

OPINION
77-32

August 25, 1977 (OPINION)

Mr. John E. Jacobson
Mercer County State's Attorney
Mercer County Courthouse
Stanton, ND 58571

Dear Mr. Jacobson:

This is in response to your letter in which you make the following inquiry:

This is to request your opinion as to the question whether a county may contract with an electrical utility to provide plantsite security during the construction phase of a new facility.

I am enclosing a copy of the proposed contract.

The county feels that entering into such a contract would prevent the loss of trained deputies who could possibly be hired by a private security company for a higher wage and better working hours. This would force increased expenditures on the county to compete with the private security. Also it is felt that a contract of this type would be beneficial to law enforcement in that it would prevent theft and vandalism during the construction period.

As a general rule of law, a "sheriff, constable or deputy cannot, as such, engage to guard the property of a private individual or corporation not in the custody of the law." "Likewise, it is not within the functions of a constable or deputy to engage in conducting and soliciting business for a private patrol service." 80 C.J.S., "Sheriffs and Constables" Section 49. See also Texas and N.O.R. Co. v. Parsons, 102 Tex. 157, 113 S.W. 914 (1908); S.L., I.M. and S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S.W. 881; Hogle v. Reliance Mfg. Co., 113 Ind. App. 488, 48 N.E.2d. 75 (1943).

We note that the duties of security guards at mining and power plant construction sites commonly include such responsibilities as maintaining check points at gates, issuing passes, badges and identification cards and checking the same, checking manifests and truck contents on entering and leaving, directing parking and traffic on private property, monitoring and controlling "traffic" vehicle safety on private property, inspecting the contents of employee lunch boxes and the like, giving information, escorting visitors and peddlers, punching in at time check points, conducting "background" checks on some new employees, watching for fires, sabotage, and OSHA violations, providing first aid and ambulance services, and carrying out instructions given by representatives of the company. These functions are also beyond the scope of the official duties of a law enforcement officer. See the Rand Corporation study prepared for the Department of Justice, The Private Police Industry, (1971).

It does not matter whether payment for providing the security services is made directly to the guard/deputies or through intermediaries, Texas and N.O.R. Co. et al. v. Parsons, 109 S.W. 240 (1908).

The privileges, immunities and exemptions of a sheriff or deputy cease when functioning in the capacity of a private security guard, and in such cases the officer's acts are treated the same as if he were not a public officer at all, Sharp v. Erie Ry. Co., 194 N.Y. 100, 76 N.E. 293 (1906); Hudson v. St. Louis Southwestern Ry. Co. of Texas, 293 S.W. 811 (Texas 1927).

Thus, we are of the opinion that a county cannot contract with a private individual or corporation to have the sheriff or deputies, as such, guard or patrol the property of a private individual or corporation.

We are of the opinion that a county cannot engage in the business of, nor contract to provide, private security by persons not functioning as law enforcement officers, since the same is not within the statutory authority of the county, and the county is limited to such expressly conferred or necessarily implied powers. 20 C.J.S., "Counties" Section 193; (1944-1946) Rep. of Attorney General of North Dakota, 59, (Attorney General's Opinion, January 16, 1946); (1946-1948) Rep. of Attorney General of North Dakota, 59, 75, Attorney General's Opinion, June 11, 1948, July 1, 1946); (1950-1952) Rep. of Attorney General of North Dakota, 31, (Attorney General's Opinion, June 11, 1951); (1956-1958) Rep. of Attorney General of North Dakota, 70, (Attorney General's Opinion, April 10, 1958); (1962-1964) Rep. of Attorney General of North Dakota, 73, (Attorney General's Opinion, January 14, 1963).

For the case of a law enforcement officer seeking to provide private security services, in a nonlaw enforcement capacity, we note that a sheriff, constable or deputy is subject to occupational licensing for private security services provided, Ex parte Hitchcock, 34 Cal. App. 111, 166 P. 849 (1917).

In Ex parte Hitchcock, the court, 166 P. at 851, stated:

It is further contended by the petitioner herein that the ordinance in question interferes with his powers and rights as a deputy constable under the state law, but in respect to this contention it is to be noted that the ordinance by its terms is limited in its application to those business firms or corporations who are seeking to maintain a patrol service or system, and has no application to individuals who are either officially or unofficially performing the ordinary functions of such peace officers as sheriffs or constables. The charge upon which the defendant is held in custody is that of unlawfully engaging "in the business of conducting, maintaining and soliciting business for a certain patrol service without having obtained a permit so to do," in accordance with the terms of the ordinance in question. It cannot seriously be contended that the doing of these acts is within the range of the statutory functions of a constable or his deputies.

Therefore, it would be necessary for the sheriff and deputies to comply with the licensing requirements of North Dakota Century Code Chapter 43-30 which deals with private detectives and security guards.

Functioning as a private security guard not being within the official duties of a sheriff or deputy, it would appear that a sheriff or deputy could not properly function as a private security guard - carrying out private services not within the scope of official duties - in sheriff department uniforms or in vehicles marked as law enforcement vehicles. Wearing such uniforms and using such vehicles would create problems with several sections of the law as well as with rules and regulations having the force and effect of law. E.g., North Dakota Century Code Sections 12.1-13-04, 12.1-14-01 and rules R 43-30-01 through 03.

In addition to the strict legal question, the practice of persons who are law enforcement officers serving as private security guards and investigators has been criticized by courts and studies as being ripe with actual and potential conflicts of interest. See, e.g., Terry v. Burford, 175 S.W. 538 (Tenn. 1915). National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Private Security, (1976).

After public hearings and considerations of written comments, this office, on April 18, 1977, indicated its intention to promulgate, effective July 1, 1978, the following private detective rule:

R 43-30-05

No private detective or holder of a private detective agency license may be employed full or part-time in any capacity wherein he has any type of police powers or access to any law enforcement records.

No holder of a private detective agency license shall employ any person who is employed full or part-time in any capacity wherein such employee would have any type of police powers or access to any law enforcement type records.

No private detective or employee of any private detective agency shall solicit or accept any commission or deputization that in any way involves the authority to use or employ, or the use or employment of any police type powers, except that of a special deputy sheriff, and then only in the case of an emergency or disaster, and only for the immediate time of such emergency or disaster.

As used with R 43-30-05, positions with police type powers shall not include official volunteer civil defense positions or membership in the National Guard or Armed Forces of the United States, with the exception of Military Police.

Therefore, in specific response to your question, we believe that the county cannot contract to have the sheriff or his deputies provide security guard services in their capacity as such law enforcement officers. Any other contracting must be circumscribed by the

standards we have herein set forth.

We trust this adequately sets forth our position on this matter.

Sincerely,

ALLEN I. OLSON

Attorney General