

**FORMAL OPINION
2002-F-02**

DATE ISSUED: January 24, 2002

REQUESTED BY: Terry W. Elhard, McIntosh County State's Attorney

QUESTIONS PRESENTED

I.

Whether a county sheriff may legally hold a full-time job other than the sheriff's position.

II.

Whether a county commission may prohibit a county sheriff from using a sheriff's department patrol vehicle to commute to and from the sheriff's other job.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that a county sheriff may legally hold a full-time job other than the sheriff's position, although there are limits on the ability to hold a full-time position.

II.

It is my further opinion that a county commission may prohibit a county sheriff from using a sheriff's department patrol vehicle to commute to and from the sheriff's other job.

ANALYSES

I.

The sheriff is an elected county officer. N.D. Const. art. VII, § 8; N.D.C.C. §11-10-02. There are no state laws that prohibit a county sheriff from acquiring other employment. In addition, the county commission does not have the authority to prohibit the sheriff from acquiring other employment. Regarding a county commission's authority over elected county officers, this office has previously stated:

[T]he . . . County Board of Commissioners has very little supervisory authority or control over the state's attorney. Although state law does permit the board of county commissioners to supervise the conduct of county officers (N.D.C.C. § 11-11-11), it has been recognized that this authority is significantly limited and might be best characterized as "advisory." In 1996 N.D. Op. Att'y Gen. 1, it was concluded that the board of county commissioners may not usurp the duties and powers given to the respective elected county officers pursuant to state law since elected county officials are responsible to the electorate for their conduct and job performance. That opinion also concluded that the board of county commissioners has no statutory authority to sanction elected county officials for poor job performance, improper behavior, or failure to properly perform their jobs.

Letter from Assistant Attorney General Robert Bennett to Frank Landeis (Jan. 4, 2000) (emphasis added). See also 1998 N.D. Op. Att'y Gen. L-107 (elected county officers have implied authority to determine when and how much vacation time they take). As the quoted language indicates, the county commission has very little supervisory authority or control over the elected county sheriff. The sheriff is responsible to the electorate for the sheriff's conduct and job performance.

Thus, it is my opinion that a county sheriff may legally hold a full-time job outside of the sheriff's position. However, there are limits on the ability to hold a full-time position.

A sheriff who takes another job must continue to perform the duties of the sheriff. Failure of the sheriff to perform those duties may result in a vacancy in the office. N.D.C.C. §§ 44-02-01(5), 44-02-04. Section 44-02-04, N.D.C.C., provides, in part:

The board of county commissioners may declare a county office to be vacant whenever the officeholder is unable to perform the duties of the office for six months or more. However, if within one year the officeholder should become able to perform the officeholder's duties, the county commissioners may, for good cause shown, reinstate the officeholder.

(Emphasis added.) State law also provides:

An office becomes vacant if the incumbent shall:

. . . .

5. Fail to discharge the duties of office, when the failure has continued for sixty consecutive days, except when prevented from discharging the duties by reason of the person's service in the armed forces of the United States, by sickness, or by other unavoidable cause. . . .

. . . .

N.D.C.C. §44-02-01. If a county officer is performing his duties, even while holding another full-time job, a vacancy cannot be declared.

Furthermore, the actual employment assumed by the sheriff is not without limits. As an elected official, a sheriff may not hold another office that is incompatible with the office of sheriff. State v. Lee, 50 N.W.2d 124 (N.D. 1951); Tarpo v. Bowman Public School District, 232 N.W.2d 67 (N.D. 1975). In addition, the employment must not compensate the sheriff for acts or services rendered in an official capacity. N.D.C.C. § 11-10-14 (statutory salaries of county officers shall be full compensation for acts or services rendered in an official capacity). A sheriff is also prevented from providing private investigative or security services. N.D.A.C. §§ 93-02-01.1-07(2) and 93-02-02.1-11(2) (prohibiting a licensee or registrant of the Private Investigative and Security Board from being employed in a full-time or part-time capacity wherein the individual has any police-type powers or access to any official law enforcement records). The sheriff must assume the responsibility to ensure that the employment is not in conflict with these, or other provisions of law that may apply depending on the actual job sought or obtained.

A county officer who takes another full-time job may be the subject of a recall under N.D. Const. art. III, § 10 and N.D.C.C. § 16.1-01-09.1 (recall by petition of qualified electors), or subject to removal from office under N.D.C.C. chs. 44-09 (removal by impeachment by the state House of Representatives), 44-10 (removal by judicial proceedings), and 44-11 (removal by the Governor).

In conclusion, although there is no state law prohibiting a full-time county sheriff from taking another full-time job, there are limits on that ability and potential concerns regarding recall or removal from office.

II.

State law does not specifically address whether a sheriff may use a sheriff's department patrol vehicle to commute to and from the sheriff's other job. Our office has previously been asked whether the county commission may order a patrol car to remain at the sheriff's office overnight, thereby preventing the sheriff from using the patrol car owned by the county to travel to and from work each day from the sheriff's home. That opinion stated:

The various North Dakota statutes discussing the duties of the sheriffs and county commissioners of the state are not so specific as to address your questions. However, there are statutes which clearly place the responsibility for the general administration of the affairs of the county with

the board of county commissioners. N.D.C.C. § 11-11-11(1). Indeed, with respect to property belonging to the county, which apparently is the case with respect to your specific questions, N.D.C.C. § 11-11-14(2) does provide authority with the board of county commissioners to make all orders respecting such property of the county. Finally, in 1982 this office issued an opinion recognizing that the sheriff does have authority with respect to the administration of his department but further indicating that the board of county commissioners retains authority with respect to the overall fiscal administration of various county offices, including that of the sheriff. 1982 N.D. Op. Att'y Gen. 108.

As the county commissioners have general supervisory authority over the fiscal affairs and property of the county, it would appear that they do possess the authority to determine the handling and operation of county owned patrol cars. However, where the sheriff is unable to use a county owned patrol car and does travel in the performance of his duties, he is entitled to the mileage provided for in N.D.C.C. § 11-10-15.

Letter from Attorney General Nicholas Spaeth to Terry Elhard (Nov. 12, 1985) (emphasis added).

The quoted language indicates a county commission has the authority to determine the handling and operation of county owned patrol cars. Thus, it is my opinion that a county commission may prohibit a county sheriff from using a sheriff's department patrol vehicle to commute to and from the sheriff's other job.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Wayne Stenehjem
Attorney General

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