S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

May 8, 2001

Opinion No. 01-075

Authority of Metropolitan Nashville Police Department to Provide Law Enforcement Officers or Lease Equipment to a Third Party

QUESTIONS

1. May the Metropolitan Nashville Police Department (MPD) contract, for a fee, with a third party (such as businesses, individuals or even other governmental agencies) to provide law enforcement officers for the primary use and benefit of the third party and, if so,

   (a) what statute or other similar enabling authority delegates such power to the MPD, and

   (b) under what circumstances are such fee arrangements allowable?

2. May the MPD compete with private business, including private security companies which are regulated under Tennessee Code Annotated Title 62, by contracting for a fee with a third party (such as businesses, individuals or even other governmental agencies) to provide individuals, who may be law enforcement officers, for the primary use and benefit of the third party as security officers and, if so, under what circumstances?

3. May the MPD provide, for a fee, governmental equipment (e.g., patrol cars, communications equipment, weapons etc.) to a third party if such equipment is provided for the primary use and benefit of the third party?

4. May the MPD restrict or prohibit a law enforcement officer from working secondary employment for a "contract security company" as that term is defined in Tenn. Code Ann. § 62-35-102(6) during off-duty time and, if so, under what circumstances?

5. (a) If the MPD can contract for a fee with a third person to provide "on duty" law enforcement officers for the primary use and benefit of the third party, may the governmental entity refuse to enter in to such contracts with a "contract security company" (Tenn. Code Ann. § 62-35-102(6)) and, if so, under what circumstances?

(b) If the MPD can refuse to contract with a "contract security company," may the governmental law enforcement agency discriminate between a "contract security company" and a "proprietary security company" by allowing officers to work for a "proprietary security company" but not a "contract security company"?

OPINIONS

1. Yes, the MPD may contract, for a fee, with a third party (such as businesses, individuals or even other governmental agencies) to provide law enforcement officers for the primary use and benefit of the third party if so authorized by the Nashville Metropolitan Government for a public purpose.

(a) Article 2, Section 2.01, Paragraph 37 of the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee is the primary authority that delegates such power to the Metropolitan Government.

(b) The circumstances under which such fee arrangements are allowable are limited by the Charter, which authorizes the Metropolitan Government to enter into contracts with governmental entities, private persons, firms, or corporations to furnish, receive and pay for services and by the Charter's articulation of the powers and responsibilities of the MPD, including the preservation of the public peace.

2. It appears that there is no provision in the Tennessee Constitution or the Tennessee Code Annotated that expressly prohibits the MPD from competing with private business, including private security companies which are regulated under Tennessee Code Annotated Title 62, by contracting for a fee with a third party (such as businesses, individuals or even other governmental agencies) to provide individuals, who may be law enforcement officers, for the primary use and benefit of the third party as security officers. The circumstances under which such competition may take place are subject to the monopoly provision of the Tennessee Constitution, due process, equal protection and antitrust concerns.

3. Yes, the MPD may provide, for a fee, governmental equipment (e.g., patrol cars, communications equipment, weapons etc.) to a third party for the primary use and benefit of that third party under Article 2, Section 2.01, Paragraph 5 of the Metropolitan Nashville Charter if the equipment is under the control of the MPD.

4. Yes, the MPD may restrict or prohibit a law enforcement officer from working secondary employment for a "contract security company" as that term is defined in Tenn. Code Ann. § 62-35-102(6) during off-duty time.

5. (a) Yes, the MPD may refuse to enter in to such contracts with a "contract security company" as defined in Tenn. Code Ann. § 62-35-102(6), but such refusal is limited by the concerns addressed in Question 5(b).

(b) It is possible that the MPD and its officers may incur liability if the MPD discriminates between a "contract security company" and a "proprietary security company" by allowing officers to work for a "proprietary security company" but not a "contract security company." The MPD will likely avoid liability under due process and equal protection claims if it can clearly articulate a rational basis for such a differentiation. In addition, depending upon the particular circumstances, the MPD's entry into the private security services market may also raise issues under the antitrust laws that are beyond the scope of this opinion.

ANALYSIS

A law enforcement agency, such as the MPD, governed by a municipality or a county that has a charter, may or may not have the authority to contract with third parties to provide officers for security services depending on whether such authority is granted to the agency in the municipality's or county's charter. The Metropolitan Government has such authorization to allow the MPD to enter into such contracts as stated expressly in Article 2, Section 2.01, Paragraph 37 of the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro Charter") which states:

> The metropolitan government of Nashville and Davidson County shall have power . . . [t]o enter into contracts and agreements with other governmental entities and also with private persons, firms and corporations with respect to furnishing by or to the other services and the payments to be made therefor.

The Metropolitan Nashville government is also given authority to enter into cooperative agreements with other local governments concerning law enforcement by several provisions in the Code including the Interlocal Cooperation Act and a provision addressing Mutual Aid Agreements. Tenn. Code Ann. §§ 12-9-101 *et seq.* (1999); Tenn. Code Ann. § 6-54-307 (1998).

Any contracts entered into would be limited by the express declaration of the responsibilities and powers of the MPD stated in Article 8, Section 8.202 of the Metro Charter which include "the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights and enforcement of laws of the State of Tennessee and ordinances of the metropolitan government." Performing security services would require the exercise of several of those powers.

Article 2, Section 2.01, Paragraph 5 of the Metro Charter also provides the metropolitan government the authority to provide, for a fee, governmental equipment (e.g., patrol cars, communications equipment, weapons etc.) to a third party if such equipment is provided for the primary use and benefit of the third party, by stating:

> The metropolitan government of Nashville and Davidson County shall have power . . . [t]o purchase, lease, construct, maintain or otherwise acquire, hold and operate any building or other property, real or personal, for any public purpose, and to sell, lease or otherwise dispose of any property, real or personal, belonging to the metropolitan government.[1]

The current state of the law regarding off-duty security work by police officers indicates that law enforcement agencies, such as the MPD, may constitutionally restrict or prohibit their law enforcement officers from engaging in secondary employment during off-duty time if, at the time in question, the agency had a clear policy restricting or prohibiting such employment and if the agency can articulate how its policy is rationally related to a legitimate government interest (the "rational basis" test).[2] Courts treat cases involving the issue of secondary employment of police officers on a case-by-case basis, so, without additional facts, our Office cannot opine on the likelihood of success of any claim against the MPD regarding this issue. However, generally speaking, if the two requirements stated above are met, courts have upheld restrictions or even prohibitions on secondary employment set by law enforcement agencies.

The remaining questions present more difficulties. The preceding questions, as posed, present situations in which the MPD through Metro Government and its Charter is authorized to contract to provide security services and equipment for third parties and may, if it meets the requirements stated above, restrict secondary employment of its officers. Now, as the factual situations change as presented in the remaining questions, the issue becomes whether the MPD continues to be authorized to engage in all of these activities and restrictions. The situations presented in the remaining questions may cause the MPD to incur liability depending on the level of competition in which the MPD engages with private security companies and the method and rules by which the MPD allows or prohibits its officers from performing security services.

Some states expressly prohibit government agencies from competing directly with private parties.[3] This Office knows of no Tennessee law that states such an express prohibition. However, such competition will be limited by other legal concerns such as equal protection, antitrust law and the Tennessee constitutional prohibition against monopolies.

---

[1] This Office does not opine on whether there are any local ordinances or resolutions that otherwise prohibit such contracts for services or equipment.

[2] *Allison v. Southfield*, 432 N.W.2d 369 (Mich. 1988)(holding that secondary employment rule was not void for vagueness and did not violate due process or equal protection, where police officers were unambiguously prohibited from secondary employment unless prior approval had been obtained). *See generally*, Annotation, *Validity, Construction and Application of Regulation Regarding Outside Employment of Governmental Employees or Officers*, 94 A.L.R.3d 1230 (1979 & Supp. 1998); 70 Am. Jur.2d *Sheriffs, Police and Constables*.

[3] Iowa Code § 23A.2 (2000)(prohibiting state agencies and political subdivisions from competing with private enterprise with specific exceptions).

In order to justify a regulation that prohibits officers from working for a "contract security company" and not a "proprietary security company" under equal protection jurisprudence, the MPD must not only articulate a rational basis for prohibiting secondary employment, but must also articulate a rational basis for allowing officers to work for one type of security business, but not the other.[4] This might be accomplished by citing how these types of employment are different and how those differences justify the regulation. A grandfather provision for one type of employment could also be justified by citing concern for violating existing commitments and the liability that could be incurred if such commitments were broken. It is likely that the MPD could articulate some rational basis for its differentiation between the types of security services.

The MPD's entry into the private security services market, depending on the particular facts and circumstances, may also raise issues under the antitrust laws. This office does not have sufficient information concerning either the private security services market or the details of the MPD's proposed course of action to address any such issues at this time.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

WYLA M. POSEY
Assistant Attorney General

[4] *Profill Dev., Inc. v. Dills*, 960 S.W.2d 17 (Tenn. Ct. App. 1997), *perm. app. denied*, (1997)(holding no rational basis existed to sustain Solid Waste Disposal Act's discrimination against private landfills by exempting county and municipally owned or operated landfills from local government approval requirements, thus discriminatory provision of Act violated equal protection).

Requested by:

The Honorable Ben West, Jr.
State Representative
Suite 37, Legislative Plaza
Nashville, TN 37243-0160