prescribed salary. May 21, 2013 minutes, Book 9, Page 237, lines 47-49. Commissioner Bostwick further noted that among the Sheriff's responsibilities included in the Agreement were his coordination of inmate transportation and his consultation and advice to the acting jail administrator on qualifying inmates for the ankle bracelet program. Commissioner Bostwick stated that the Commission had already appropriated funds to allow the Sheriff and his employees to perform both of these services. Following a brief discussion about the Sheriff's deputies working overtime at the Detention Center, Commissioner Bostwick questioned "whether [the Commission] need[ed] to pay extra money to have the Sheriff be a participant" in the operation and management of the Detention Center. *Id.*, lines 50-52, 56-64; Page 238, lines 2-3.

When asked by Commissioner Bostwick if the County could thus pay additional compensation to the Sheriff, Mr. Doerr stated that this "is a gray area." *Id.*, Page 237, lines 47-52; Page 238, lines 8-9. Mr. Doerr described the \$3,000.00 per month payment under the Agreement as a "monthly additional amount providing consulting services," and was not an increase in the Sheriff's salary. *Id.*, Page 238, lines 13-14. Mr. Doerr added that because the Commission had voted to place oversight of the detention center under a jail administrator, the Sheriff had no obligation to provide security for or oversight of the detention center, and thus a separate agreement was necessary to allow the Sheriff to work with the jail administrator. *Id.*, lines 9-13.

Commissioner Bostwick asked if the consulting services that were the subject of the Agreement being presented to the Commission for formal action should be procured through a formal request for proposals. *Id.*, Page 237, lines 46-47. Mr. Doerr responded that a request for proposals for the security and safety consulting agreement was unnecessary because the Commission was entering into a professional services contract for less than \$50,000.00. *Id.*, lines 46-47; Page 238, lines 6-8. Mr. Doerr cited no legal authority for his conclusion.

On May 21, 2013, the same day the Commission voted to approve the Agreement,² Sheriff Murray and the Commission formally entered into the Agreement, under which the Sheriff, as of April 1, 2013 (seven weeks earlier), would be paid \$3,000.00 per month to provide "consultation on security and policies and procedures to the Curry County Adult Detention Center. As such, Murray will work directly with the Curry County Detention Administrator and with Curry County Manager Lance Pyle." Agreement, p. 1. The Agreement's compensation provision indicated that the Sheriff would be paid retroactively for his consulting services between April 1 and May 21, 2013. *Id.*

The Agreement identified the Sheriff's responsibilities with regard to safety and security issues as including at least weekly walk-throughs and inspections of the Detention Center, arranging for weekly visits by drug dogs, scheduling and arranging for shakedowns, coordinating inmate transportation, advising the Detention Center administrator regarding the ankle bracelet program and, when necessary, working with judges on qualifying inmates for the program, and notifying the County Manager of emergencies and security breaches. Agreement, ¶¶ 2(A)-(F).

Analysis

1. Governmental Conduct Act

The Governmental Conduct Act places limitations on a local public body contracting with a public officer of that local public body:

Unless a public officer ... has disclosed [his] substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local public body shall not enter into a contract with a public officer ... of that local public body....

NMSA 1978, § 10-16-7(B) (1967, as amended through 2011) (emphasis added). This language and conditions are intended to alert the public of a potential conflict of interest that may arise when a county contracts with an elected public officer of that county. See New Mexico Governmental Conduct Act Compliance Guide ("GCA Compliance Guide") at 22-24 (1st ed. 2013) (available online at www.nmag.gov).

Under this conflict of interest law, the Commission could lawfully enter into a contract with the Sheriff only if two conditions were met. One, the Sheriff must have publicly disclosed the substantial interest he holds in offering his consulting services and, two, the County must have awarded the contract pursuant to a competitive process. See § 10-16-7(B); see *also* GCA Compliance Guide at 22-23. It appears that neither of these conditions was met.

First, as noted earlier, the Commission on January 8, 2013 voted to terminate the employment contract of jail administrator Mr. Billy, and directed Mr. Pyle to work with the Sheriff "to handle the administration" of the Adult and Juvenile Detention Centers "[u]ntil a new Detention Center Administrator can be hired." January 8, 2013 minutes, Book 9, Page 152, lines 35-45 (emphasis added). There was no Commission action or vote that directed Mr. Pyle to work with the Sheriff *after* a jail administrator, acting or permanent, was hired. We have no information as to when Ms. Sandoval was hired as acting jail administrator.

The Commission did not discuss the Detention Center again until its May 21, 2013 meeting. The Agreement presented to the Commission for its approval that same day specifically stated that the Sheriff had been "assisting the Interim Curry County Detention Administrator" since January 8, 2013. The Agreement identified its starting

date as April 1, 2013, seven weeks before the Agreement was executed. Agreement, p. 1. Presumably, the Sheriff was to be paid retroactively \$3,000.00 per month for those seven weeks.

Until the Agreement was presented to the Commission on May 21, 2013, there was no public disclosure of the Sheriff's "substantial interest" in providing his private consulting services to acting jail administrator Ms. Sandoval, which "security, policies and procedures" assistance the Sheriff had already been providing, with no additional compensation, for the previous four and a half months since January 8, 2013. *Id.* Apparently, only the May 21 meeting agenda, printed the day before the meeting, gave the public any notice whatsoever that the Commission would be asked to approve an "Agreement for Consulting Services with Matt Murray." This agenda item, however, did not notify the public or the Commission as to what sort of "consulting services" would be discussed and voted upon.

Second, the Commission did not offer the safety and security consulting agreement to anyone other than the Sheriff, so other persons who might have offered to provide the same services to the County were given no opportunity to compete for that contract. The May 21, 2013 meeting minutes indicate that Commissioner Bostwick had multiple concerns about the Agreement. May 21, 2013 minutes, Book 9, Pages 237-238.

Mr. Doerr assured the Commission that no request for proposals was needed because the Agreement was for less than \$50,000.00. *Id.*, Page 238, lines 6-8. However, the Procurement Code provision governing contracts for small purchases of professional services³ does not comport with the more specific Governmental Conduct Act requirement that the County's contract with a public officer of the County must be "awarded pursuant to a competitive process." NMSA 1978, § 10-16-7(B); *see also* GCA Compliance Guide at 23, n. 8 (small purchases procured pursuant to Section 13-1-125 of the Procurement Code "would not meet the GCA's requirement for a contract awarded through a competitive process"). Nothing suggests that the County sought out any potential offerors for, or awarded, the Agreement pursuant to the statutorily-mandated "competitive process." Consequently, it appears that the Agreement was awarded contrary to Section 10-16-7(B) of the Governmental Conduct Act.

2. Incompatible Positions

The Attorney General's Office has previously concluded that one person may hold two positions of employment at the same time so long as the duties of one position "do not physically interfere" with the duties of the other public position during ordinary working hours and the functions of both positions "are not otherwise incompatible." N.M. Att'y Gen. Op. 90-14 (1990) (a county commissioner could serve as a tribal council member if he performs his tribal duties outside of his working hours as commissioner). By statute, if a person holding a public office and another position fails "to devote his time to the usual and normal extent during working hours" to performing the duties of the public office for thirty or more successive days, the person is deemed to have vacated the public office, NMSA 1978, § 10-6-3 (1943), and the two positions are "declared to be

incompatible.” NMSA 1978, § 10-6-5 (1979). This test applies to the Sheriff performing his duties as elected county sheriff while also providing contractual safety and security consulting services to the county jail administrator.

The Agreement mandated that the Sheriff not neglect his duties as elected sheriff, but did not limit performance of his contractual responsibilities to his own time outside of his regular work hours as sheriff. In fact, all the responsibilities prescribed by the Agreement appear to require the Sheriff to perform those responsibilities during his regular work hours as sheriff. Agreement, ¶ 2(A), (C)-(F); see also Background, *supra* at pp. 3-4. As discussed above, a public office is vacated or abandoned if the public officer takes another public position or private employment and fails for “thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office.” Section 10-6-3. Were the Sheriff to perform his consulting responsibilities on his own time, before or after his normal working hours as sheriff, and if he continued to perform his statutory duties as county sheriff, he would not vacate or abandon his public office. See N.M. Att’y Gen. Op. 90-14. However, the Agreement did not contemplate, much less require, that the Sheriff would perform his consulting responsibilities outside of his ordinary working hours. Consequently, the Agreement, on its face, suggests that the Sheriff’s duties under the Agreement are incompatible with his duties as Sheriff and may amount to an abandonment of that position under Section 10-6-3.

In addition to incompatibility, the apparent intermingling of the Sheriff’s contractual duties with his official duties raises related concerns under other constitutional and statutory provisions. As structured by the parties, the Agreement was entered into with the Sheriff in his private capacity as the provider of consulting services. The services the Sheriff is required to provide under the Agreement are “paid in addition to the salary [the Sheriff] is receiving as elected Sheriff of Curry County.” Agreement, ¶ 2(E). The Agreement goes on to provide that “Murray will not neglect his duties as elected Sheriff of Curry County and, similarly, Murray will be responsible for managing the employees of the Curry County Sheriff’s Office to ensure that employee overtime is not incurred by Sheriff’s employees with regard to the terms, conditions and services to be provided by Murray under this agreement.” *Id.*

Apart from the performance of overtime, the Agreement does not prevent the Sheriff from assigning employees of the Sheriff’s office to perform services the Sheriff is obligated to perform under the Agreement. This, along with the Agreement’s failure to restrict the Sheriff from performing his contractual responsibilities during his regular work hours as sheriff, may indicate that the Sheriff is being paid under the Agreement for work performed on County time and with employees and other resources of the Sheriff’s office. If so, the Agreement would implicate the provisions of the Governmental Conduct Code that prohibit a public officer from using “the powers and resources of public office ... to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16-3(A) (2011). See also *id.* § 10-16-3.1(C) (prohibiting a public officer from “us[ing] property belonging to a ... local government ..., or allow[ing] its use, for other than authorized purposes”).

The apparent commingling of the Sheriff's official duties and those required by the Agreement also negates the Agreement's representation that the Sheriff is being paid for his contractual duties in addition to his salary as the elected sheriff. See Agreement, ¶ 2(E). Instead, the Agreement's failure to clearly separate the Sheriff's official duties from his contractual duties may suggest that the Commission, as a practical matter, is paying the Sheriff an additional amount for his official duties, contrary to New Mexico law. See N.M. Const. art. X, § 1 (precluding a county officer from "receiv[ing] to his own use any fees or emoluments *other than the annual salary provided by law...*") (emphasis added); NMSA 1978, § 4-44-21 (1939) ("No [county] officer shall accept or receive ... any ... compensation ... other than [as] provided by law").

Conclusion

We conclude that the Agreement, in its current form, may be improper in two respects. First, it appears the Agreement violated the Governmental Conduct Act's provisions allowing the County to contract with a public officer only if the officer's substantial interest is publicly disclosed and the contract is procured pursuant to a competitive process. Second, the Agreement does not clearly separate the Sheriff's obligations as a contractor with the County from his official duties as Sheriff. Specifically, the Agreement does not require the Sheriff to perform his contractual duties outside the normal business hours of the Sheriff's office, does not preclude the Sheriff from performing his duties under the Agreement concurrently with his official duties and does not preclude the Sheriff from using County personnel and other resources to perform his contractual duties. We believe the Agreement's ambiguity in this respect makes it vulnerable to challenge under state laws prohibiting a County officer from holding incompatible positions, using County resources for personal benefit and receiving compensation beyond that provided by law.

Your request was for an Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of this letter instead of a formal Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,
MARY H. SMITH
Assistant Attorney General

[1] The Commission vote was 4-1, with Commissioners Robert Sandoval, Frank Blackburn, Ben McDaniel and Tim Ashley voting in the affirmative, and Commissioner Wendell Bostwick voting no.

[2] Commissioners Sandoval, Blackburn and McDaniel voted "aye," Bostwick voted "nay," Ashley abstained.

[3] In 2013, the value of professional services considered a "small purchase" under the Procurement Code increased from \$50,000 to \$60,000. See NMSA 1978, § 13-1-125(B) (1984, as amended through 2013); see also 1.4.1.52 NMAC, 2.40.2.13 NMAC (small purchases of professional services).