ALAN WILSON
ATTORNEY GENERAL

October 11, 2011

The Honorable Glenn G. Reese
Senator, District No. 11
502 Gressette Senate Office Building
Columbia, SC 29202

Dear Senator Reese:

We received your letter requesting an opinion of this office. By way of background, you inform us about complaints to you from private businesses that contract to use drug-sniffing dogs in South Carolina school districts to detect contraband. You ask whether a sheriff's department may compete against these private businesses for the contract to provide these services to the school districts?

Law/Analysis

We note a previous opinion of this office dated August 7, 2000, which addresses your question. We then advised that:

> [o]ur Supreme Court has consistently recognized that costs and fees "are in the nature of penalties and the statutes granting them have always been strictly construed." State et al. v. Wilder, 198 S.C. 390, 394, 18 S.E.2d 324 (1941). In other words, "statutes providing for fees are to be strictly construed against allowing a fee by implication with respect to both the fixing of the fee and the officer entitled thereto." 67 C.J.S. Officers, §224. Governing the fees and costs of public officers generally, South Carolina Code of Laws Section 8-21-10 states, "The several officers named in . . . Article 1 of Chapter 19 of Title 23, shall be entitled to receive and recover the fees and costs prescribed by this chapter . . . and Article 1 of Chapter 19 of Title 23, and none other, for the services herein enumerated." Moreover, §8-21-30 of the Code requires that if a Sheriff "improperly" charges a fee, he may be liable for "ten times the amount so improperly charged. . . ."

S.C. Code Ann. §23-19-10 states the general schedule of fees that a sheriff's department may charge for the performance of some of their duties. The statute begins: "Except as otherwise expressly provided by general law, the fees and commissions of sheriffs are as follows . . ." [Emphasis added]. The provision presents a detailed list of the circumstances in which the sheriff is allowed to charge a fee, including for the service of civil process, commission on monies collected, and for claim and delivery actions. The statute ends: "The provisions of this section do not apply to criminal processes or cases,"

which has been interpreted by this office to further restrict the sheriff from charging fees in criminal processes. See Ops. S.C. Atty. Gen., March 16, 2011; Jan 27, 2000. Only a few additional statutes permit the sheriff to collect fees for other particular services. See, *e.g.*, §12-59-110 [compensation for serving warrants and taking possession of forfeited property, §15-17-540 [fee for summoning freeholders of property], §38-57-260 [fee for levy on debtor's property].

Additionally, simply as a matter of public policy, the sheriff of a county cannot receive remuneration for the performance of a duty imposed on him by law. Opinions of this office recognize the status of a sheriff as the chief law enforcement officer of a county. Ops. S.C. Atty. Gen., September 10, 2010; April 20, 2006. As noted in an opinion dated March 1, 2005, a sheriff's jurisdiction encompasses the entire county. Sheriffs are required to "patrol the entire county" where they serve pursuant to §23-13-70. Such enactment obligates a sheriff's department "to prevent or detect crime or to make an arrest . . . for the violation of every law which is detrimental to the peace, good order and morals of the community." Moreover, §23-13-20 prescribes the oath of office of a deputy sheriff to be "alert and vigilant to enforce the criminal laws of the State."

In an opinion dated April 7, 2008, we discussed whether a special tax district should enter into a contract with a sheriff's department to provide "police protection" to the tax district in addition to the regular sheriff's department patrols and law enforcement activities. Therein, we referenced an opinion dated April 18, 1995, which addressed whether a sheriff's department could contract with a subdivision to provide additional law enforcement protection and services. That opinion cited a prior opinion dated April 11, 1985, and stated that:

> [a]s a matter of public policy, a political subdivision, such as a county, is prohibited from entering into a contract by which it receives remuneration from a citizen for the performance of a public duty which is imposed on it by law, either expressly or by implication. McQuillin, Municipal Corporations, Section 29.08 p. 234. As stated by our Supreme Court in Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346, 360 (1929), "[a]s a general rule, [a governmental body] ... may not contract with ... the public to discharge a purely public duty owed to the public generally." The rationale of the rule, noted the Court, "is grounded upon the theory that such a contract would restrict the discretion of the ... [governmental body] ...; that is, embarrass or control it in the exercise of governmental functions, which cannot be surrendered or abrogated." 147 S.E. at 360.

We further noted in the 1995 opinion that, consistent therewith is the following proposition of law:

> [t]he general rule with reference to peace officers is well settled that a promise of reward or additional compensation to a public officer for services rendered in the performance of his duty cannot be enforced. Both public policy and sound morals forbid that such an officer should be permitted to demand or receive for the performance of a purely legal duty any fee or reward other than that

established by law as compensation for the services rendered, including the arrest of criminals, protection of property and the recovery of stolen property. 70 Am.Jur. 2d, Sheriffs, Police and Constables, §71.

The foregoing basic common law and public policy principles have been codified by the General Assembly in specific statutory enactments. For example, §16-9-250 makes it a misdemeanor for any sheriff or other peace officer in South Carolina ". . . to make any charge for the arrest, detention, conveying or delivering of any person charged with the commission of crime in this State, except the mileage and necessary expenses as now provided by law." A public employee is proscribed from receiving additional compensation to that provided by law for the performance of duties by §16-9-230. Moreover, §8-13-720 of the Ethics, Government Accountability and Campaign Reform Act of 1991 requires that no person ". . . may offer or pay to a public official [etc.] . . . and no public official [etc.] . . . may solicit or receive money in addition to that received by the public official [etc.] in his official capacity for advice or assistance given in the course of his employment as a public official [etc.]. . . ."

Certain exceptions to the general rule that a public entity or public official may not contract or receive remuneration to provide the services required by law are also provided in specific statutory provisions. One example is that the Sheriff may contract with a municipality within the county for the provision of law enforcement services. As was concluded in an Opinion, dated May 17, 1978, "[t]here are currently no state statutes which would prevent the Greenville County Sheriff's Department from offering Contract Law Enforcement services to municipalities within Greenville County." Another notable exception is found in Section 4-9-30 (5). As we noted in an opinion of June 13, 1985, a county is authorized to create a special tax district for police protection in a specific area of a county, pursuant thereto. Article VIII, Section 13 of the South Carolina Constitution and Section 6-1-20 of the Code authorizes the tax district to contract with the county for the provision of services like law enforcement. Id. The contract may not, however, unreasonably limit the Sheriff's duty, and discretion to carry out his statutory mandate to patrol the entire county. See, Section 23-13-70.

Conclusion

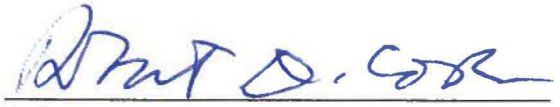
As we previously advised in our opinion dated August 7, 2000, given the rule that fee statutes must be strictly construed against the charging of fees not expressly authorized, the specific prohibition in the Ethics Act against the charging of fees not enumerated in the statutes, and the absence of any express authority to charge a fee for providing drug-sniffing dogs, it remains the opinion of this office that a sheriff's department which has the resources to provide such a service to a school district must do so free of charge. Furthermore, simply as a matter of public policy, the sheriff of a county cannot receive remuneration for the performance of a duty imposed on him by law. See Ops. S.C. Atty. Gen., March 16,

2011 [a sheriff may not charge a private security agency the cost incurred in the processing of evidence collected by private security guards]; January 27, 2000 [a sheriff may not charge a criminal defendant for serving subpoenas in the proceedings against him]; May 7, 1999 [a sheriff has no authority to charge a fee for responding to a false alarm from a private security system]; April 11, 1985 [a sheriff's department is not authorized to enter into a contract to provide law enforcement with a housing subdivision whereby the subdivision would receive additional law enforcement protection and services for a fee]. Although no statute mandates the sheriff's use of drug-sniffing dogs, the service certainly falls under his general law enforcement responsibilities. A sheriff who cannot charge a fee to provide the services of his drug-sniffing dogs to school districts should not, therefore, be involved in any bid competition for a contract with a school district.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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