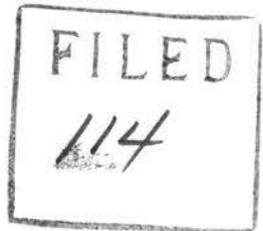


July 3, 1972

OPINION LETTER NO. 114
Answer by Letter - Paden

Honorable R. J. Gordon
Prosecuting Attorney
Hickory County
P. O. Box 4
Hermitage, Missouri 65668



Dear Mr. Gordon:

This opinion is in response to your request for an opinion from the Office of the Attorney General with respect to the following inquiry:

"May the Sheriff of a fourth class county appoint deputies, who are non-residents of the county, in an emergency situation? In the event that he may not make such appointment, is a law enforcement officer from any other jurisdiction considered a peace officer or a private citizen when he aids a county sheriff in enforcing the law at the request of such sheriff?"

The authority for the sheriff to appoint deputies in an emergency situation is derived from Section 57.119, RSMo 1969, as follows:

"In any emergency the sheriff shall appoint sworn deputies, who are residents of the county, possessing all the qualifications of sheriff. The deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

Honorable R. J. Gordon

Section 57.119, RSMo 1969, limits the authority of a sheriff to appoint sworn deputies in emergency situations to those deputies who are residents of the county and possess all the qualifications of sheriff. See State v. Owen, 258 S.W.2d 662 (Mo. 1953), see Opinion of the Attorney General No. 15, Caslavka, 9-8-54.

It is therefore the opinion of this office that a sheriff of a fourth class county may not appoint deputies in an emergency situation who are not residents of that county.

In the second part of your question you ask, if a law enforcement officer from another jurisdiction is considered a peace officer or a private citizen when he aids a county sheriff in enforcing the law at the request of such sheriff. In State v. Goodman, 449 S.W.2d 656 (Mo. 1970), the Supreme Court indicated that a person summoned by the sheriff to assist him in making an arrest for a felony is neither an officer nor a private citizen, but occupies the legal position of a posse comitatus.

"In a proper case the sheriff may summon to his assistance any person to assist him in making an arrest for a felony. A posse comitatus, i.e., those called to attend the sheriff, may be summoned verbally. The mode is immaterial, so long as the object is to require assistance. A person so summoned is neither an officer nor a mere private person, but occupies the legal position of a posse comitatus and while cooperating with the sheriff and acting under his orders is just as much clothed with the protection of the law as the sheriff himself. It is not essential for a posse comitatus to be and remain in the actual physical presence of the sheriff; it is sufficient if the two are actually endeavoring to make the arrest and acting in concert with a view to effect their common design." (l.c. 661) (Emphasis added).

The right of the sheriff to summon a posse comitatus, or the whole power of the county, exists by virtue of the common law and statutes empowering a sheriff to summon aid in the suppression of disturbances of the peace. 80 C.J.S. Sheriffs and Constables, §34, pp. 202-203; Sections 542.150, 542.170; 542.180; 542.190, RSMo 1969.

Honorable R. J. Gordon

The authority of a sheriff to summon a posse comitatus under the common law exists by virtue of Section 105.210, RSMo 1969, as follows:

"In all cases where, by the common law or a statute of this state, any officer is authorized to execute any process, he may call to his aid all male inhabitants above the age of twenty-one years in the county in which the officer is authorized to act."

Therefore, the sheriff may summon under his common law authority a posse comitatus only those male inhabitants above the age of twenty-one years in the county in which the sheriff is authorized to act.

It is the opinion of this office that a law enforcement officer from another jurisdiction could not validly be summoned by the sheriff as a posse comitatus for the reason that this law enforcement officer would not be an inhabitant of the county in which the sheriff is authorized to act and would not be clothed with the protection of the law afforded to the sheriff, his deputies and his posse comitatus. State v. Owen, supra.

It is the opinion of this office that a sheriff of a fourth class county may only appoint deputies in an emergency situation who are residents of such county. A law officer from another jurisdiction who is not a resident of such county is not eligible to be appointed a special deputy or eligible to be summoned a posse comitatus and therefore is not clothed with the protection of law afforded the sheriff himself.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 15,
9-8-54, Caslavka