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OPINION	:	No. 84-204
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of	:	<u>JULY 19, 1985</u>
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THE HONORABLE GARY R. KERN, CHIEF, BUREAU OF COLLECTION AND INVESTIGATIVE SERVICES, has requested an opinion on the following questions:

1. Do California cities and counties or the heads of their local law enforcement agencies have the authority to contract with private parties to provide law enforcement personnel for regular ongoing private security services for an agreed compensation?

2. May the head of a local law enforcement agency acting in his or her non-official capacity arrange to provide protective security services by off-duty local peace officers to private parties for a fee and, if so, must he or she then be licensed as a private patrol operator by the Bureau of Collection and Investigative Services?

## CONCLUSIONS

1. Neither cities or counties, nor their respective heads of local law enforcement, have the authority to contract with private parties to provide on- or off-duty law enforcement officers for regular ongoing private security services for an agreed compensation.

2. When approved pursuant to Government Code section 1126, the head of a local law enforcement agency in his or her non-official capacity as a private individual may act as an agent for such off-duty local peace officers who would be interested and arrange to provide security services to private parties for a fee, but the sheriff or chief of police would then have to be licensed as a private patrol operator by the Bureau of Collection and Investigative Services.

## ANALYSIS

When private parties have found it necessary to secure additional protective security services for their businesses above what is or can be provided by their local law enforcement agency, they have traditionally hired private security from private patrol operators for that purpose. We are told that recently, however, in several California communities some private parties have been filling their need for ongoing supplemental security services by obtaining the services of oft-times uniformed, off-duty local law enforcement officers (sometimes with official vehicles) through arrangements they have made with the head of their local law enforcement agency, i.e., the county sheriff or chief of police, or in some cases with the local government itself. In some of the latter cases the arrangement has involved the local agency furnishing *on-duty* peace officers for the private security services.

To be clear at the outset, the security that is sought and spoken of herein is *not* for a special event or occurrence, the type of privately needed occasional supplemental law enforcement services which Government Code section 26228 authorizes a county board of supervisors to provide by contracting with private parties on behalf of the sheriff. (See fn. 4, *post* & accompanying text.) Rather, it is for regular and continuous security services to be provided on an ongoing basis. While the scenario for its provision has varied, it usually has involved a general law city (or its chief of police), or a county (or its sheriff) setting up a program whereby requests from private businesses to have local peace officers provided for specific *ongoing* private security services at certain times and places are actively solicited or at least are actively entertained. Where the program involves supplying *off-duty* peace officers, the requests are "matched" to the expressed preferences and hours of availability of the local officers who want extra work, and they are "assigned" or "made available" accordingly. The compensation for this service is usually set in

advance either by the governmental agency involved (the city or county), or its chief of police or sheriff, and it is paid either directly to the officer or deputy involved, to the police or sheriff department itself, or to the city or county which then pays the officer. In the cases in which the arrangements have called for the furnishing of *on-duty* peace officers to provide the special private security services, a "rent-a-cop" situation if you would, payment for their services goes to the local law enforcement agency or to the city or county fisc.

The "services" provided come within the definition of a "private patrol operator" that is set forth at section 7521, subdivision (b), of the Private Investigator [and Adjuster] Act ("the PI[A]A") (Bus. & Prof. Code, div. 3, ch. 11.5 (Private Detectives), §§ 7512-7573, as recodified by Stats. 1983, ch. 1196, p. , § 2.5), to wit:

"[A] person . . . who, for any compensation whatsoever; [a]grees to furnish, or furnishes, a watchman, guard, patrolman, or other person 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 performs the service of such watchman, guard, patrolman, or other person, for any of said purposes." (Bus. & Prof. Code, § 7521, subd. (b).)

(See *People v. Corey* (1978) 21 Cal.3d 738, 743; 65 Ops.Cal.Atty.Gen. 631, 633 (1982); 48 Ops.Cal.Atty.Gen. 80, 83 (1966); 1 Ops.Cal.Atty.Gen. 291, 292-293 (1943).) Section 7523(a) of the "PIA" provides that unless specifically exempted by its section 7522, no "person" may "engage in the business" of a "private patrol operator" without being licensed as such by the Bureau of Collection and Investigative Services ("BCIS" or "the Bureau"). No such license has been sought or obtained by any person or entity involved herein.

We are asked whether the aforementioned arrangements between local (law enforcement) agencies and private individuals for the provision of local peace officers for private auxiliary security services are legal. First we are asked whether the cities and counties or the police and sheriff departments involved have the authority to make those arrangements with private parties in the first place. We conclude they do not. Second we are asked whether the head of the local law enforcement agency (i.e., the chief of police or the county sheriff) acting in a private or nonofficial capacity might make those private security arrangements by acting as a coordinating agent or middleman between the local peace officers and the private parties who would be interested. We conclude that when acting in a private capacity, a chief of police or county sheriff may make such arrangements and may charge fees to have private security protective services provided private parties by *off-duty* local peace officers, but that he/she would have to be licensed by the Bureau as a "private patrol operator." In no event may any county sheriff or chief of police contract

in his/her *official* capacity to furnish *any* security services to private parties for a fee and in no event may any fee be charged for the rendering of "*official*" services. (Pen. Code, § 70, subd. (a), fn. 3, *post.*)

I. The Authority of Local Agencies (Cities and Counties) and the Heads of Local Law Enforcement (Chiefs of Police and Sheriffs) to Contract With Private Individuals to Provide Local Law Enforcement's Peace Officers (Police and Deputies) for Private Security Services for a Fee.

As a general proposition, local governmental agencies in California (such as cities and counties) have only such authority as has been conferred on them by the Constitution or as has been delegated to them by the Legislature; they possess and can exercise only those powers that have been so expressly conferred, that are necessarily implied therefrom, or that are indispensable (and not simply convenient) to their operational existence. (See, e.g., *Irwin v. Manhattan Beach* (1966) 65 Cal.2d 13, 20-21; *Legault v. Board of Trustees* (1911) 161 Cal. 197, 201; *Frisbee v. O'Connor* (1932) 119 Cal.App. 601, 603; *Ex Parte Roach* (1894) 104 Cal. 272, 274; *McCafferty v. Board of Supervisors* (1969) 3 Cal.App.3d 190, 192; *Byers v. Board of Supervisors* (1968) 262 Cal.App.2d 148, 155, 157; *Richter v. Board of Supervisors* (1968) 259 Cal.App.2d 99, 105; *Simpson v. Payne* (1926) 79 Cal.App. 780, 785; 45 Cal.Jur.3d *Municipalities*, §§ 116-118 (cities), §§ 163-165 (counties).) As a corollary, it is accepted that whatever powers have not been expressly conferred upon cities or counties, or which are not necessary to the execution of an expressed power, are withheld from them to exercise. (*Wichman v. City of Placerville* (1905) 147 Cal. 162, 165; *Hayne v. San Francisco* (1917) 174 Cal. 185, 196; *Byers v. Board of Supervisors*, *supra*, 262 Cal.App.2d 148; *Simpson v. Payne*, *supra*, 79 Cal.App. 780.) As has been said apropos the situation presented herein:

"A municipal corporation is invested with full power to do everything necessarily incident to a proper discharge of its public functions but no right to do more can be implied, and *in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.* (McQuillan's *Municipal Corporations* (rev. 2d ed.), vol. 1, § 375; *Taylor v. Dimmitt*, 336 Mo. 330 [78 S.W.2d 841, 98 A.L.R. 995]; *Low v. Marysville*, 5 Cal. 214; *Brougher v. Board of Public Works*, 205 Cal. 426 [271 P. 487]; *Vallejo Ferry Co. v. City of Vallejo*, 146 Cal. 392, 397 [80 P. 514].)" (*Ravettino v. City of San Diego* (1945) 70 Cal.App.2d 37, 44, *emphasis added.*)

The California Constitution grants general power to cities and counties to make and enforce within their limits all local, police, sanitary, and other ordinances that are not in conflict with general laws. (Cal. Const., art. XI, § 7; cf. 63 Ops.Cal.Atty.Gen.

874, 877 (1980); 49 Ops.Cal.Atty.Gen. 136, 137 (1967).) It also requires the Legislature to provide appropriate powers to cities (*id.*, art. XI, § 2, subd. (a)) and to counties (*id.*, art. XI, § 1, subd. (b)) and the Legislature's response thereto is therefore instructive as a persuasive indication of the scope of local governmental powers. (Cf. *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175; *Lundberg v. County of Alameda* (1956) 46 Cal.2d 644, 652.)

The Legislature has answered its constitutional charge and has granted to cities (Gov. Code, § 37100 et seq., § 41000 et seq., § 51300 et seq., § 53000 et seq.) and to counties (*id.*, § 23000 et seq., § 50001 et seq., § 53000 et seq.) a plethora of governmental powers. Scan them as we did however, aside from the special case of Government Code section 26228, *post*, we have found no statutory basis whatsoever for a county or a city, or a sheriff or chief of police acting *in an official capacity* to contract with private individuals for the provision of *any* law enforcement services. Indeed the tenor of the general understanding of the provision of law enforcement services has always been that such is owed to the community as a whole with no special favor going to those who are able to pay for special private services.

Statutory authority does exist of course for governmental entities such as counties and cities to contract to provide special law enforcement services for consideration (see, e.g., Gov. Code, §§ 54981, 54982;<sup>1</sup> cf. *id.*, § 55632, fn. 2, *post*), and for sheriffs and chiefs of police to enter into written agreements for local peace officers to furnish the same. (See, e.g., "PIA," § 7522, subd. (b), fn. 8 & prior text, *post*.) But that statutory authority deliberately limits such arrangements to those that would be made *with public agencies*. (See fns. 1, 2, 8.) No authorization can be found in any statute for such contracts or arrangements to be made *with private parties*, save one, section 26228, which is not

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<sup>1</sup> Section 54981 of the Government Code authorizes:

"The legislative body of any local agency [to] *contract with any other local agency* for the performance by the latter of municipal services or functions within the territory of the former." (Emphasis added.)

Section 54980 defines "[l]egislative body" to mean "the board of supervisors in the case of a county or a city and county, the city council or board of trustees in the case of a city, and the board of directors or other governing body in the case of a district" (*id.*, subd. (a)); it defines "[l]ocal agency" to mean "any county, city, city and county, or *public district* which provides or has authority to provide or perform municipal services or functions" (*id.*, subd. (b)); and "[m]unicipal services or functions" to include but not be limited to, "firefighting, *police*, ambulance, utility *services*, and the improvement, maintenance, repair, and operation of streets and highways" (*id.*, subd. (c), emphasis added). Section 54982 provides that any agreement so made must be "for valuable consideration."

This authorization was added in 1978. (Stats. 1978, ch. 960, p. 2121, § 1.)

pertinent here. That being so, we must view the deliberate limitation on specialized law enforcement services being rendered to those made *with public agencies*, and the Legislature not having provided any express grant of similar authority for local agencies or their law enforcement heads to contract (or arrange) with *private entities* to provide particularized personal security services other than the one special case, as a denial of such authority in other situations such as the one we have here. (Cf. *Kaiser Steel Corp. v. County of Solano* (1979) 90 Cal.App.3d 662, 668; *County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 668; cf. *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 607; 49 Ops.Cal.Atty.Gen. 136, 139 (1967).<sup>2</sup>

It is not particularly surprising that an authority for a local government to provide particularized private law enforcement services to those who would specially pay

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<sup>2</sup> In 49 Ops.Cal.Atty.Gen. 136 (1967) we concluded that a school district is not authorized to expend district funds for law enforcement services of city police officers at activities conducted by school districts. That conclusion was based on our view that school districts were not empowered to employ personnel for the performance of law enforcement duties or to expend district funds for the performance of such duties. We expressed the view that 1959 Education Code sections 15831-15834 (1959 version) authorizing school districts to establish security patrols for the purpose of protecting district property did not authorize the expenditure of district funds for securing general law enforcement services for the district, either through direct employment of police personnel or by way of reimbursement of a governmental police agency.

When the opinion was issued in 1967, then Education Code section 15831 provided that the function of a school district security patrol was "to ensure the security of the real and personal property of the school district." Subsequent amendments to this statute have expanded the functions considerably. Chapter 987, Statutes of 1967, amended section 15831 to provide that a school district security patrol was "to ensure the security of school district personnel and pupils in or about school district premises and the security of the real and personal property of the school district." Chapter 1010, Statutes of 1976, changed the section number to section 39670 of the 1976 Reorganized Education Code. Chapter 306, Statutes of 1977 changed the words "security patrol" to "security department" of the school district. Chapter 945, Statutes of 1982 amended section 39670 to authorize school districts to establish the "school district police department" or a security department which is "to ensure the *safety* of school district personnel and pupils, and the security of the real and personal property of the school district." (Emphasis added.)

With these changes in the statute it can no longer be said that a school district is not authorized to expend district funds for the performance of law enforcement duties. The amendments have expressly empowered school districts to expend district funds to establish a school district police department to protect school personnel and pupils as well as property. Thus school districts may share such law enforcement functions with cities and counties and their respective law enforcement agencies by agreements authorized by the Joint Exercise of Powers Act. (Gov. Code, § 6500 et seq.) Therefore the conclusion in our 1967 opinion that a school district is not authorized to expend district funds for law enforcement services of city police officers at activities conducted by school districts has been nullified by subsequent legislation.

for it is wanting for the concept is quite alien to the way in which California's law enforcement has traditionally been provided and funded. While it is true that local agencies have been granted broad law enforcement power to enforce the criminal law, to prevent the commission of crimes, and to provide police personnel and services for the preservation of the safety, health and welfare of their citizenry (cf. 49 Ops.Cal.Atty.Gen., 136, 137, *supra*), as we shall now explain, their doing so and the funding for their so doing has traditionally been predicated on the needs and resources of the local community as a whole (cf. 57 Ops.Cal.Atty.Gen. 423 (1974); 49 Ops.Cal.Atty.Gen. 136, *supra*) and not on the needs of those who would pay for those services.

Essentially the Legislature has provided local agencies with a chief law enforcement officer with broad law enforcement powers. (See Gov. Code, § 26600 et seq. (sheriffs), §§ 38638, 41601 (chiefs of police); cf. Pen. Code, § 830.1.) While there is no comprehensive statutory litany of their duties, they being "so varied and indefinable that . . . an exact and detailed outline [of them] [could not be expected]" (*Noble v. City of Palo Alto* (1928) 87 Cal.App. 47, 53), still some are statutorily set forth. The basic duties of the county sheriff are found in article 1, chapter 2, division 3, of the Government Code to include preserving the peace (§ 26600), preventing and suppressing affrays and disturbances (§ 26602), investigating public offenses which have been committed (*ibid.*) and arresting persons which have committed them (§ 26601). (See generally, 64 Ops.Cal.Atty.Gen. 846, 847 (1981).) The basic duties of a chief of police of a general law city, found in chapter 6, part 3, division 3, of title 4 of that code, are similar. (§ 46101; cf. § 38638 (keeping order at public meetings where breach of the peace may occur); Pen. Code, § 410 (duty to suppress riot or unlawful assembly); see generally, 49 Ops.Cal.Atty.Gen. 136, 137, *supra*.) In addition, both the sheriff and his/her deputies and the chief of police and his/her police officers are classified in Penal Code section 830.1 as peace officers with statewide authority. Indeed, the Legislature has relied on these local officers as the principal means of enforcing the state's criminal laws. As was stated in *Noble v. City of Palo Alto, supra*, 87 Cal.App. at 52, the policeman, as a public officer, is "part of the personal force by which the state acts, thinks, determines, administers and makes effective its constitution and its laws operative." (*Ibid.*, quoting *People v. Coler*, 166 N.Y. § 1.) Not surprisingly then, sheriff and police departments have been funded throughout the state's history from general tax revenues as would be budgeted by the people through the legislative body of their local agency, i.e., the board of supervisors (cf. Gov. Code, § 29000 et seq.; 67 Ops.Cal.Atty.Gen. 205, 209-210 (1984)) or a city council (cf. Gov. Code, § 43000 et seq.)

When the police act, then, they perform *public governmental functions* that are fundamental to the principal purpose of any representative government, to wit, the protection of the people. (Cf. 49 Ops.Cal.Atty.Gen. 136, 137, *supra*, citing *People v. Seely* (1944) 66 Cal.App.2d 408 ("guardians and protection of society".) And when they act,

they do so on behalf and in the name of the people. (Pen. Code, §§ 814, 981, 1427; cf. *id.*, at § 684.) In short, they and other law enforcement agencies act as the people's representatives in the enforcement of the people's laws, and the duty they owe in that regard is to the public generally (within a respective territorial jurisdiction) and not to any particular segment or person. An assault or theft works the same duty on the police whether the victim be prince or pauper. Thus while it is true that with finite resources a sheriff or chief of police can provide but a limited degree of protection from crime, the duty nonetheless remains to provide that degree, as appropriate, throughout the city or county without unjustifiably deploying protective services in one area at the expense of another. (57 Ops.Cal.Atty.Gen. 423, 428-429, *supra*; 49 Ops.Cal.Atty.Gen. 136, 137-139, *supra*.)

The sale of police services is not only antithetical to the notion of a *public* law enforcement function, but it also violates sound public policy, expressed in Penal Code section 70, subdivision (a),<sup>3</sup> by making law enforcement services subservient to those who would pay for them. (Cf. 48 Ops.Cal.Atty.Gen. 80, 84 (1966).) If the policeman when acting in an official capacity cannot be paid by the bank for arresting the bank robber -- cf. *Cervantes v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 588; *People v. Corey*, *supra*, 21 Cal.3d at 745-746; see also 57 Ops.Cal.Atty.Gen. 423 (1974) ("county service area" may *not* be established to provide services already included in the mandated basic and uniform level of law enforcement a sheriff is under an obligation to provide) -- neither should the city be paid for posting the officer in front of the bank. The influence of such payments is as potentially corrupting on city or county officials deploying their police forces as it is on the actions of the individual officers, and time and again we have inveighed against it as providing fertile field for a possible conflict of interest. (See, e.g., 51 Ops.Cal.Atty.Gen. 110, 112-113; 48 Ops.Cal.Atty.Gen. 80, 83, *supra*.) Inevitably too, such payments lead to the concentration of police services for those who make the payments and a diminution of police services for the rest of the community. The end result would be a system of law enforcement which could not rightly be called a *public* service.

The Legislature to be sure has recognized that patrol and investigative services might be sold to those private parties who have a need for them and, as hinted prefatorily, it has created a comprehensive regulatory scheme, the Private Investigators [and Adjusters] Act, under the aegis of the Bureau, by which those services might be provided. Indeed, as we shall come to see in connection with our discussion of the second

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<sup>3</sup> Penal Code section 70, subdivision (a), provides:

"Every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to received any emolument, gratuity, or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor."

question, the Legislature has also taken pains to specifically declare that those services might be furnished by peace officers privately engaged to provide them (Gov. Code, § 1127, see fn. 6, *post* & accompanying text) and indeed even exercise peace officer powers in connection therewith (Pen. Code, § 70, subd. (d), see fn. 7, *post*). Nevertheless although both such public and private police services "may involve protection of persons and property (see Bus. & Prof. Code, § 7521), as well as effecting the arrest of those who commit such crimes in their presence (Pen. Code, §§ 834, 836, 837)" (*People v. Corey, supra*, 21 Cal.3d at 745), several features differentiate the two. Public police services are provided to the public generally by government at public expense. Private police services are provided to particular persons by qualified private persons by contract between the parties. The public police officer owes his duty and loyalty to the public generally, while the private investigator or patrolman owes his duty and loyalty to his employer. (Cf. 48 Ops.Cal.Atty.Gen. 80, 84, *supra*.)

The scheme of things then, as it has always been, simply does not contemplate local governmental agencies contracting with private parties to deploy public law enforcement personnel clothed with public authority for the purpose of providing personalized protective security services for the private parties who would specially and specifically pay for them. Indeed, the special case of Government Code section 26228 demonstrates that the Legislature thought specific legislation was necessary in order for such arrangements to be made. (Cf. *Safer v. Superior Court* (1975) 15 Cal.3d 230, 238; *Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920, 927.)

Prompted by the need for additional law enforcement at the 1984 XXIIIrd Olympiad in Los Angeles, the Legislature enacted section 26228 of the Government Code to permit ". . . the board of supervisors of any county [to] *contract* on behalf of the sheriff of that county *to provide supplemental law enforcement services to private individuals or private entities to preserve the peace at special events or occurrences that happen on an occasional basis.*" (*Id.*, subd. (a); Stats. 1982, ch. 953, p. 3444, § 1, emphasis added.)<sup>4</sup> The Legislative Counsel's digest of the bill (A.B. 2482) which enacted the section, is a valuable indication of the Legislature's intentions in its regard. (*People v. Superior Court (Douglas)* (1979) 24 Cal.3d 428, 434; *Maben v. Superior Court* (1967) 255 Cal.App.2d 708, 713.) It stated:

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<sup>4</sup> Section 26228 does not apply to the situation with which we are concerned: The activity contemplated herein does *not* involve a special event or occasional occurrence. Moreover, the section also provides that "[a] contract entered into pursuant to this section shall encompass only law enforcement duties and *not services authorized to be provided by a private patrol operator, as defined in Section 7521 of the Business and Professions Code.*" (*Id.*, subd. (d); emphasis added.)

"Existing law authorizes counties to enter into contracts with other governmental entities to render law enforcement services to such entities. *There is no express authority for a county to contract with private individuals or entities to provide supplemental law enforcement services.*

"This bill would authorize, with certain exceptions, a county board of supervisors to contract on behalf of the sheriff of that county to provide private individuals or private entities supplemental law enforcement services to preserve the peace at special events or occurrences that happen on an occasional basis, and would require such contracts to provide for full reimbursement to the county of the actual costs of providing such services, as determined by the county auditor or auditor-controller."(Emphasis added.)

The foregoing demonstrates beyond doubt's peradventure that when the Legislature has wished to confer authority on local government and its officials to contract to provide certain types of law enforcement services to private individuals or entities for a fee, it has felt it necessary, and has specifically done so. It has not provided authority for counties and their sheriffs, or cities and their chiefs of police to make the arrangements we speak of here and we conclude they may not do so.

## II. The Authority of Sheriffs and Chiefs of Police to Arrange in Their Private Unofficial Capacities the Provision of Private Security Services for Private Parties (for a Fee) and the Requirement of Bureau Licensure Therefor.

In the first part of this opinion we concluded that neither local agencies nor the heads of local law enforcement may contract with private parties to provide ongoing private security services by local peace officers for a fee. We now address the question of whether the head of a local law enforcement agency may undertake that activity when acting not in an official capacity but as a private individual and if so, whether he or she must then be licensed by the Bureau as a "private patrol operator." We will conclude that when acting as a private individual, a local sheriff or chief of police may arrange with private parties to furnish off-duty peace officers to perform private security services for a fee but the sheriff or chief must then be licensed by the Bureau as a private patrol operator to do so.

Generally speaking, peace officers of this state are not prohibited from undertaking *private* employment related to their public duties for compensation. In fact the Legislature has taken pains to specifically declare that they may do so. (Gov. Code, § 1127; cf. Pen. Code, § 70, subd. (d), fn. 7, *post.*)<sup>5</sup> Such employment, activity, or

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<sup>5</sup> Government Code section 1127 provides:

enterprise however, may not be inconsistent, incompatible, in conflict with, or inimical to their public duties (Gov. Code, § 1126, subd. (a)) and in that regard, subdivision (b) of section 1126 of the Government Code essentially leaves it for each appointing power (subject to the approval of its local agency such as a county or a city (*id.*, § 1125)), to determine which outside activities would be incompatible with a local peace officer's public duties and thus not be permitted.<sup>6</sup> (*Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141, 153; 65 Ops.Cal.Atty.Gen. 631, 637, *supra*; cf. 63

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"It is not the intent of this article [incompatible activities] to prevent the employment by private business of a public employee, such as a peace officer, fireman, forestry service employee, among other public employees, who is off duty to do work related to and compatible with his regular employment, or past employment, provided the person or persons to be employed have the approval of their agency supervisor and are certified as qualified by the appropriate agency."

<sup>6</sup> Section 1126 of the Government Code provides:

"(a) Except as provided in Section 1128, a local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed. Such officer or employee shall not perform any work, service, or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board, or commission of his or her employing body, unless otherwise approved in the manner prescribed by subdivision (b).

"(b) Each appointing power may determine, subject to approval of the local agency, and consistent with the provisions of Section 1128 where applicable, those outside activities which, for employees under its jurisdiction, are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees. *An employee's outside employment, activity, or enterprise may be prohibited if it: (1) involves the use for private gain or advantage of his or her local agency time, facilities, equipment and supplies; or the badge, uniform, prestige, or influence of his or her local agency office or employment or, (2) involves receipt or acceptance by the officer or employee of any money or other consideration from anyone other than his or her local agency for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his or her local agency employment or as a part of his or her duties as a local agency officer or employee or, (3) involves the performance of an act in other than his or her capacity as a local agency officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit, or enforcement of any other officer or employee of the agency by which he or she is employed, or (4) involves such time demands as would render performance of his or her duties as a local agency officer or employee less efficient.*" (Emphasis added.

Ops.Cal.Atty.Gen. 868, 874 (1980).) Section 70 of the Penal Code now does so as well and confirms that in specific regard to peace officers engaging in private employment as private security guards or private patrolmen. (Pen. Code, § 70, subd. (d), added by Stats. 1984, ch. 1665, § 1.)<sup>7</sup> Undoubtedly some local agencies will prohibit their peace officers from engaging in off-duty private police work and the head of the local law enforcement agency from arranging that, while others will permit it. Presumably the outside "moonlighting" activity contemplated herein, although pregnant with the possibility of conflict of interests (see, e.g., 51 Ops.Cal.Atty.Gen. 110, 112-113, *supra*; 48 Ops.Cal.Atty.Gen. 80, 84, *supra*), will have received the required imprimatur and the

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<sup>7</sup> Penal Code section 70 had been amended in 1982 as a vehicle to recognize that peace officers might work for *public entities* for compensation in their off hours and still retain certain aspects of their peace officer status while so doing. (Stats. 1982, ch. 1300, p. 4799, 1, now codified at Pen. Code, § 70, subd. (c).) It was amended in 1984 to do the same with respect to their engaging, with appropriate local government approval, in part-time *private employment* as private security guards or patrolmen. (Stats. 1984, ch. 1665, § 1, adding subd. (d) to Pen. Code, § 70.) New subdivision (d) of section 70 provides as follows:

"(d) *Nothing in this section* precludes a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman by a private employer while off duty from his or her principal employment and outside his or her regular employment as a peace officer, and exercising the powers of a peace officer concurrently with that employment, provided that all of the following are true:

"(1) The peace officer is in his or her police uniform.

"(2) *The casual or part-time employment as a private security guard or patrolman is approved by the county board of supervisors* with jurisdiction over the principal employer or by the board's designee *or by the city council* with jurisdiction over the principal employer or by the council's designee.

"(3) The wearing of uniforms and equipment is approved by the principal employer.

"(4) The peace officer is subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (k) and (l) of section 7522 of the Business and Professions Code.

". . . The issue of whether or not casual or part time employment as a private security guard or patrolman pursuant to this subdivision is to be approved shall not be a subject for collective bargaining. . . .

"It is the intent of the Legislature by this subdivision to abrogate the holdings in *People v. Corey*, 21 Cal.3d 738, and *Cervantez v. J. C. Penney Co.*, 24 Cal.3d 579, to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, while wearing a police uniform approved by the principal employer, as private security guards or patrolman, and to allow the exercise of peace officer powers concurrently with that employment." (Emphases added.)

question thus becomes whether a "private patrol operator" license is necessary from the Bureau for the sheriff or police chief to perform it. (Cf. fn. 9, *post.*)

To recall, unless exempt thereunder, the Private Investigators Act requires licensure by the Bureau of Collection and Investigative Services before any person "engages in the business" of "agree[ing] to furnish or furnishing, a watchman, guard, patrolman, or other person to protect persons or property or to prevent the theft, unlawful taking . . . of any goods, wares, merchandise, money . . . or property of any kind." (PIA, §§ 7521(b), 7523(a).) (It also requires licensure before any person performs such services. (*Ibid.*) The exemptions from the strictures of the PIA are set forth in section 7522 of that Act, and two of them warrant discussion.

Section 7522's subdivision (b) provides that the PIA does not apply to:

"(b) An officer or employee of the United States of America, or of this state or a political subdivision thereof, while such officer or employee is *engaged in the performance of his or her official duties, including uniformed peace officers employed part time by a public agency* pursuant to a written agreement between a chief of police or sheriff and the public agency, provided such part-time employment does not exceed 50 hours in any calendar month."(Emphasis added.)

On a superficial reading it might seem that a sheriff or chief of police who arranges contractual part-time employment for his/her peace officers would fall within that subdivision's exemption, but that is not the case.

*People v. Corey, supra*, 21 Cal.3d 738 demonstrated on an examination of the legislative history of the 1973 amendment to the subdivision, that the Legislature intended, "by deleting the [prior] exception for peace officers engaged in part-time *private* patrol employment (which exception had formerly been provided by law), that . . . such peace officers [were to thereafter be] subject to the regulatory provisions of the PIAA." (21 Cal.3d at 745; fn. omitted.<sup>8</sup> Picking up from there, we have just shown how it is outside

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<sup>8</sup> Prior to 1973, section 7522 specifically exempted from the operation of the "PI[A]A," peace officers whether or not in uniform engaged in part-time *private patrol employment* that did not exceed 50 hours per month. (Stats. 1967, ch. 1377, p. 3227, § 1.) The exemption was replaced in 1973 by the more limited exemption found in subdivision (b) of the section for "*uniformed* peace officers employed part-time by a *public agency* . . ." (Stats. 1973, ch. 605, p. 1262, § 1.) It was presumed that a substantial change in the law was thereby intended (*People v. Valentine* (1946) 28 Cal.2d 121, 142; *Clements v. T.R. Bechtel Co.* (1954) 43 Cal.2d 227, 231; *People v. Schmel* (1975) 54 Cal.App.3d 46, 51) and that its purport was to no longer have privately employed peace officers exempt from the PIA. (*People v. Corey, supra*, 21 Cal.3d 738, 744-745.) An attempt was

the scope of *official authority* for the head of local law enforcement to contract law enforcement services to private parties for a fee and the present line of inquiry proceeds on the premise that he or she is engaging in that activity as a private individual and not in his or her official capacity.<sup>9</sup> Since the exemption provided by subdivision (b) calls for *officially performed activity* including part-time employment for *a public agency*, neither requirement is met and exemption from licensure under the PIA is not secured.

We turn next to subdivision (k) of section 7522. It provides that the "PIA" does not apply to:

"(k) A peace officer of this state or a political subdivision thereof while such peace officer is employed by a private employer to engage in off-duty employment in accordance with the provisions of Section 1126 of the Government Code. *However, nothing herein shall exempt such peace officer who contracts for his or her services or the services of others as a private investigator or private patrol operator.*" (Emphasis added.)

Enticing as this subdivision might be, in 65 Ops.Cal.Atty.Gen., *supra*, at 633, we conclusively demonstrated that "when a peace officer accepts work in a private capacity *as . . . a private patrol operator* [which would be the activity here] he or she is subject to the PIA. . . ." (See also 48 Ops.Cal.Atty.Gen., *supra*, at 83; 1 Ops.Cal.Atty.Gen., 291, 293, *supra*.)

The recent addition of subdivision (d) to Penal Code section 70 does not change that conclusion. The subdivision provides that without violating the section's general proscription on one being compensated for officially performed activity (see fn. 3, *ante*), peace officers might, with local government approval, undertake part-time or casual employment as private security guards or patrolmen and exercise peace officer powers concurrently therewith. (See fn. 7, *ante*.) Among the conditions for their so doing is that they "[be] subject to reasonable rules and regulations of the agency for which [they are] peace officer[s] *and within the provisions of subdivisions (k) and (l) of section 7522 of the*

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made to reinstate the broader exemption in 1979 (A.B. 286) but Governor Brown vetoed it (July 16, 1979) on the grounds that "it is not desirable public policy to allow a private entity to purchase the symbols of public order and protection, and the power that flows therefrom, and deploy them for private ends."

<sup>9</sup> As it has been suggested, we dismiss the notion that the private nature of outside employment becomes "official" because of an appointing power having approved it under section 1126 of the Government Code (fn. 6, *ante*) or new section 70, subdivision (d), of the Penal Code (fn. 7, *ante*). Furthermore, the activity of the chief or sheriff contemplated herein goes beyond merely approving a deputy's outside off-duty employment.

*Business and Professions Code.*" (Pen. Code, § 70, subd. (d)(4); emphasis added.) Since subdivisions (k) and (l) of Business and Professions Code section 7522 constitute exemptions from the Private Investigators Act, one might be led to think that somehow because of that condition, licensure under the "PIA" was no longer required of the sheriff or chief of police who undertakes to act as a private patrol officer. But that too is not so.

To begin with, the scope of subdivision (d) is limited; it only deals with peace officers undertaking two particular types of private employment—that of *private patrolmen* and that of *private security guards*. While those endeavors might fit within the definitional activities of a *private patrol operator*, by nature they are more specific and limited and therefore not coextensively the same. The activity spoken of for the sheriff or chief, that of a private patrol *operator*, is of a broader genre than that which subdivision (d) covers and the subdivision is of no avail for it being undertaken. This is made clear if we go yet further into the subdivision and examine in greater detail the exemption its fourth condition would seem to bring.

As mentioned, subdivision (d)(4) of Penal Code section 70 requires that the peace officers involved be "within the provisions of subdivisions (k) *and* (l) of section 7522 of the [PIA]." The former provides an exemption from PIA licensure for "peace officers who are employed by a private employer to engage in off-duty employment in accordance with the provisions of section 1126 of the Government Code"; the latter essentially does the same for *retired* peace officers.<sup>10</sup> But both of those subdivisions, to which subdivision (d)(4) requires reference, are qualified. Each *excepts* from its respective exemption from "PIA" licensure, "[a] peace officer *who contracts for his or her services or the services of others as a private patrol operator,*" "and such officers do *not* fall within either subdivision's exemption for peace officers who engage in approved private employment (while off duty). Thus, however one views the cryptic requirement contained in Penal Code section 70, subdivision (d)(4) that a peace officer engaging in off-duty private patrol employment be "within the provisions of subdivisions (k) and (l)," one thing is clear: when that employment activity involves the performance of services of a private patrol operator, as it does here, the "windows" for PIA exemption provided by them would not be open and licensure under the "PIA" is still required. (Accord, 65 Ops.Cal.Atty.Gen. 631, *supra*.) To posit otherwise would have the "tail" (subd. (d)) "wag its dog" (subds. (k) and (l)).

New subdivision (d) to Penal Code section 70, as its introduction hints, is a legislative recognition that peace officers might engage in certain law enforcement related off duty *private* employment without violating the section itself. It is neither a new

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<sup>10</sup> It is difficult to understand then how one might be "within subdivisions (k) *and* (l) of section 7522" when their covered categories seem mutually exclusive. The conjunction is better read disjunctively.

authorization to engage in that activity nor an exemption from such other licensure as might be required elsewhere to do so. Thus our observations in 48 Ops.Cal.Atty.Gen. 80, 83, *supra* are still viable:

"[N]othing in the law . . . prohibits a sheriff or other regular peace officer from being licensed as . . . a private patrol operator. A sheriff need not be licensed in order to perform the duties of his office (Business and Professions Code § 7522 subdivision (b)); however, insofar as local policy permits a sheriff or other peace officer to engage in off-duty activities which require licensing, as . . . a . . . private patrol operator, then the individual may, and indeed must, possess the appropriate license (1 Ops.Cal.Atty.Gen. 291 (1943))." (48 Ops.Cal.Atty.Gen. 80, 83, *supra*; accord 65 Ops.Cal.Atty.Gen. 631, 634 (1982); 62 Ops.Cal.Atty.Gen. 626, 630 (1979).)

We find none of the other exemptions of the Private Investigators Act applicable to the situation presented herein.<sup>11</sup> Accordingly, we conclude that a sheriff or chief of police acting in a private capacity *may* undertake to provide private individuals with protective security services with local law enforcement personnel for compensation *but* also that he or she must then be licensed by the Bureau as a private patrol operator.<sup>12</sup> (Accord, 65 Ops.Cal.Atty.Gen. 631, 654, *supra*; 62 Ops.Cal.Atty.Gen. 626, 630 (1979); 48 Ops.Cal.Atty.Gen. 80, 83, *supra*; cf. *People v. Corey*, *supra*, 21 Cal.3d at 745-746; *Cervantes v. J.C. Penney Co.*, *supra*, 24 Cal.3d at 588-589.)

One further aspect of the requestor's concern must be discussed. As previously mentioned, we have repeatedly cautioned that the type of outside "moonlighting" activity involved herein provides fertile field for a possible conflict of interest. (See, e.g., 51 Ops.Cal.Atty.Gen. 110, 112-113, *supra*; 48 Ops.Cal.Atty.Gen. 80,

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<sup>11</sup> We should also mention that although subdivision (a) exempts "a person employed . . . by one employer in connection with the affairs of such employer," it requires that to be exempted the person be so employed "exclusively and regularly." That would not apply to the situation presented herein.

<sup>12</sup> We are unimpressed with the suggestion that the officers/deputies and county sheriffs/chiefs of police as officials of a state instrumentality would not be "persons" within the meaning of the PIA, because for its purposes, it defines the term "person" as "any individual, firm, company, association, organization, partnership or corporation" ( 7590.1, subd. (a)). Such a definition *usually* excludes the state and its instrumentalities. (See, e.g., 67 Ops.Cal.Atty.Gen. 256, 259, fn. 2.) That notion would not apply "across the board" here because the Legislature *has indicated* that the "PIA" is applicable to peace officers under certain circumstances when they do not act in their official capacities. Where no official action is involved, they act as private individuals and must be licensed. (48 Ops.Cal.Atty.Gen., *supra*, at 83; 65 Ops.Cal.Atty.Gen., *supra*, at 634; 1 Ops.Cal.Atty.Gen. 291, 293 (1943); see also, "PIA", § 7522(k).)

84-85, *supra*.) In essence, however, the Legislature has left it to the discretion of each local agency to make the determination of whether such activity might be permitted. (Cf. Gov. Code, § 1126.) But even should the requisite permission be found (cf. *Mazzola v. City and County of San Francisco, supra*, 112 Cal.App.3d at 153-154) for a county sheriff or a city chief of police to privately run a "private patrol" and furnish off-duty local peace officers for special security services for private parties, he/she must scrupulously keep all aspects of that activity separate and distinct from his/her public role. As we said in 48 Ops.Cal.Atty.Gen. 80, *supra*:

"Fidelity in public office must be maintained, and the law does not permit a public officer to place himself in a position in which he might be tempted by his own private interests to disregard the interests of the public. See *Stigall v. City of Taft*, 58 Cal.2d 565 (1962); *People v. Darby*, 114 Cal.App.2d 412 (1952). [] A sheriff of a county, who is also licensed as a . . . private patrol operator, is in both capacities involved in activities of the nature of law enforcement. Many situations might arise where the public officer, by engaging in activities as a private licensee, would violate the public policy against conflicts of interest; such conflicts can arise in any situation where the sheriff must elect whether to render needed law enforcement services through his public office or through his private agency. We do not intend to imply that there has been, or will be, any activity on the part of the sheriff which violates the prohibitions against conflicting interests. However, the basic purpose behind the conflict of interest rules as they have been established by the courts of this State is to preclude the possibility of divided allegiance."

(48 Ops.Cal.Atty.Gen., *supra*, at 84; cf. 51 Ops.Cal.Atty.Gen. 110, 113, *supra*.)

Given that there is no *inherent* conflict in the mere possession of a private patrol operator's license by a sheriff or chief of police (*ibid.*), we conclude that he or she may arrange in a private capacity to provide security protection services for private parties for a fee, if such a license is secured. Put directly, in his or her private capacity a chief of police or sheriff may act as an agent for local peace officers who might desire to provide security services for private individuals during their off-duty hours but a private patrol operator license from the Bureau would be necessary for him or her to do so.

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