

Opinion 09-01

OPINION OF: GARY K. KING Attorney General

July 15, 2009

BY: Andrea R. Buzzard, Assistant Attorney General

TO: The Honorable John Arthur Smith, New Mexico State Senator, P.O. Box 998, Deming, NM 88031

QUESTIONS:

1. Must a deputy sheriff forfeit his position if he has not been awarded a certificate of completion by the director of the New Mexico Law Enforcement Academy Board attesting to his completion of an approved law enforcement training program within twelve months after beginning his employment as a deputy?
2. Pursuant to what authority may a county sheriff or the board of county commissioners of a county decommission a commissioned sheriff's deputy to permit that deputy to complete the certification requirements? What process would be utilized to decommission a sheriff's deputy? Would a hearing be required prior to decommissioning a sheriff's deputy for purposes of due process or otherwise?
3. Absent an express legislative grant, would implying a power to decommission a sheriff's deputy in a county sheriff undermine the legislative grant of authority to the board of county commissioners to control the demotion and discharge of deputies and other employees of the sheriff's office where the board of county commissioners has established a merit system by ordinance pursuant to NMSA 1978, Section 4-41-5 (1975) and where such decommissioning would render a deputy unable to meet the job requirements?
4. Does the county sheriff or the board of county commissioners of a county have the authority to waive or otherwise disregard the regulations promulgated by the Law Enforcement Academy Board where a deputy sheriff fails to submit to the department of public safety training and recruiting division an application for certification and required supporting documentation within fourteen days of his employment as a deputy sheriff, as set forth in NMAC 10.29.9.18 (C), or within thirty days of his employment, as set forth in NMAC 10.29.9.10 (B)(1)?

CONCLUSIONS:

1. Based on NMSA 1978, Section 29-7-6(B) (1993), forfeiture of position is required by law if certification by the New Mexico Law Enforcement Academy is not attained within twelve months of employment as a deputy sheriff.

2. The mechanical process of issuing a sheriff deputy's "commission" or of withdrawing that "commission" is not regulated by statute. That process is a matter for the reasonably exercised discretion of the sheriff. Assuming no dispute as to the basic fact that certification has not been achieved within the required period of time after employment, it is likely that procedural due process would not require a hearing in order to terminate employment as required by law.

3. It does not appear that Sierra County has adopted a merit system ordinance applicable to the county's deputy sheriffs that conflicts with Section 29-7-6(B). Where a merit system ordinance is enacted by a county pursuant to NMSA 1978, Section 4-41-5 (1975), as further authorized by NMSA 1978, Section 4-41-6 (1975), the ability of a sheriff to discharge at-will a deputy may be restricted by such ordinance that provides for "the methods of employment, promotion, demotion and discharge of such deputies and employees within the limits provided by law." *Id.* There is no indication that the legislature intends, by Section 4-41-6, to permit enactment of an ordinance that would override the "forfeiture" provision of Section 29-7-6(B).

4. A county sheriff or board of county commissioners does not have the authority to waive or disregard the regulations duly promulgated and adopted by the New Mexico Law Enforcement Academy to implement the Law Enforcement Training Act.

ANALYSIS:

1. Forfeiture of Position for Failure to Attain Certification.

There are two general terms applicable to this matter: (a) certification, and; (b) commission. The term "certification" refers to the process where a citizen attends and graduates from a state-approved law enforcement training program. Among other criteria, "certification" requires that the applicant complete an approved law enforcement training program, must not have been convicted of a felony and must be free of physical or mental conditions that might adversely affect performance as a police officer or prohibit successful completion of basic law enforcement training. NMSA 1978, § 29-7-6(A) (1993). The term "commission" refers to the process where a citizen obtains permission from a law enforcement official, including but not limited to a sheriff, to perform law enforcement duties.

Under New Mexico law, a deputy sheriff is statutorily disabled from retaining his position as a peace officer of a sheriff's department, thus losing the power to apprehend, arrest and bring before the court violators of the law, if that deputy sheriff does not become certified by the New Mexico Law Enforcement Academy ("Academy") within twelve months after beginning his employment with the sheriff's department. NMSA 1978, Section 29-7-6(B) (1993) provides:

A person employed as a police officer by any law enforcement agency in this state shall forfeit his position unless, no later than twelve months after beginning his employment as a police officer, the person satisfies the qualifications for

certification set forth in Subsection A of this section and is awarded a certificate attesting to that fact.

(Emphasis added). “Forfeiture” is by force of law, not by reason of a discretionary employment decision made by an employer. “Forfeiture,” as required by state law, is not waivable. A deputy sheriff is a “police officer” subject to Section 29-7-6(B). See NMSA 1978, § 29-7-7(G).

Thus, a deputy sheriff who does not obtain Academy certification within twelve months of his employment with the sheriff’s department is required by law to forfeit his law enforcement position as deputy sheriff. See also N.M. Att’y Gen. Op. 88-09 (1988) (undersheriffs must comply with Academy certification requirements); N.M. Att’y Gen. Op. 87-25 (1987) (inspectors of the Motor Transportation Division are police officers, and such inspectors have twelve months, after commencement of employment, within which “to receive proper training and obtain their certification from the Academy, or forfeit their position”); N.M. Att’y Gen. Op. 87-34 (1987) (Livestock Board inspectors are police officers and, therefore, “have twelve months after employment in which to receive their certification from the Law Enforcement Academy or forfeit their positions;” further recommending that “the commission of any officer who has worked for [the Livestock Board] for more than twelve months be revoked until the officer is properly certified”); N.M. Att’y Gen. Op. 81-10 (1981) (observing that “[t]he requirement that all police officers complete a basic law enforcement training program or its equivalent within twelve months ... is enforced by forfeiture of employment”).[1]

2. Decommissioning Procedures.

The mechanical process of issuing a “commission” to a deputy sheriff or of withdrawing that “commission” is not regulated by statute. The term “commission” denotes authority granted by a sheriff to a deputy to exercise law enforcement powers,[2] such authority being limited to that possessed by a sheriff.[3] Such authority necessarily flows from the appointment by the sheriff of a deputy pursuant to NMSA 1978, Section 4-41-5 (1865, as amended in 1975), which gives sheriffs “power to appoint deputies, who shall remain in office at the pleasure of such sheriffs....” The mechanical process of ending that appointment and corresponding commission, i.e. decommissioning a police officer, for failure to obtain a certificate under Section 29-7-6(B) or otherwise, is a matter for the reasonably exercised discretion of the sheriff. Accordingly, we believe that a sheriff might decommission a deputy, permit the deputy to complete the requirements for certification, and re-commission the deputy at a later date. See also infra note 4.

Assuming no dispute as to the basic fact that the appointed deputy sheriff has not achieved Academy certification within twelve months of his employment by the sheriff, it is likely that procedural due process would not require a hearing in order to terminate employment as a deputy sheriff and consequent revocation of the appointment or commission to act as such. A procedural due process hearing is not required in order to terminate public employment where a public employee does not have a legitimate claim of entitlement to continued employment. See Zwygart v. Bd. of County Comm’rs, 483

F.3d 1086, 1093 (10th Cir. 2007) (when a plaintiff alleges that he has a constitutionally protected property interest in state employment, such that due process protections are applicable, the court must decide whether, under state law, the employee has “a legitimate claim of entitlement” in continued employment, as opposed to a “unilateral expectation” or “an abstract need or desire” for it) (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)); Kingsford v. Salt Lake City School Dist., 247 F.3d 1123, 1129 (10th Cir. 2001) (“a legitimate claim of entitlement to continued public employment arises only when there are substantive restrictions on the ability of the employer to terminate the employee”); Lovato v. City of Albuquerque, 106 N.M. 287, 289, 742 P.2d 499, 501 (1987) (a public employee has a constitutionally protected property interest in continued employment where he has a reasonable expectation that he will continue to be employed; petitioner’s employment status was a protected property interest only if he had an express or implied right to continued employment). When Academy certification is not achieved within twelve months of employment, a deputy sheriff could not have, under state law, a “legitimate claim of entitlement” to continued employment as such, because state law mandates that he or she forfeit their position as a police officer.

3. Effect of Merit System Ordinance on Sheriff’s Authority to Decommission.

NMSA 1978, Section 4-41-5 (1975) allows a county to establish by ordinance a merit system applicable to deputy sheriffs. That section provides:

The sheriffs in all the counties of this state shall have power to appoint deputies, who shall remain in office at the pleasure of such sheriffs; except that in counties which have established a merit system by ordinance, the provisions of the ordinance shall control the demotion and discharge of deputies and other employees of the sheriff’s office, except for one under-sheriff and an executive secretary, both of whom shall hold exempt positions.

It does not appear that Sierra County has a merit system ordinance applicable to the county’s deputy sheriffs that conflicts with Section 29-7-6(B). The provisions of the Sierra County Code that we have reviewed, Code codification: 1/2008, at 3.03.040(b) and (c), provide, in part:

- (b) Every peace officer employed by the Sheriff’s Department shall serve, to the satisfaction of the appointing authority, a probationary period which shall be the equivalent of fifty-two consecutive weeks of FTE (full time employment)....
- (c) Any employee may be discharged at any time during his or her probationary period and without reason or cause and without providing any hearing. The Appointing authority shall provide proper notification to the employee and a separation report to the Auditor’s office.

Twelve months is a period of approximately 52 weeks. Assuming the sheriff is the appointing authority, the ordinance, therefore, would not appear inconsistent with the

statutory requirement that Academy certification be obtained in order to avoid forfeiture of position under Section 29-7-6(B).[4]

As a general proposition, county ordinances may not conflict with state law. See Bd. of Comm'rs of Rio Arriba County v. Greacen, 2000-NMSC-016, ¶¶ 15, 16, 129 N.M. 177, 3 P.3d 672 (in evaluating alleged inconsistency, test is whether the ordinance permits an act the general law prohibits, or vice-versa). Where a merit system ordinance is enacted pursuant to Section 4-41-5, as further authorized by NMSA 1978, Section 4-41-6 (1975), the ability of a sheriff to discharge at-will a deputy may be restricted by an ordinance that provides for “the methods of employment, promotion, demotion and discharge of such deputies and employees within the limits provided by law.” Id. There is no indication that the legislature intends, by Section 4-41-6, to permit enactment of an ordinance that would override the “forfeiture” provision of Section 29-7-6(B).

4. Authority to Waive Academy Regulations.

Academy Rule 10.29.9.10 NMAC establishes certain paperwork and eligibility requirements for admission to the training program. It provides, in part:

B. (1) An applicant for training or for certification, or his department, must submit the initial application for admission/certification and all necessary paperwork within 30 days of the initial hire date for said applicant.

(2) Non-compliance with the 30 day application requirement will result in assignment to class ... on a space available basis only ... [T]he applicant must have his commission suspended if he exceeds one year from initial hire date.

(3) No applicant shall be admitted to the department of public safety training and recruiting division after one year of initial hire date unless the applicant and his Chief, Sheriff, or agency head certify:

(a) that he was suspended from duty as a law enforcement officer and his commission revoked within one year of his initial hire date; and

(b) that the department will reinstate the officer based upon his successful completion of the basic training course and certification by the New Mexico law enforcement academy board.[5]

The New Mexico Law Enforcement Academy Board has statutory authority to adopt rules concerning the operation of the Academy and the implementation and enforcement of the Law Enforcement Training Act. NMSA 1978, § 29-7-4 (F) (2003). With respect to admission of a deputy who did not attain the certification requirement within a year of initial employment, the rule requires that the sheriff certify that: (1) the deputy was suspended from duties as a law enforcement officer and his or her commission was revoked, and; (2) the sheriff will reinstate the officer to his law enforcement position when he has completed the training course and become certified.

Neither a county sheriff nor a board of county commissioners has the authority to waive or disregard the Academy Board's duly adopted and promulgated rules that implement this Act.

GARY K. KING
Attorney General

ANDREA R. BUZZARD
Assistant Attorney General

[1] These opinions involved a discussion and analysis of predecessor statutes, which are not markedly dissimilar from current law. See, e.g., Section 29-7-8, repealed by N.M. Laws, Ch. 255, § 11 (requiring a police officer to forfeit his or her position if certificate not obtained).

[2] See NMSA 1978, Section 4-41-8 (1905) ("No person who may be under indictment or may be generally known as a notorious bad character ... shall be eligible to serve as a deputy sheriff, and sheriffs are prohibited from issuing commissions to such persons as deputy sheriffs...."); NMSA 1978, Section 29-1-11(B) (1972, as amended) ("The chief of the state police is granted authority to issue commissions as New Mexico peace officer to members of the police or sheriff's department of any New Mexico Indian tribe or pueblo...."). The dictionary definition of "commission" is "a formal written warrant or authority granting certain powers or privileges and authorizing or commanding the performance of certain acts or duties." Webster's Third New International Dictionary 457 (1986).

[3] See NMSA 1978, Section 4-41-9 (1865) ("The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed under their charge by their principals, with the same effect as though they were executed by the respective sheriffs").

[4] The ordinance refers to "peace officer" employment, i.e. "commissioned" employment. If the requirement of certification is not met, the ordinance does not appear to prohibit such employee from being decommissioned and remaining employed in a non-commissioned activity, or the probationary employee could be terminated from employment, in either case as determined at the discretion of the sheriff.

[5] Police officers who have passed the Academy's required training course and the Academy's certification examination must submit an application for certification and required supporting documentation to the department of public safety training and recruiting division within fourteen days of employment as a police officer, and; "[a]ny officer (or department) not submitting the required documents is in violation of NMSA 1978, Section 29-7-1 et al., (Repl. Pamp. 1994), and will be required to forfeit his position." Rule 10.29.9.18(C) NMAC; Rule 10.29.5.11(C) NMAC. Thus, under these rules, it is incumbent upon such officers or their employing departments to submit with

alacrity the required documents necessary for certification within the allotted period of time after their employment.