

Opinion No. 43-4252

March 16, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. John G. Montgomery, Member, House of Representatives, Santa Fe, New Mexico

We are in receipt of your letter of March 12, 1943, in which you ask various questions concerning the State Police and the State Guard. These questions and my answers are as follows:

(1) "Does an officer of a department of the state, such as a member of the State Police or State Guard exceed in authority a county sheriff within the county in which he is elected, or a constable within his precinct?"

Our Legislature has not set up either the State Police or the sheriff's constables on this basis, rather the Legislature has imposed certain duties upon each of these officers. By Section 15-3802 of the 1941 Compilation (all references to statutes are to the 1941 Compilation) the Legislature has provided that:

"The sheriff shall be the conservator of peace within his county, shall suppress assaults and batteries, and apprehend and commit to jail all felons and traitors. * * *"

By Section 40-217, relating to the powers of the State Police, the Legislature provided:

"They (the State Police) shall be the conservators of the peace within the State of New Mexico, with full power to apprehend arrest and bring before the proper court of law violators within the State of New Mexico."

Thus, both the State Police or the sheriff have the duty of enforcing the laws of this state. Since the State Police is given full power to enforce these laws, it appears to me that they could not refuse or be prevented from doing so, because the sheriff had failed to act or to request the State Police to take action.

It is, therefore, my opinion that the authority of the State Police and sheriffs within a county are concurrent, and that each has the power and duty of enforcing the laws of this state independent of the other.

By Section 40-302, it is contemplated that the State Police cooperate with the sheriffs, but this would not detract from their power to enforce the laws. The State Police are not a subordinate of the sheriff, but are an independent law enforcement agency without being limited to county lines.

As to the State Guard, they are not civil officers, and are not authorized to act unless called out to enforce the laws of this state as a military organization.

Under a proclamation of martial law, as provided by Section 66-104, the State Guard, as a military force, would supersede civil authorities under the decision of our Supreme Court in *Roberts v. Swope*, 38 N.M. 53.

(2) "Does the Governor of the State have authority at will to send the State Police or State Guard to enforce the laws in any part of the state?"

As to the State Police, Section 40-220 provides:

"The Governor of the State of New Mexico may, from time to time, detail all or any part of the New Mexico State Police to such part of the state as in his judgment may be necessary to bring about proper law enforcement in the state, to handle disturbances, or to investigate specific law violations."

With respect to the State Guard, your attention is directed to Section 66-105 wherein it is provided:

"The Governor shall have power, in case of insurrection, invasion, riot or breach of the peace, or immediate danger thereof, to order into active service of the state the National Guard or any part thereof."

Under this section, the Governor may call upon the State Guard (successor to the National Guard) under the circumstances set forth therein. It is noted that if there is eminent danger of any of these things, the Governor may call out the State Guard, and it is my opinion that it is in the Governor's absolute discretion whether or not such danger exists.

(3) "May the Governor, by decree, declare an emergency or martial law at will, and if so, upon what grounds must he declare such emergency or martial law?"

In answer to this question, I cite Section 66-104, which is as follows:

"Whenever any portion of the National Guard * * * is employed in aid of civil authority, the Governor, if in his judgment, the maintenance of law and order will thereby be promoted, may, by proclamation declaring the county, or city, or both, in which the troops are serving, or any specified portion thereof, to be in a state of insurrection, and may declare martial law therein."

Thus, if the State Guard has been called out under the circumstances outlined in the latter portion of my answer to your question No. 2, the Governor, if he believes that the maintenance of law and order will be promoted, by declaring martial law, may, in his absolute discretion, make such order.

(4) "Does the Governor have authority, without declaring an emergency or martial law, to send State Police or the State Guard to police polling places during an election unless requested to do so by the local officers of such place?"

First I might state that in my opinion the fact whether or not local officers make a request has no bearing on the powers of the Governor. The only limitation upon the power of the Governor to send State Police or the State Guard to police polling places during an election is that found in Section 56-528, which provides in part as follows:

"No sheriff * * * State Policeman * * * shall, during the conduct of an election, enter into an election **booth**, nor shall any such officer in any polling place give or offer to give any advice, counsel, aid or assistance of any kind to any official or voter therein, except to assist in preserving the peace, when requested so to do by any election official, and where the case of such assistance is apparent."

Thus, it is my opinion that without declaring an emergency or martial law, the Governor might, under the circumstances outlined in answer to question No. 2, send the State Guard or State Police to police the general area where an election is being held, but that he could not order them to enter any election booth, and that further, while any such officer could go into the polling place, he could in no way, take part in the conduct of the election except to assist in preserving the peace when requested by an election official, and where such assistance is apparent.

(5) You ask "In declaring the emergency or martial law, does not the Governor have to state in his decree why such emergency or martial law is declared?"

Your attention is again directed to Section 66-104, quoted above. You will note that there is no requirement as to how the Governor shall declare such emergency. In connection with this question, the author in 40 C. J. 691 says:

"The right to call out the militia in times of public disorder or danger, or where there is eminent danger thereof, or to aid the civil authorities in the enforcement of the law, is generally vested in the Governor, and he may act without a request from local civil officers in the place where the disturbance exists * * * the decision of the Governor that the condition exists which demands the exercise of his authority, is conclusive, and is not subject to review by the courts."

It is therefore my opinion that the Governor does not have to set out in his decree why such emergency or martial law was declared, and that if he makes such declaration, his decision is conclusive.

Trusting that the foregoing sufficiently answers your inquiries, I am

By ROBERT W. WARD,

Asst. Atty. General