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OPINION COMMITTEE

November 28, 2005

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I.D. # 44514

Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0421-GA

Re: Use of police uniforms and insignia by reserve peace officers while employed as private security officers.

Dear Mr. Abbott:

Pursuant to section 402.043 of the Texas Government Code, I request your written opinion regarding the following issue:

Is it unlawful for a reserve peace officer to wear his police uniform and display the insignia of an official law enforcement agency while working as a private security officer licensed and/or commissioned by the Texas Private Security Board?

Section 1702.130 of the Occupations Code generally prohibits the wearing of a police uniform or the display of law enforcement insignia by a licensed security officer.

Prior to October 17, 2005, the Texas Administrative Code purported to authorize a reserve law enforcement officer to wear his government uniform while working at a private security job, if the officer obtained written permission to do so from the chief administrator of the law enforcement agency which issued his reserve commission. *See* 37 TEX. ADMIN. CODE § 35.39(e) (repealed effective October 17, 2005). However, that section of the administrative code was repealed by the Private Security Board during its meeting on June 24, 2005. It is reasonable to infer that the rule was repealed because it was in conflict with state law, as set out in § 1702.130(a) of the Occupations Code, and that the Private Security

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Board no longer believes that the reserve officers may lawfully work at a private security job while garbed in a police uniform.

There remains an additional question of whether volunteer, unpaid reserve officers fall under the statutory exception set out in subsection (c) of § 1702.130, which provides that the police uniform ban does not apply to a “commissioned security officer employed by a political subdivision of this state.”

The legislative history of that provision suggests that it was intended to apply only to individuals who were employed by municipalities to serve as security officers—rather than peace officers—for the political subdivision. Furthermore, even if subsection (c) did apply to security officers who are also employed as reserve deputies by a political subdivision, it would seem that the exception would *not* apply to an unpaid volunteer reserve officer, who generally is not regarded as an “employee” of the political subdivision.

In keeping with the requirements of § 402.043, this office has investigated the issued raised in this correspondence, and a brief on the merits of the issue is enclosed. I look forward to obtaining your opinion on this issue, and I thank you for your assistance in this regard.

Sincerely,



CHARLES A. ROSENTHAL, JR.
Harris County District Attorney

CAR/bd

**BRIEF IN SUPPORT OF ROSENTHAL'S OPINION
REQUEST CONCERNING THE WEARING OF POLICE
UNIFORMS BY RESERVE PEACE OFFICERS**

A. Issue Presented.

Harris County District Attorney Charles A. Rosenthal, Jr., is requesting a formal written opinion of the attorney general regarding the following issue:

Is it unlawful for a reserve peace officer to wear his police uniform and display the insignia of an official law enforcement agency while working as a private security officer licensed and/or commissioned by the Texas Private Security Board?

It is respectfully suggested that this question should be answered in the affirmative, because:

(1) TEX. OCCUPATIONS CODE ANN. § 1702.130(a) (Vernon 2004) expressly prohibits private security officers from wearing a police uniform;

(2) the Texas Private Security Board recently repealed an administrative rule which purported to authorize the wearing of a police uniform by a reserve deputy officer with the written permission of the agency which commissioned the individual as a reserve officer; and

(3) the statutory exception set out in subsection (b) of § 1702.130 was intended to apply only to individuals who are employed by political subdivisions to work as security officers, rather than peace officers; and in any case, reserve deputies are not "employed" by the political subdivision because they serve as unpaid volunteers.

B. Historical Context.

The legislation now known as the Private Security Act was first promulgated in 1969 with the cumbersome title of "Private Detectives, Private Investigators, Private Patrolmen, Private Guards and Managers Act." See Act of June 11, 1969, 61st Leg., R.S., ch. 610, 1969 Tex. Gen. Laws 1807. The original act contained an exception for

peace officers performing their official duties, but did not address whether they needed a license for private security employment.

That omission was remedied in the next session of the Legislature, which clarified that the Act did not apply to “a person receiving compensation for private employment on an individual, independent contractor basis as a patrolman, guard or watchman who has full time employment as a peace officer as defined by Article 2.12 of the Texas Code of Criminal Procedure . . .” See Act of June 15, 1971, 62nd Leg., R.S., ch. 929, sec. 8, 1971 Tex. Gen. Laws 2835, 2838. By 1977, the Act contained a provision expressly excluding a “reserve peace officer” from the scope of that exception for peace officers. See Act of June 16, 1977, 65th Leg., R.S., ch. 746, sec. 3, 1977 Tex. Gen. Laws 1871, 1872.

The statutes requiring reserve and part-time peace officers to obtain a license for private security work have repeatedly been challenged in state and federal courts. For instance, in *Texas Board of Private Investigators and Private Security Agencies v. Bexar County Sheriff's Reserve*, 589 S.W.2d 135 (Tex. Civ. App.—San Antonio 1979, no writ), the court agreed with the Board that the Legislature made a rational distinction between full-time and reserve officers, on account of differences in training, supervision and experience. In *Garay v. State*, 940 S.W.2d 211 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd), another court reached the same conclusion with regard to part-time officers with regular—rather than reserve—credentials.

Thus it is now clear that reserve officers must obtain a private security license in order to obtain employment as a private security officer, and a substantial number of

reserve officers have obtained a license from the Board. The issue of whether they may wear their police uniforms while engaged in private security work, however, is not so well-settled.

The Private Security Act, which now comprises chapter 1702 of the Occupations Code, has long prohibited licensees from wearing a police uniform or displaying the insignia of any governmental agency, with one significant exception:

§ 1702.130. Use of Certain Titles, Uniforms, Insignia, or Identifications Prohibited.

(a) A license holder, or an officer, director, partner, manager, or employee of a license holder, may not:

(1) use a title, an insignia, or an identification card, wear a uniform, or make a statement with the intent to give an impression that the person is connected with the federal government, a state government, or a political subdivision of a state government; or

(2) use a title, an insignia, or an identification card or wear a uniform containing the designation "police."

(b) Subsection (a) does not prohibit a commissioned security officer employed by a political subdivision of this state from using a title, insignia, or identification card, wearing a uniform, or making a statement indicating the employment of that individual by the political subdivision.

In 2001, the Private Security Board promulgated an amendment to chapter 22 of the Texas Administrative Code which purported to authorize a reserve officer to wear a police uniform while performing private security work, if he or she obtained the written permission of the chief administrator of the police agency which issued the reserve commission. *See* 26 Tex. Reg. 8985. After the provision was moved and renumbered,

37 Tex. Admin. Code § 35.39, entitled "Uniform Requirements," contained the following authorization for the wearing of a reserve uniform while working a private security job:

e) A reserve law enforcement officer who has made application for or who has been issued a registration as a non-commissioned security officer or has been issued a security officer commission by the Texas Private Security Board under a licensed security services contractor or a letter of authority may wear the official uniform of that agency while working private security only when:

(1) the chief administrator of the appointing law enforcement agency has the authority to appoint reserve peace officers and a reserve peace officer license has been issued by the Texas Commission on Law Enforcement Officer Standards and Education;

(2) the reserve law enforcement officer has written permission to wear the official uniform of the appointing law enforcement agency;

(3) the written authorization must be signed and dated by the chief administrator of the appointing law enforcement agency and shall be maintained for inspection by the Texas Private Security Board at the principal place of business or branch office of the licensed security service contractor or letter of authority;

(4) the reserve is wearing the official uniform of the appointing agency that clearly identifies that agency and is not wearing a generic peace officer uniform;

(5) the reserve peace officer meets the definition of the Internal Revenue Service as an employee of the licensed security service contractor or letter of authority;

(6) the licensed security services contractor or letter of authority has not accepted any monies or remuneration to allow the reserve peace officer to work under the license of the security services contractor or letter of authority;

(7) the reserve peace officer has not terminated employment with the appointing agency; and

(8) the reserve peace officer has not been summary suspended or summary denied or revoked by the Texas Private Security Board.

(f) A reserve law enforcement officer, while working as a noncommissioned security officer or commissioned security officer for a licensed security services contractor (guard company), private business letter of authority, or governmental letter of authority, shall at all times carry on their person the noncommissioned security officer registration pocket card or security commissioned pocket card issued by the Texas Private Security Board and their official appointing agency's identification; and shall present the same upon request to any individual or law enforcement officer requesting them to identify themselves.

(g) A regular peace officer who maintains full-time employment, and meets the requirements of §1702.322 of the Act, may wear the uniform of the licensed security services contractor (guard company), private business letter of authority, or governmental letter of authority or the official police officer uniform of their appointing law enforcement agency while working private security in Texas.

In its meeting on June 24, 2005, the Board voted to repeal subsections (e) and (f) of § 35.39, and that repeal became effective on October 17, 2005. *See* 30 Tex. Reg. 6772-73. An explanatory note in the Texas Register stated that the “deletion of subsections (e) and (f) are [sic] necessary in order to eliminate a portion of the rule which has created confusion for the public and law enforcement,” and that “[n]o comments were received regarding adoption of the amendments.” *Id.*, at 6773. It is reasonable to infer that the “confusion” mentioned by the Board resulted from the apparent conflict between subsections (e) and (f) of the rule and the statutory prohibition set out in § 1702.130(a) of the Occupations Code.

C. Analysis.

Section 1702.130(a) of the Occupations Code unambiguously prohibits the wearing of a police uniform by a person performing private security work under a license

issued by the Private Security Board. A violation of the statute constitutes a Class A misdemeanor offense, under TEX. OCCUPATIONS CODE ANN. § 1702.388 (Vernon 2004).

Section 1702.130(a) has not been enforced in cases involving reserve peace officers prior to the repeal of 37 Tex. Admin. Code § 35.39(e) and (f) (repealed October 17, 2005), because of the obvious inequity involved in the prosecution of reserve officers for conduct which appeared to be specifically authorized by the agency charged with regulation of the private security industry. Now that the conflicting provisions of the administrative rule have been repealed, however, the reserve officers must comply with the statutory prohibition of the wearing of a police uniform and official insignia while working at a private security job.

It has been suggested that reserve officers may still wear their police uniforms under the statutory exception set out in subsection (b) of § 1702.130:

(b) Subsection (a) does not prohibit a commissioned security officer employed by a political subdivision of this state from using a title, insignia, or identification card, wearing a uniform, or making a statement indicating the employment of that individual by the political subdivision.

One could argue from the current version of the statute that a reserve deputy working a private security job is a “commissioned security officer” who is also “employed by a political subdivision” in the capacity of a reserve officer. It is obvious from the *previous* version of the statute, though, that the legislative intent was to permit individuals who were *employed as security guards* by a political subdivision to wear insignia reflecting the name of that subdivision on their security uniforms. Before its 1987 amendment, the exception plainly applied only to individuals commissioned by a

political subdivision to serve *as security officers* under the terms of the former subsection 3(e) of the Act:

(d) No licensee or officer, director, partner, manager or employee of a licensee shall use a title, or wear a uniform, or use an insignia, or use an identification card, or make any statement with the intent to give an impression that he is connected in any way with the federal government, a state government, or any political subdivision of a state government. No licensee or officer, director, partner, manager or employee of a licensee shall use a title, an insignia, or an identification card or wear a uniform containing the designation "police." *This subsection does not prohibit a an officer employed by a political subdivision commissioned as provided by Subsection (e) of Section 3 of this Act from using a title, insignia, identification card, wearing a uniform, or making a statement indicating his employment by the political subdivision [emphasis supplied].*

See Act of June 19, 1987, 70th Leg., R.S., ch. 873, sec. 15, 1987 Tex. Gen. Laws 2956, 2966-67.

Section 3(e) of the Act at that time pertained solely to an individual who was commissioned by a political subdivision to serve as a "security guard, security watchman, or security patrolman on property owned or operated by the political subdivision":

(e) The provisions of this Act relating to security officer commissions apply to a person employed by a political subdivision whose duties include serving as a security guard, security watchman, or security patrolman on property owned or operated by the political subdivision if the governing body of the political subdivision files a written request with the board for the board to commission the political subdivision's employees with those duties. The board may not charge a fee for commissioning those officers. The board shall issue the officer a pocket card designating the political subdivision employing him. The commission expires when an officer's employment as a security officer by the political subdivision is terminated. The board may approve a security officer training program conducted by the political subdivision under the provisions of Section 20 of this Act applicable to approval of a private business' training program.

See Act of June 19, 1987, 70th Leg., R.S., ch. 873, sec. 2, 1987 Tex. Gen. Laws 2956, 2959; *see also* TEX. OCCUPATIONS CODE ANN. § 1702.321(b) (Vernon 2004) (current version of former subsection 3(e) of the Act, pertaining to security personnel employed by political subdivisions).

Thus while the current version of § 1702.130(b) is arguably ambiguous, the legislative history plainly shows that it was intended to apply only to individuals who are hired by a political subdivision to guard the property and facilities of the subdivision, and cannot be construed to apply to a person who works as a licensed private security officer and happens to also work as a reserve deputy officer for a political subdivision of the State.

Furthermore, even if § 1702.130(b) could be construed to apply to a person who works for a political subdivision as a peace officer, rather than as a security guard, reserve deputies are unpaid volunteers who are not “employed” by a political subdivision under the commonly understood meaning of the term “employment.”

The Occupations Code does not contain a definition of the word “employ” or “employee,” but other statutory provisions define the word “employee” in terms of compensation for services rendered. For instance, TEX. GOV. CODE ANN. § 554.001(4) (Vernon 2004) defines “public employee” as “an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity.” The Texas Supreme Court has held that a reserve deputy sheriff is not an “employee” of the county within the meaning of that term as it is used in the Tort Claims Act, wherein it is defined as an individual “in the paid service of a governmental

unit.” See *Harris County v. Dillard*, 883 S.W.2d 166 (Tex. 1994). And the Court of Appeals for the Fifth Circuit recently held that a volunteer “non-paid regular” police officer was not an “employee” of a municipality for purposes of the Fair Labor Standards Act. See *Cleveland v. City of Elmendorf, Texas*, 388 F.3d 522 (5th Cir. 2004)

Section 1702.130(b) should be construed to apply only to individuals who are employed by a municipality to safeguard the property and personnel of a municipality, for the reasons set out *supra*. Even if it were to be construed as applying to individuals who are appointed to serve as peace officers, however, it would still only apply to part-time officers who work for pay, as individuals who volunteer to serve as reserve deputies are not regarded as “employees” of a political subdivision.

D. Conclusion.

For all the foregoing reasons, it is unlawful for a reserve law enforcement officer to wear a police uniform or the insignia of a political subdivision while working as a licensed private security officer.

Respectfully submitted,



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