

## Opinion No. 73-25

February 23, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Honorable Bennie J. Aragon State Representative State Capitol Building Santa Fe, New Mexico 87501

### QUESTIONS

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1. Can the Bernalillo County Commission consolidate the County Sheriff's Department with the Albuquerque City Police Department?
2. Can the appointed Chief of Police have command over the elected County Sheriff?

#### CONCLUSION

1. It would take legislation in order to change the statutory powers, duties and functions of the sheriff's office.
2. Not under existing law.

### OPINION

#### {\*40} ANALYSIS

We believe it is not amiss to point out initially that Article X, Section 4, New Mexico Constitution, provides that:

"The legislature shall, **by general law**, provide for the formation of combined city and county municipal corporations, and for the manner of determining the territorial limits thereof . . ." (Emphasis added)

Such authorizing legislation, setting forth the required procedures, including {\*41} the provisions relative to voting on the consolidation by the electorate in both the city area and the county area, is contained in Section 14-15-1 **et seq.**, NMSA, 1953 Comp.

Nor can we ignore House Bill 217, introduced during the present session of the legislature, which would have amended Section 15-40-2, NMSA, 1953 Comp., relating to the duties of sheriffs, to add the following language:

"provided, however, that in A class counties the county commission may, by ordinance, alter, amend, broaden, restrict or redefine the powers, duties and functions of the sheriff of the county."

In addition, House Bill 217 would have amended Section 15-40-9, NMSA, 1953 Comp., the statute relating to the appointment and terms of deputy sheriffs, by adding the following:

"provided, however, that in A class counties the power to appoint deputies may be altered, modified or amended by ordinance of the county commission."

This Bill received a "DO NOT PASS" from the House Judiciary Committee and is apparently dead for this session of the legislature.

Not having utilized the constitutional procedure and authorizing legislation for city-county consolidation, and since the proposed statute on permissive restructuring of the sheriff's office has failed to pass the legislature, the Bernalillo County Commission has now, we are informed, adopted a resolution on this subject matter. Our information is that the resolution directs that ordinances and a joint powers agreement be prepared which will effect some type of merger, consolidation, amalgamation or the like of the sheriff's office and the Albuquerque police department.

We do not speak to the desirability of such a plan. Obviously, there are proponents and opponents of any type "consolidation". Our comments are limited solely to the legal aspects of the question.

Depending on just what the Bernalillo County Commission has in mind in regard to "consolidation" of the law enforcement entities, there seems to exist here a real, not superficial, analogy to the situation in the case of the State Auditor a few years back. In 1961 a proposed constitutional amendment abolishing the constitutional office of State Auditor was voted down by the electorate. Failing in this effort, the legislature attempted, in effect, to abolish the office indirectly. It deprived the auditor of most of his statutory duties, cut his appropriation and left the office "an empty shell." Our Supreme Court in **Thompson v. Legislative Audit Commission**, 79 N.M. 693, 448 P.2d 799 (1969) held the legislature simply could not do this, quoting with approval this language from a prior decision:

"Of course the legislature cannot abolish a constitutional office nor deprive the office of a single prescribed constitutional duty. **Nor can this be done by indirection**, such as depriving him of all statutory duties, thereby leaving the office in name only, an empty shell." (Emphasis added)

Additionally, the court said:

"So to sanction the legislative repeal of the office would not only thwart the constitutional provision but would circumvent the will of the people as expressed at the ballot box."

Now if the legislature cannot indirectly "abolish" the constitutional office of State Auditor, then applying the same reasoning, local governing bodies cannot, by the expediency of a contract, eliminate, curtail or impede the legislatively mandated functions of an office created by the legislature -- and the office of sheriff is specifically provided for by legislative enactment. Section 15-40-1, NMSA, 1953 Comp., provides:

"At each general election held in this state there shall be elected in each county a sheriff."

The duties of the office are also **prescribed by statute**, and they are many and varied. See, e.g., Section 15-40-2, NMSA, 1953 Comp. and the numerous cross-references enumerated thereunder.

Section 15-40-9, NMSA, 1953 Comp. provides that:

{\*42} "The sheriffs in all the counties of this state shall have power to appoint deputies, who shall remain in office during the pleasure of said sheriffs."

In addition, Section 15-40-11, NMSA, 1953 Comp. states as follows:

"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." (Emphasis added)

Keep in mind that if a city and county can, by contract between their governing bodies, alter the statutory powers, duties and functions of an elected county official, in this case the sheriff, then they could do the same thing in the case of every other elected county officer -- the county clerk, county treasurer, county assessor, etc. Legislative enactments, laws to be precise, simply cannot be nullified or altered by such method. It should be noted that probably the most important statutory function of a Board of County Commissioners is set forth in Section 15-37-16, NMSA, 1953 Comp., as follows:

"To represent the county and have the care of the county property and the management of the interest of the county **in all cases where no other provision is made by law**." (Emphasis added)

This brings us to the vehicle by which the "alteration" of the sheriff's statutory duties is to be accomplished, namely, the Joint Powers Agreements Act, Sections 4-22-1 through 4-22-7, NMSA, 1953 Comp. What is sometimes forgotten by governmental agencies attempting to use this act is the requirement that the contracting parties must **each** have the necessary power to enter into the particular type of contract. As the Act says, the governing bodies "may jointly exercise any **power common** to the contracting parties." Section 4-22-3, **supra**. The Act itself confers no special powers, nor does it serve as a device for one governmental body to use a power which only the other body possesses. In the situation posed here, neither the city nor the county can effectively contract to

supersede state statutes setting forth the powers, functions and duties of the sheriff's office. Such changes, if they are to be accomplished, other than by constitutional city-county consolidation, must come by way of statutory enactments -- the same way they were mandated in the first instance.

By: Oliver E. Payne

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