

Opinion No. 74-15

April 24, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Fred T. Hensley District Attorney Ninth Judicial District P.O. Box 119 Portales, New Mexico 88130

QUESTIONS

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May an off-duty municipal police officer or county sheriff's deputy work part time checking identification cards at a liquor establishment (and being compensated by the liquor establishment) without being licensed by the Private Investigators Act?

CONCLUSION

No.

OPINION

{*28} ANALYSIS

The first issue is whether the private employment is incompatible with official duties. There is nothing in the Municipal Code (Section 14-1-1, et seq., NMSA, 1953 Comp.) or the County Sheriff's Law (Section 15-40-1, et seq., NMSA, 1953 Comp.) which either allows or prohibits such an arrangement. Accordingly, the statutes relating to public officers and employees are considered (Section 5-1-1, et seq., NMSA, 1953 Comp.). Sections 5-3-40 and 5-3-42, **supra**, relate to physical incompatibility. In this instance, there would be no physical incompatibility because the police officer or sheriff's deputy would perform his official duties during working hours and perform his private employment duties after normal work hours and on a part-time basis.

{*29} Functional incompatibility is a well-settled doctrine in New Mexico. In **Haymaker v. State ex rel. McCain**, 22 N.M. 400, 168 P. 248 (1917), the Supreme Court of New Mexico stated the following rule [p. 403]:

In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible (Citations omitted)."

In this instance, the private employment of a municipal police officer or a county sheriff's deputy would clearly not interfere with, subordinate, or be subordinate to, the official duties of the officer or deputy.

The second issue is whether the off duty officer or deputy is required to be licensed under the Private Investigators Act (Section 67-33-1, et seq., NMSA, 1953 Comp. (1973 Supp.)). Section 67-33-9 (A) and (B) provide:

"A. **A private investigator** within the meaning of this act [67-33-1 to 67-33-49] **is a person** other than an insurance adjuster **who for any consideration whatsoever engages in business or accepts employment to furnish or agrees to make or makes an investigation for the purpose of obtaining information with reference to** : crime or wrongs done or threatened against the United States of America or any state or territory of the United States of America; **the identity**, habits, conduct, business, occupation, honesty, integrity, credibility knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliation, association, transactions, acts, reputation or character **of any person** ; the location, disposition or recovery of lost or stolen property; the cause or responsibility for fires, liables, losses, accidents or damage or injury to persons or properties; or securing evidence to be used **before any court, board, officer or investigating committee.**

B. **A private patrol operator** or operator of a private patrol service within the meaning of this act **is a person who for any consideration whatsoever: agrees to furnish or furnishes a uniformed or un-uniformed watchman, guard, patrolman, or other persons to protect persons or property** or to prevent the theft, unlawful taking, loss, embezzlement, misappropriation or concealment of any goods, wares, merchandise, money, bonds, stocks, notes, documents, papers or property of any kind; **or perform the service of such watchman, guard, patrolman, or other person for any of said purposes.**" (Emphasis added.)

However, the New Mexico Legislature created a specific exemption section of the Private Investigators Act, which reads, in pertinent part:

"67-33-10. Persons exempted -- This act [67-33-1 to 67-33-49] does not apply to:

A. A person employed **exclusively** and regularly by one [1] employer in connection with the affairs of such employer only and where there exists an employer-employee relationship.

B. An officer or employee of the United States of America or of this state or the political subdivision thereof **while such officer or employee is engaged in the performance of his official duties.** " (Emphasis added)

The Attorney General has issued rules and regulations pertaining to the Bureau of Private Investigators. Rule XI is entitled "Determination of Employer-Employee Relationship" and is set forth in full:

"For purposes of the exemptions from the Private Investigator's Act set forth at Section 67-33-10, NMSA, 1953 Compilation, P.S., the Attorney General will determine the existence of an employer-employee relationship with reference {*30} to the following indicia:

- (a) Whether the person is paid a wage or salary by 'employer';
- (b) Whether the 'employer' is required to withhold income tax from the person's wage or salary;
- (c) Whether FICA tax is required to be paid by the 'employer' and the 'employee';
- (d) Whether the person is covered by workmen's compensation insurance, as provided by Sections 59-10-1, et seq., N.M.S.A., 1953 Comp.;
- (e) Whether the 'employer' is required to make unemployment insurance contributions on the person; and
- (f) Whether the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. It is not necessary that the 'employer' actually direct or control the matter in which the services are performed; it is sufficient if he has the right to do so."

From the above, it is clear that an off duty police officer or sheriff's deputy, engaged in private employment as a private investigator or private patrol officer, would not be able to claim exemption under 67-33-10 (A), **supra**, as long as there exists an employer-employee relationship between the off-duty officer or deputy and the department.

Further, Section 67-33-10 (B), **supra**, exempts the officer or deputy only while engaged in the performance of his official duties. It follows that if the officer or deputy engages in off-duty private employment to check identification at a liquor establishment, either as a "private investigator" within the meaning of 67-33-9 (A), **supra**, or as a "private patrol officer" within the meaning of 67-33-9 (B), **supra**, it would be a violation of Section 67-33-8 (B) of the Private Investigators Act. In our opinion, the off-duty police officer or sheriff's deputy would be required to be licensed under the Private Investigators Act in order to check identification at a liquor establishment.

By: Ralph W. Muxlow, II

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