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ATTORNEY GENERAL OPINION NO. 88- 171

The Honorable Herbert W. Walton
District Judge, Division No. 1
Johnson County Courthouse
Olathe, Kansas 66061

Re: Counties and County Officers -- County
Commissioners -- Powers and Duties; Budget for
Operation of Sheriff's Office

Counties and County Officers -- Sheriff --
Preservation of Peace; Courthouse Security

Synopsis: K.S.A. 19-812 and 19-813 do not by their terms
mandate the continual presence of a county sheriff
at the courts of record in the county. However,
the county sheriff possesses the discretionary
authority to determine if and when such security is
necessary. The board of county commissioners is
vested with general authority and responsibility
over county expenditures, but may not prevent a
county official from carrying out statutorily
imposed duties. Competing county budgetary
constraints must therefore be reasonably balanced
with the need to fund the performance of
discretionary official duties. Cited herein:
Kan. Const., Art. 9, §2; K.S.A. 19-212;
19-801a; 19-812; 19-813.

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Dear Judge Walton:

You request our opinion as to whether a county sheriff is required to provide security for the courts and if the board of county commissioners has an affirmative duty to provide funding for that security. You note that there is often a great need for such security because of the number of people exposed to potential harm from uncontrolled persons involved in tense and difficult court actions.

Kan. Const., Art. 9, § 2, gives the legislature the authority to provide for "such county and township officers as may be necessary." K.S.A. 19-801a et seq. are a product of that constitutional authority. These statutes establish the office of county sheriff. K.S.A. 19-813 sets forth the general duties of the county sheriff:

"It shall be the duty of the sheriff and undersheriffs and deputies to keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they, and every coroner, may call to their aid such person or persons of their county as they may deem necessary."

In addition to K.S.A. 19-813, there are numerous statutes which define and set forth specific official duties required of a county sheriff. Libby v. Schmidt, 179 Kan. 683, 687 (1956). (See e.g. K.S.A. 28-109, 60-2602, 66-1,131, 74-3302, 75-5220 and 79-320.) K.S.A. 19-812 states:

"The sheriff, in person or by his undersheriff or deputy, shall serve and execute, according to law, all process, writs, precepts and orders issued or made by lawful authority and to him directed, and shall attend upon the several courts of record held in his county, and shall receive such fees for his services as are allowed by law." (Emphasis added).

Thus, the issue becomes whether language in K.S.A. 19-812 creates an affirmative duty requiring all county sheriffs to

at all times be present or provide security at county courthouses. That statute requires a sheriff to "attend upon the several courts of record held in his county." Attend is generally defined as "[t]o look after or to take charge of . . . to go or stay with as a companion . . . to visit professionally . . . to be present at." Websters Seventh New Collegiate Dictionary 57 (1969). The two Kansas cases citing K.S.A. 19-812 do not mandate that a county sheriff has an affirmative duty to be at all times present in the courthouse. See State v. Lamb, 209 Kan. 453, 468 (1972); Robson v. Dickinson County, 8 Kan. App. 374 (1898). Citing a statute substantively identical to K.S.A. 19-812, the Robson court held that a reasonable and fair interpretation is that the sheriff shall, when required or when necessary, attend upon the several courts of records. The court in Skinner v. Cowley County, 63 Kan. 557 (1901), stated that the law does not require the sheriff to be continuously in the probate judge's office, nor to follow him about on the watch for issuance of writs. Id., at 562.

Cases from other jurisdictions discuss the duty of the sheriff to attend the court, but do not recognize an absolute affirmative statutory or common law duty requiring a sheriff to be at all times present at the courthouse. Rather, while it may be part of a sheriff's duty as chief law enforcement officer of the county to assist the courts in enforcing the law, it is generally sufficient that the sheriff or his deputies be available to the court. "That a court be ready and able to summon witnesses or parties, requires sooner or later the sanction of force entrusted to the coordinate executive arm of government, i.e., the sheriff of his county. See, Hobart v. Hobart, 45 Iowa, 501; State ex rel. Steers v. Crim. Court of Lake County, 232 Ind. 443, 112 N.E. 2d 445, 113 N.E. 2d 44." Tidwell v. State, 130 So.2d 206, 208 (Ala. 1961). See also, Near v. Commonwealth, 116 S.E. 2d 85 (Va. 1960) (permitting a sheriff and deputy, who were later called as witnesses, to remain in the courtroom when the other witnesses were excluded was not an abuse of the court's discretion because it is part of the sheriff's duty to wait upon the court); Adams v. Tackett, 365 S.W. 2d 125 (Ark. 1963) (while a sheriff can be forced to attend a session of the county court, if the judge so orders, the sheriff cannot prevent a session from being legally held merely by staying away.); Taylor v. Wilson County, 216 S.W. 2d 717 (Tenn. 1949) (while the Tennessee Code requires the sheriff to wait on the court, he cannot be required to do so without being paid the statutorily established compensation. See Tenn. Code Ann. § 16-15-601, ". . . the sheriff shall designate a court officer to wait on the court at all times said court is in session."). Thus, based upon the specific statutory

language in each state, courts allow, but do not mandate, the continual presence of an officer in the courthouse.

Custody of the courthouse is a duty which, at common law, rests on the sheriff as an incident to his general duties. 80 C.J.S., Sheriffs and Constables, § 46 (1953); See also 70 Am. Jur. 2d Sheriffs, Police, and Constables, § 46 (1987). However, care and custody of the courthouse does not automatically dictate that the sheriff must provide full-time security at the courthouse. Whether such full-time security is necessary appears to be one of the many discretionary decisions properly made by a sheriff. See Brooks v. Marquess, 157 Kan. 244, 248 (1943); Hopkins v. State, 237 Kan. 608, 610 (1985). While K.S.A. 19-813 allows a sheriff to be present at all public gatherings in order to preserve the peace, his presence at certain public gatherings is not mandated.

K.S.A. 19-812 requires the sheriff to attend upon the court. K.S.A. 19-813 mandates that he keep and preserve the peace. It is our opinion that these duties do not absolutely mandate that a sheriff at all times be present at the courthouse. Therefore, while the county sheriff may provide security for the courts of record in his county, it is our opinion that the necessity for such security and the exercise of such authority is a discretionary decision, properly addressed by the sheriff of each county. A county sheriff may reasonably determine that such security is necessary. Such a determination raises the second issue you ask us to address; the extent to which a board of county commissioners must provide funding to an elected officer for the performance of that officer's duties.

Previously issued Attorney General opinions discussing the budgetary control of the board of county commissioners over other elected offices include 87-37, 87-14, 84-53, 84-30, 82-100 and 80-69. As noted in opinions no. 84-53 and 80-69, the general authority and responsibility over county expenditures is vested in the board of county commissioners. See K.S.A. 19-212. An exception to the general rule exists when the expenditure or obligation is necessary in order for a county official to carry out statutorily imposed duties. Thus, a board may not use its budgetary powers to preclude the performance of duties imposed by law upon other elected officials.

As discussed herein, while a county sheriff may discretionarily conclude that there is a necessity for security at a courthouse, Kansas statutes do not absolutely mandate the full-time presence of a county sheriff or officer at the courthouse. It therefore becomes necessary to

reconcile potential conflicts between the general budgeting authority enjoyed by the board of county commissioners and the discretionary authority of a county sheriff who reasonably believes it is necessary to provide full-time or increased security at a courthouse. This reconciliation process requires the exercise of good judgment and conscience in a manner that appears to be just and proper under the circumstances. There is no hard and fast rule as to the course of conduct that must be taken in such a discretionary situation. If, in the reasonable judgement of a county sheriff, public safety and order dictate the presence of an officer at court, competing county budgetary constraints dictate that a board of county commissioners must decide whether it is economically feasible to provide additional funding for additional security or personnel.

Maricopa County v. Dann, 758 P. 2d 1298 (Az. 1988), discusses county policies in filling court personnel positions. The Arizona Supreme Court held that the judge of the superior court was required to follow county procedures necessary to employ court personnel and stated that an orderly fiscal policy is a governmental necessity. Judicial proceedings do not require the presence of a sheriff or officer at court, however desirable that presence may sometimes be for security reasons. If a sheriff discretionarily concludes that such security is necessary in order to preserve the peace, he must work within the established county budgetary processes and restraints. However, a board of county commissioners cannot completely control the proper exercise of such discretionary authority, but must balance economic realities with public safety interests. Whether discretionary decisions thus made by a board of county commissioners or a county sheriff are reasonable, is a fact question to be determined on a case by case basis.

Very truly yours,



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