

MEMORANDUM

STATE OF ALASKA DEPARTMENT OF LAW

To: Maj. Gen. Craig Campbell
Commissioner and Adjutant General
Department of Military and Veterans'
Affairs

Date: March 30, 2006

File No.: 661-06-0093

Tel. No.: (907) 269-5100

From: Michael G. Mitchell
Assistant Attorney General
Labor and State Affairs – Anchorage

Subject: Alaska State Defense Force
as State Law Enforcement
Officers When in State
Active Service

This memorandum responds to your request for advice on whether the Alaska State Defense Force (“ASDF”), also known as the Alaska State Defense Force 49th Military Police Brigade, is a “State law enforcement agency” and whether ASDF personnel are “State law enforcement officers” when called to active state service by the governor under AS 26.05.070 to assist the United States Coast Guard in enforcing security zones around escorted high capacity passenger vessels and Alaska Marine Highway System vessels. The Coast Guard has proposed a regulation providing for the establishment of such security zones, which includes provisions for the Coast Guard to designate State law enforcement agency vessels as escorts and to designate State law enforcement officers as on scene representatives.

I. Introduction and Summary Conclusion

In section II of this memorandum, we provide background on the Coast Guard’s proposed regulation and on the Alaska State Defense Force and its statutory authority under AS 26.05.070 to serve as an “additional police force” in certain circumstances. In section III we interpret the terms “State law enforcement agency” and “State law enforcement officers” used in the Coast Guard regulation. We consider a number of previous opinions in which we have discussed whether certain state personnel were “peace officers” as that term is used in the Alaska statutes. We conclude that when the ASDF is called to active state service under AS 26.05.070 to assist the Coast Guard, it is a “State law enforcement agency” and its personnel are “State law enforcement officers” for purposes of assisting the Coast Guard. The law enforcement authority of the ASDF is limited by the terms and purpose of the activation order and may also be limited by the Coast Guard in its request for assistance.

II. Background

A. The Coast Guard's Security Zone Regulation

In March 2005, the Coast Guard proposed a regulation establishing security zones around all high capacity passenger vessels such as cruise ships ("HCPV") operating in the navigable waters of Coast Guard District 17 (Alaska). 70 Fed. Reg. 11595 (Notice of Proposed Rulemaking, March 9, 2005). The proposed regulation provided that "when immediate action is required and representatives of the Coast Guard are not present or not present in sufficient force to provide effective enforcement of this section in the vicinity of a HCP vessel, any Federal Law Enforcement Officer or State Law Enforcement Officer may enforce the [security zones]." *Id.* at 11598 (proposed 33 CFR 165.1711(e)). The proposed regulation defined "State Law Enforcement Officer" as "any peace officer as defined in Alaska Statute § 01.10.060." *Id.*

After receiving numerous comments, in October 2005 the Coast Guard issued a Supplemental Notice of Proposed Rulemaking revising the proposed regulation. 70 Fed. Reg. 62261 (Oct. 31, 2005). Instead of establishing security zones around all high capacity passenger vessels, the Coast Guard proposed to establish them only around those HCPV and Alaska Marine Highway System vessels transiting under escort. *Id.* It defined "escorted HCPV or AMHS vessel" to include a vessel "accompanied by one or more Coast Guard assets or Federal, State, or local law enforcement agency assets." *Id.* at 62264 (proposed 33 CFR 165.1711(a)).¹ The revised proposed regulation also authorized the Coast Guard to designate a "Federal, State, or local law enforcement agency" to serve as on scene representative to grant permission to transit within 100 yards of the escorted vessel. *Id.* (proposed 33 CFR 165.1711(a) and (c)(4)). It defined "State law enforcement officer" to mean "any State or local government law enforcement officer who has authority to enforce State or local criminal laws." *Id.* at 62264 (proposed 33 CFR 165.1711(a)). The Supplemental Notice of Proposed Rulemaking did not explain why the definition of "State law enforcement officer" was changed.

The Coast Guard recently published a Second Supplemental Notice of Proposed rulemaking, which makes minor changes to exempt certain fishing vessels actively engaged in fishing from having to comply with the security zones. 71 Fed. Reg. 9984 (Feb. 28, 2006).

¹ The proposed regulation does not specify when these vessels will be escorted, apparently because this information is security-sensitive. In a telephone conversation, the Coast Guard said it will designate which non-Coast Guard vessels to serve as escorts and when, the presence of which will establish a security zone.

B. The Alaska State Defense Force

State defense forces have their origin in federal law providing that in addition to the National Guard, a state may provide and maintain at its own expense a defense force. *See generally* 1999 *Inf. Op. Att’y Gen.* at 2 (July 7; 661-99-0228) (citing 32 U.S.C. 109(c) and *Perpich v. Dept. of Defense*, 110 S.Ct. 2418, 2429 (1990)).

Two sections in the Alaska military code address the organization and composition of the Alaska State Defense Force. AS 26.05.030(d) describes the composition of the Alaska State Defense Force:

(d) The Alaska State Defense Force consists of units authorized by the governor and manned by volunteer personnel qualifying under state law and regulation. All Alaska State Defense Force personnel shall be

(1) appointed, commissioned, or warranted, and assigned by the governor or the adjutant general as the governor’s designee;

(2) subject to serve on state active duty at the call and by order of the governor.

In addition, AS 26.05.100 provides:

A state militia, known as the Alaska State Defense Force, may be organized through voluntary enlistments under regulations as to discipline and training that may be prescribed by the governor. During the time that the Alaska National Guard or the Alaska Naval Militia, or any part of either of them, is not available to the state by reason of active federal services, or the National Guard or Naval Militia requires augmentation to perform its state mission, the governor may activate the Alaska State Defense Force.

Activation of the “organized militia,” which under AS 26.05.010, includes the ASDF, is addressed in AS 26.05.070:

Sec. 26.05.070. Governor may order organized militia into active service. In the event of war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot; or if a mob or body of men act together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist

the laws of the state, or the United States; or in the case of imminent danger of the occurrence of any of these events; or whenever responsible civil authorities fail to preserve law and order, or protect life and property, or the governor believes that failure is imminent, the governor may order the organized militia or any part of it, into active state service to execute the laws and to perform duties in connection with them that the governor considers proper. Whenever any portion of the militia is ordered into active service by the governor, it becomes an additional police force, retaining its separate entity and operating at all times as a military organization under military command, with power to cooperate with but not to supersede the existing civilian law enforcement officers whenever possible, for the re-establishment of law and order and for the protection of life and property. The governor may also order members of the organized militia to active state service, with their consent, for the purpose of training or for full-time duty with the office of the adjutant general. (Emphasis added.)

These statutes authorize the adoption of regulations addressing qualifications to serve in the Alaska State Defense Force and discipline and training of ASDF personnel. AS 26.05.030(d) and AS 26.05.100. No regulations have been adopted under the Administrative Procedures Act, although DMVA has adopted internal procedures for operations and training of ASDF personnel. These include provisions for training required for ASDF personnel carrying out military police functions, including training in criminal procedure, criminal law, criminal investigation, laws of arrest and search and seizure, crowd and riot control, and firearms training. ASDF Pamphlet 350-1 (April 24, 1999).

III. ASDF Activated Under AS 26.05.070 To Assist The Coast Guard Are “State Law Enforcement Officers” Under AS 01.10.060

We now turn to the question whether ASDF personnel activated under AS 26.05.070 are “State law enforcement officers,” which is defined in the Coast Guard’s proposed regulation as “any State or local government law enforcement officer who has authority to enforce State or local criminal laws.”²

² For purposes of this discussion, we will assume that exigent circumstances specified in AS 26.05.070 for activation exist (*e.g.* “war, disaster, . . . [or] catastrophe, . . . or . . . imminent danger of any of these events . . . or the governor believes that failure [to preserve law and order or protect life and property] is imminent”) and the governor orders ASDF personnel to active state service to assist the Coast Guard as “an additional police force” under AS 26.05.070.

Looking first at the text of AS 26.05.070, we can infer from the reference to the ASDF as an “additional police force, . . . with power to cooperate with but not to supersede the existing civilian law enforcement officers” that the legislature considered the ASDF, when serving as an additional police force, to be law enforcement officers.³ Looking beyond AS 26.05.070, we find no general definition of the term “law enforcement officer.” *Cf.* n. 3, *supra*.

We do find, however, relevant discussion in Alaska Court of Appeals opinions interpreting the term “law enforcement officer” as used in AS 28.35.225. This statute authorizes “all law enforcement officers in this state” to enforce motor vehicle offense provisions of AS 28.35, but it does not define the term. In *State v. Burke*, 714 P.2d 374 (Alaska App. 1986), the Court of Appeals found this term to be similar to the term “peace officer,” which is defined in AS 01.10.060(6).⁴ In *Clark v. State*, 738 P.2d 772 (Alaska App. 1987), the court interpreted “all law enforcement officers” in AS 28.35.225 by referring to the definition of “peace officer” in AS 01.10.060 and also to the definition of “police officer” in AS 18.65.290. It commented: “These definitions are helpful in defining ‘law enforcement officer’ as used in AS 28.35.225. If anything, the term ‘law enforcement officer’ is broader than ‘peace officer’ or ‘police officer.’” *Id.* at 773. The court concluded that “all law enforcement officers” encompassed airport police officers.

³ See also AS 18.15.250(d)(3) (defining the term “law enforcement officer” for purposes of the hepatitis B vaccination program for volunteer emergency personnel and law enforcement officers to mean “a member of the police force of a municipality”). Although the term is used in various places in the statutes, this is the only place where it is defined.

⁴ The court stated:

The state directs our attention to AS 01.10.060(6), which defines the similar term “police officer” as

Any officer of the state troopers, members of the police force of any incorporated city or borough, United States marshals and their deputies, and other officers whose duty it is to enforce and preserve the public peace.

We agree that any member of the police force of an incorporated city or borough is a ‘law enforcement officer’ for purposes of AS 28.35.225.

We also have interpreted the terms “peace officer” and “police officer” in several opinions, and, like the Court of Appeals, we have concluded that “law enforcement officer” is broader than “peace officer.” Further, we have concluded in our opinions that “peace officer” in turn is broader than “police officer.” These opinions discuss what categories of state personnel fall within the definition of “peace officer.” They lead us to now conclude that ASDF personnel called to state active service are “peace officers,” and therefore also are “state law enforcement officers.” We turn to an examination of our previous opinions.

The first of these opinions, issued in September 1977, is central to those that followed and to our conclusions today. There, we considered whether the following personnel fell within the definition of “police officer” in AS 18.65: (a) officers with limited police authority with respect to specific statutes or ordinances, (b) officers with full police authority but with their service limited to a restricted geographical area such as an airport or a harbor, and (c) officers employed by other than a police department but given the authority of a police officer by commission from a police department.⁵

In the September 1977 opinion, we first addressed whether these personnel were “peace officers” under AS 01.10.060 before addressing whether they were “police officers” under AS 18.65.290. This required interpretation of the clause “other person whose duty it is to enforce and preserve the public peace,” included in the definition of “peace officer” in AS 01.10.060. We concluded that to fall within this clause, a law enforcement officer must be empowered with a full range of police duties and authority and must be currently functioning on essentially a full time basis in that role.

The terms employed in defining the class of persons who are peace officers within the meaning of AS 01.10.060(6) evidences a legislative intent to include only publicly employed law enforcement officers who have full police duties. An ambiguity in this definition

⁵ 1977 *Inf. Op. Att’y Gen.* (Sept. 18; 660-77-0036). Specifically, we were asked to consider the following categories of law enforcement personnel: (1) employees of the Department of Fish and Game designated under AS 16.05; (2) employees of the Department of Public Safety such as fire marshals, not commissioned per se but who received special police commissions from the commissioner of public safety, presumably under AS 18.65; (3) municipal harbor masters, some of whom were police department employees and some of whom were supervised by departments of public works, who normally had police authority limited to harbor areas and harbor ordinances; (4) Alaska State Park Rangers employed by the Department of Natural Resources with full police authority but limited to park areas under AS 41.20; and (5) municipal arson investigators employed by a fire department but also commissioned by a police department with some police authority.

is present in the subordinate clause which includes in the definition of peace officer “other person whose duty it is to enforce and preserve the public peace.” It must be assumed, in assigning a meaning to these words, that the legislature did not add superfluous language to the statute and that all parts of the definition, including the general language in the last clause and the specifically defined classes of law enforcement officers preceding it are to be construed together. In doing so, the class defined by the particular words is clearly that category of publicly employed law enforcement officers who have full police responsibility and who spend substantially all of their working hours performing these functions.

Law enforcement officers within the category “peace officers” as used in AS 01.10.060(6) include, but are not limited to, state troopers, fish and wildlife protection officers and police officers employed by police departments of incorporated municipalities. This definition, however, also clearly anticipates that other persons may be considered peace officers by its reference to “other officers whose duty it is to enforce and preserve the public peace.” Thus, with respect to the executive branch of state government, the term “peace officer” is not restricted to commissioned officers employed by the Department of Public Safety.

For illustration purposes, fish and game biologists employed by the Department of Fish and Game are peace officers and have the full panoply of concomitant duties, if they are so designated by the commissioner of fish and game under AS 16.05.160 and are presently engaged in enforcing AS 16.05 and the regulations promulgated thereunder. The unifying principle throughout the various statutes pertaining to peace officer status does not depend so much on the department of state government which employs the peace officer, but instead upon the range of his authority and the present nature of his duties. In the fish and game biologist example, the designated employee would not only have to be designated by the commissioner but also actively participate during substantially all of his working hours in law enforcement activities in order to be considered a peace officer in the fullest sense. Thus, although the commissioner of fish and game may designate employees with the powers of a peace officer, such individuals do not automatically obtain full peace officer status within the meaning of

AS 01.10.060(6) unless they function almost exclusively as a fish and game protection officer.

In summary, it is our view that the statutory framework of the Alaska Statutes viewed as a whole contemplates that for any publicly employed law enforcement officer to be considered a peace officer within the meaning of AS 01.10.060(6), he or she must be empowered with a full range of police duties and authority and must be currently functioning on essentially a full time basis in that role.

1977 *Inf. Op. Att’y Gen.* at 2-3 (Sept. 18; 660-77-0036) (emphasis added, footnotes omitted.).

In the September 1977 opinion, we next considered whether the personnel in question came within the more restrictive definition of the term “police officer” in AS 18.65, the Alaska Police Standards Council statutes.⁶ We examined the statutory definitions of “peace officer” and “police officer,” and concluded that while all police officers are peace officers, the converse is not true.

Comparing the classification of “peace officer” with that of “police officer”, it is apparent that police officers, as defined in AS 18.65.290(2), are always peace officers since they have full police duties that are exercised on a full time basis. However, the converse of this proposition can never be the case; that is, peace officer status does not automatically vest one with the status of a police officer since peace officers are not necessarily employees of a police department and do not necessarily have the power to enforce all the “penal, traffic or highway laws of the state.” In other words, a general power to enforce all state criminal laws is not an inherent characteristic of peace officer status, although certain peace officers who are coincidentally police officers clearly possess this authority.

⁶ In September 1977, AS 18.65.290(2) defined “police officer” as meaning “a full-time employee of a police department which is part of or administered by the state or a political subdivision of the state participating in a program established under §§ 130-290 of this chapter, who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this state.” *Id.* at 3.

Id. at 4 (emphasis added.) We concluded that none of the personnel in question were “police officers” subject to the Alaska Police Standards Council requirements in AS 18.65.⁷

Later in 1977, we again had occasion to consider the definition of “peace officer” in addressing whether “special officers” of the Department of Public Safety commissioned by the Commissioner under AS 18.65.010 were “peace officers” authorized to carry concealed weapons.⁸ We concluded that they were.

A comparison of the language of AS 18.65.010(b), which describes the general powers and duties of a specially commissioned officer, with that of AS 18.65.080, which describes the powers and duties of commissioned officers of the Department of Public Safety with particular reference to “member” of the State Troopers, supports the conclusion that a specially commissioned officer is a “peace officer” for purposes of both AS 01.10.060(6) and AS 11.55.020 when performing law enforcement duties within the limitations set forth on the face of a special commission and furthermore, may carry concealed weapons without violating AS 11.55.010 while performing these duties to the extent permitted by the commission itself.

1977 *Inf. Op. Att’y Gen.* at 4 (Dec. 22; J-66-005-75).

⁷ The statutory definitions of the terms “peace officer” and “police officer” have not materially changed since we issued our opinions. Presently, “peace officer” is defined in the general definitions section of the Alaska statutes, to include certain specified state or federal officers and, more generally, “an officer whose duty it is to enforce and preserve the public peace.” AS 01.10.060(a)(7)(F). “Police officer” is defined for purposes of the Alaska Police Standards Council statutes to mean “a full-time employee of the state or a municipal police department with the authority to arrest and issue citations; detain a person taken into custody until that person can be arraigned before a judge or magistrate; conduct investigations of violations of and enforce criminal laws, regulations, and traffic laws; search with or without a warrant persons, dwellings, and other forms of property for evidence of a crime; and take other action consistent with exercise of these enumerated powers when necessary to maintain the public peace” plus designated state airport police and University of Alaska public safety officers having general police powers. AS 18.65.290(7).

⁸ When we issued our 1977 opinion, AS 11.55.020 (since repealed) provided that the prohibition against carrying a concealed weapon in AS 11.55.010 did not apply “to a peace officer, whose duty it is to serve process or make arrest.”

We have relied on the September 1977 opinion in several subsequent opinions in which we considered whether various state personnel fall within the definition of peace officer in AS 01.10.060.

In 1978 we concluded, without detailed analysis, that Kodiak's harbormaster and port security officers were peace officers for purposes of Public Employees Retirement System provisions in AS 39.35.680. 1978 *Inf. Op. Att'y Gen.* (March 10; J-66-497-78).

In 1984, we concluded that occupational licensing investigators were not peace officers authorized under AS 12.25.180 – 12.25.230 to issue citations to persons violating occupational licensing statutes or regulations. We discussed the 1977 opinion and concluded that these investigators were not peace officers under AS 01.10.060(6) because their duties were "limited to the enforcement of specific licensing provisions rather than being general keepers of the peace."⁹

In 1994, we concluded that FBI agents were peace officers for most law-enforcement purposes and under AS 01.10.060. However, we found that this had limited practical effect as it applied only to their status for purposes of Title 12, the code of criminal procedure.¹⁰

Most recently, in 1998 we affirmed the analysis the September 1977 opinion and concluded that Alaska Department of Fish and Game employees were not peace officers

⁹ 1984 *Inf. Op. Att'y Gen.* at 1 (Jan. 25; 366-388-84). We also concluded that these investigators were not "peace officers" as defined in the criminal code, AS 11.81.900, because the investigators were not authorized by law to maintain public order and they had no authority to make arrests, even for the limited class of offenses involved in occupational licensing.

¹⁰ We observed:

Although the language of AS 01.10.060 applies to FBI agents, the powers that flow from Title 12 are not as significant as those in Title 11 [in which there is another definition of "peace officer"]. The status of "peace officer" under Title 12 carries with it only very limited authority that will probably not be useful for FBI agents in most situations. For example, the powers of arrest for ordinary citizens and peace officers are precisely the same with respect to felony offenses, that is, reasonable cause is needed no matter who makes the arrest. AS 12.25.030(a).

1994 *Inf. Op. Att'y Gen.* at 5 (Jan. 1; 663-94-0246).

whose dependents would be entitled to free tuition at state-supported educational institutions if the employees died in the line of duty. 1998 *Inf. Op. Att’y Gen.* (June 25; 663-98-0327).

Thus, in opinions spanning more than twenty years, we have concluded that “peace officer” encompasses any public officer empowered with a full range of police duties and authority currently functioning on essentially a full time basis in this role. This has included duly authorized fish and game biologists functioning almost exclusively as fish and game protection officers in enforcing AS 16.05; the Kodiak harbormaster and port security officers; and specially appointed officers of the Department of Public Safety with appointments of limited duration and authority exercisable only within specified geographic limits.

Considering the ASDF’s statutory authority in light of these opinions, we conclude that the legislature’s specific grant of authority to serve as “additional police force,” with the “power to cooperate with but not to supersede the existing civilian law enforcement officers whenever possible, for the re-establishment of law and order and for the protection of life and property” makes ASDF personnel “peace officers” under AS 01.10.060 when called to state active service active state service to assist the Coast Guard. When serving in this capacity they, like the personnel discussed in our previous opinions, are empowered with a full range of police duties and authority and function on essentially a full time basis in that role. As peace officers, they have authority to enforce state or local criminal laws and therefore they fall within the definition of “State law enforcement officer” in the proposed federal regulation. It also follows that the ASDF is a “State law enforcement agency” for purposes of the proposed regulation.

In so concluding, we observe that AS 26.05.070, in giving ASDF law enforcement authority in certain situations, also limits the ASDF’s law enforcement authority in certain essential respects. First, AS 26.05.070 clearly requires that at least one of the specified circumstances for activation must exist, *see n. 2, supra*, and an authorized activation order must issue for ASDF to have any law enforcement authority. Second, when activated, ASDF’s law enforcement authority will be limited by the terms and purposes of the order calling them to active state service. *Compare AS 26.05.070 with AS 18.65.010(b) and AS 18.65.080(b)* (enumerating inherent law enforcement powers of special public safety officers and state troopers). Third, the civilian law enforcement agency requesting assistance may limit the law enforcement authority of the ASDF, for example in the request for assistance or subsequently in directions to or agreements with the ASDF. *See AS 26.05.070* (ASDF personnel have “power to cooperate with but not to supersede the existing civilian law enforcement officers whenever possible”).

We hope this answers your questions. Please let us know if you have additional questions.

MGM:cmc