

Opinion No. 66-92

July 26, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: Abner Schreiber, County Attorney, P. O. Box 800, Los Alamos, New Mexico 87544

QUESTION

QUESTIONS

May unpaid, volunteer policemen in Los Alamos County, who have deputy sheriffs' commissions:

1. If in a uniform (not just badge and commission) arrest, without a warrant, a person reasonably believed to have committed a felony?
2. If in uniform (not just badge and commission) arrest, without a warrant, a person believed to have committed a misdemeanor?
3. Make such arrests if not in a cloth uniform but while carrying a badge and commission?
4. Function without being under the direct supervision of a regular, full-time salaried police officer?
5. File criminal complaints under the same provisions and in the same manner as regular full-time salaried police officers?
6. Become entitled to Workmen's Compensation or other such benefits the same as a regular, full-time salaried police officer?

CONCLUSIONS

1. See analysis.
2. No, unless the misdemeanor is being committed in the officer's presence.
3. See analysis.
4. Yes.
5. No.

6. Yes, but see analysis.

OPINION

{*123} ANALYSIS

There are numerous statutes dealing with peace officers and deputy sheriffs and this office has issued several opinions in this connection, in addition to case law hereinafter cited.

You advise that the volunteer officers are equipped with cloth uniforms and badges and hold deputy sheriffs' commissions. You do not advise whether such commissions issued {*124} show any restrictions or limitations. You also advise that the volunteer officers serve without compensation.

Section 39-1-9, N.M.S.A., 1953 Compilation provides, in part, that no special deputy or other peace officer shall be appointed who is not a citizen of New Mexico and it further provides that the appointment of a regular deputy shall be in writing and filed. Section 5-1-5, N.M.S.A., 1953 Compilation requires every employee of the State to have been a resident of the state for at least one year prior to the commencement of his employment. Opinion No. 60-222, **Report of the Attorney General, 1959-60**, held that this requirement applied to deputy sheriffs. The reasoning of this opinion and language of the statute apply with equal force to a special deputy. A person under indictment generally known to be of notorious bad character or as a disturber of the peace or who has been convicted of a felony or infamous crime and not pardoned or restored to civil rights shall not be eligible for appointment as a deputy sheriff, Section 5-1-3, N.M.S.A., 1953 Compilation and Section 15-40-10, N.M.S.A., 1953 Compilation. Only one who is a respectable and orderly person may be appointed to such office. He must upon appointment take the oath prescribed by Section 15-40-5, N.M.S.A., 1953 Compilation and may be required to execute a bond as provided in that section. The appointment of a special deputy need not be filed. Section 15-40-12, N.M.S.A., 1953 Compilation. However, as pointed out in Opinion No. 57-83, **Reports of the Attorney General 1957-58**, such a filing is advisable. This is particularly true since, your request indicates that these special deputies do not receive a separate appointment for each occasion on which they serve but act under a more general appointment. It is necessary, also, for each such special deputy to have his written commission, as well as his badge as hereafter discussed in this opinion.

Keeping in mind the above, your first question asks about the authority of such a special deputy to arrest a person when he has reasonable cause for believing the person has committed a felony. A peace officer is defined in Section 40A-1-13, N.M.S.A., 1953 Compilation as follows:

"c. 'Peace officer' means any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."

Section 15-40-2, N.M.S.A., 1953 Compilation provides that the county sheriff is a conservator of the peace charged with the duty among other things, of apprehending all felons.

Section 15-40-11, N.M.S.A., 1953 Compilation authorizes deputies to discharge all duties of a sheriff. Under Section 15-40-12, *supra*, this authority may be limited, either in scope or duration, by the appointing authority.

It follows that, **absent a limitation of authority to the special deputy**, he is a peace officer and is cloaked with all of the powers and duties of such. A peace officer is authorized to arrest a person without a warrant when he has reasonable cause to believe such person has committed a felony.

The peace officer making an arrest, without a warrant, where he has reasonable grounds to believe that the suspect has committed a felony, need not be wearing a uniform. However, it is advisable that he have in his possession his commission and prominently display his badge. An exception is noted in Section 64-22-92, N.M.S.A., 1953 Compilation (P.S.) when the suspected felon is arrested on the highway and charged with theft of a motor vehicle or a crime in another jurisdiction. **In such case the unsalaried deputy has no authority to make an arrest.** In order to have authority without a warrant to arrest one for the commission of any other felony occurring **under the motor vehicle laws**, the arresting officer must base his reasonable grounds, in part, **on a personal investigation.** Section 64-22-8.2, *supra*.

Subject to the above exceptions and limitations an unpaid, uniformed special deputy may, without a warrant, arrest a person he reasonably believes has committed a felony.

Your second question is answered {**125*} by what has been heretofore stated and by the cases of **State v. Selgado**, No. 7930, as yet unreported, advance opinions, April 18, 1966; **State v. Gutierrez**, No. 7877, as yet unreported advance opinion dated June 20, 1966, and **Cave v. Cooley**, 48 N.M. 478, 152 P. 2d 886. Since the special deputies are law enforcement officers and, unless restricted by their appointment, are charged with preserving the peace they may, while in uniform, make an arrest of one they have **reasonable grounds to believe is committing a misdemeanor in their presence**, although without a warrant. However, your attention is called to Section 64-22-8.1, N.M.S.A., 1953 Compilation (P.S.) which requires an officer making an arrest for a misdemeanor under the motor vehicle code to be wearing a uniform. A uniform for such purpose means a commission of office and a prominently displayed badge.

The third question has been answered by the foregoing. Except insofar as motor vehicle violations are concerned there is no requirement that a special deputy sheriff wear a uniform at the time of making an arrest. However, he must have his commission and a prominently displayed badge in order to make arrests for such violations and it is advisable that this be done in all cases, whether or not a cloth uniform is worn.

Your next question asks whether a special deputy sheriff need be under the direct supervision of a full time salaried police officer. Under the provisions of Section 15-40-11, supra, the deputy has the same authority as the sheriff and under the provisions of Section 15-40-12, supra, they are considered to be in the discharge of their duties at all times. They shall, whenever the sheriff feels it necessary and required, assist in preserving the peace. Although they may be restricted by the terms of the appointment, there is no requirement of direct supervision of such special deputy by a full time police officer. The possible liability for those actions is not the subject of this opinion and you are referred to Opinion No. 66-63, Report of the Attorney General 1965-66 (as yet not published), for a discussion of this subject.

Opinion No. 63-76, Report of the Attorney General 1963-64 answers your fifth question, and it is here affirmed. Since a special deputy is not a full time salaried county or state law enforcement officer, he may not file a criminal complaint without advancing the costs required by Section 36-19-18, N.M.S.A., 1953 Compilation.

Your last question is whether the officers under consideration are covered by Workmen's Compensation. It is assumed that Los Alamos County carries appropriate insurance coverage. The case of **Eaton v. Bernalillo County**, 46 N.M. 318, 128 P. 2d 738, 142 A.L.R. 647 considered this question in view of the provisions of Section 59-10-2, N.M.S.A., 1953 Compilation authorizing counties to come under the provisions of the Workman's Compensation Act and provisions of Section 59-10-10 N.M.S.A., 1953 Compilation which states that all duly elected or appointed peace officers of a county shall be deemed to be following an extra hazardous occupation **and to be within the provisions** of the Workman's Compensation Act. In the above case the claimant was found not to be a duly appointed, acting and qualified deputy sheriff at the time of the accident, and therefore not an employee within the terms of the act. However, the court said that one lawfully impressed into service in aid of a peace officer would be an employee entitled to benefits under the Workman's Compensation Act.

It is therefore our opinion that the statutory language above referred to, as interpreted by our court in **Eaton v. Bernalillo County**, supra, does provide that a duly and regularly appointed special deputy sheriff of Los Alamos County, while in the performance of his duties and within the scope of his authority, would be an employee engaged in an extra hazardous occupation within the meaning of the Workman's Compensation Act.