



Cite as: 2007 (12) AELE Mo. L. J. 201

ISSN 1935-0007

Employment Law Section - December 2007

**Regulation of Off-Duty Activities
A Multipart Series**

This is the first of a multipart series that addresses the legal right of management to regulate off-duty activity of public safety employees.

1. Secondary Employment: Part One - In General
2. Secondary Employment: Part Two - Special Issues
3. Participating in Unapproved Training Programs and/or
Membership in Controversial Organizations or Events
4. Sexual Conduct

- Parts One and Two are written in *outline format*.

➔ This outline supplements [Outside Employment Guidelines for Law Enforcement Agencies](#), a management practices article in the Jan. 1997, FBI Law Enforcement Bulletin, by Darcy U. Burton. It is strongly recommended that you read the FBI article first, and then return to this document.

**Part One
Secondary Employment (Moonlighting)
In General**

- A. The Right to Regulate
- B. Selected Types of Employment
 - Alcoholic Beverage Establishments
 - Expert Witness
 - Law Practice
 - Private Security & Investigations
 - Teaching
 - Working for Other Law Enforcement Agencies
- C. Specimen Secondary Employment Regulations

Part Two (*Next Month*)
Secondary Employment (Moonlighting)
Special Issues

- Bargaining Requirements
- Grievance Procedure as Mandatory
- Injury Liability & Indemnity
- Past Practices
- Sexually Oriented Businesses
- Retaliatory Punishment

A. The Right to Regulate

For many years, courts have upheld the right of management to limit or regulate the off-duty employment of public safety employees.

- In New Jersey, an appellate court held that the board of commissioners could formulate secondary employment rules and regulations; it was not an unconstitutional delegation of legislative duties. Hofbauer v. Board of Police Cmsnrs., 133 N.J.L. 293, 44 A.2d 80 (1945).
- New York's highest court ruled that a N.Y.P.D. regulation providing that no member of the police force should engage in any other occupation was valid because it augmented public safety. Flood v. Kennedy, 12 N.Y.2d 345, 190 N.E.2d 13, 239 N.Y.S.2d 665 (1963).
- In Oregon, an appellate panel upheld a regulation restricting off-duty employment as reasonable and consistent with proper and effective internal police administration. Cox v. McNamara, 8 Ore. App. 242, 493 P.2d 54, cert. denied, 409 U.S. 882 (1972).
- A Michigan appellate court upheld a requirement that all secondary employment receive prior approval. Allison v. City of Southfield, 432 N.W.2d 369 (Mich. App. 1988).
- In Maryland, an appellate court held that the police chief could regulate off-duty employment and the rules pertaining to secondary employment did not require prior approval by the County Council. Howard Co. Police Ofcrs. Assn. v. Howard Co., #98-1236, 126 Md. App. 319, 728 A.2d 795 (1999).

- A federal appeals court upheld a rule requiring public employees to first obtain written permission to engage in secondary occupations, even if the rule prohibits unpaid volunteer work in the public interest. Williams v. Internal Revenue Service, 919 F.2d 745 (D.C. Cir. 1990).

B. Selected Types of Employment

Engaging in sexually oriented businesses is discussed in the January 2008 issue. This section examines six selected off-duty occupations where litigation has ensued.

Alcoholic Beverage Establishments

Police officers have a duty to enforce beverage laws, and that is inconsistent with work in a liquor store, a tavern or an ABC licensed restaurant.

- The Indiana Supreme Court upheld a police rule prohibiting secondary employment where alcoholic beverages are sold or consumed. Fraternal Order of Police Lodge 73 v. City of Evansville, 559 N.E.2d 607 (Ind. 1990).

Expert Witness

The Third Circuit affirmed an injunction **against** a police chief who required subordinates to obtain his approval before appearing as an expert witness in civil or criminal cases, even if uncompensated.

Initially, a Magistrate Judge ruled that the city had not proved that the Police Bureau would be “negatively impacted by allowing its officers to provide expert testimony” without the procedure established in the Order, and that a preliminary injunction would be in the public interest and prevent an infringement of constitutionally protected speech.

The District Judge adopted the Magistrate’s recommendation and granted a preliminary injunction. A three-judge appeals panel affirmed.

A city has the right to know when and where its police officers will be occupied with court appearances, and to prevent the unauthorized disclosure of confidential information. Here, however, the regulation prohibited opinion testimony unless the Chief of Police approved it, and the rule is not dependent on compensated work.

The panel said:

“We would view this case very differently if Order 53-7 simply barred an employee of the Bureau from receiving a fee for providing expert testimony related to the employee’s official duties, but that is not what Order 53-7 provides.”

The rule was not predicated on the regulation of outside employment, but required the chief’s approval in all cases where an officer seeks to provide opinion testimony in court.

The panel affirmed the issuance of the preliminary injunction against the rule. Judge Samuel Alito, who was later named to the U.S. Supreme Court, wrote the opinion. [Swartzwelder v. McNeilly](#), #01-1085, 2002 U.S. App. Lexis 14556 (3rd Cir. 2002).

Law Practice

Conflicts of interest can arise when a police officer engages in the practice of law.

- An Illinois appellate court affirmed the one-year suspension of a police officer who that failed to inform his superiors about criminal activity of an alderman, who was his client in his off-duty private law practice. Police general order 89-8 specifically prohibits engaging in secondary employment that “would result at any time in a conflict of interest” and prevents police officers who are attorneys from representing individuals who are targets of criminal investigations. [Holden v. Police Bd. of Chicago](#), #1-00-1117, 55 N.E.2d 67, 2001 Ill. App. Lexis 618.
- A California appellate court affirmed the dismissal of police legal advisor for refusing to divulge information about his private client. [Titus v. Los Angeles Co. Civil Serv. Cmsn.](#), 181 Cal.Rptr. 699 (App. 1982).
- In Michigan, an arbitrator upheld a ban on the practice of criminal law by police officers. The court found that a possibility of a conflict was real, and the prohibition was a reasonable restraint. [City of Harper Woods and Police Ofcrs. Lab. Council](#), FMCS #96-16880-3 (Chiesa, 1997).

Private Security & Investigations

Because of the possibility of misuse of police authority, management has an absolute right to prohibit or regulate off-duty work as a private investigator, security guard, bodyguard, process server, bail bondsman, debt collector or repossession agent.

- In Iowa, the state Supreme Court held that management could ban all secondary employment or prohibit a police officer from operating a truth deception-testing agency. Borlin v. Civil Serv. Cmsn. of Council Bluffs, 338 N.W.2d 146 (Iowa 1983).
- In Illinois, an appellate panel ruled that a police chief could limit outside employment of subordinate police officers who sought private employment as security guards, to work within that city. Martin v. Mathys, 501 N.E.2d 286, 149 Ill.App.3d 800 (1986).
- In New York, an appellate court upheld a sheriff's prohibition against off-duty employment as security officers. Dake v. Bowen, 521 N.Y.S.2d 345 (A.D. 1987).
- A Michigan appellate court upheld a police department regulation against any outside employment as a private investigator. The court also upheld a requirement that all secondary employment receive prior approval. The court also recognized the potential problems that could arise when a supervisor and subordinates work as partners in a private business. Allison v. City of Southfield, 432 N.W.2d 369 (Mich. App. 1988).
- In Virginia, a Federal court upheld a police regulation forbidding officers the right to have secondary employment as private investigators. Decker v. City of Hampton, 741 F.Supp. 1223 (E.D. Va. 1990).
- In Illinois, an appellate court upheld the termination of police officer for soliciting private security business. Eaton v. Bd. of Fire & Police Cmsnrs., Hoffman Estates, #1-95-3064 (Unpub. Ill. App. 1st Dist.) *summarized at* 1997 (3) F&PPR 40 and 97 (3) Ill. Munic. Leag. L. Bull.

Teaching

In North Carolina, a police sergeant sued the chief for preventing him from conducting a concealed weapon handgun safety course for the public while off-duty. He alleged violation of the right to free speech, the right to free association; substantive and procedural due process violations, the right to bear arms, the right

to academic freedom, and other constitutional claims.

The Fourth Circuit held that the chief lacked a legitimate interest in prohibiting the activity. The panel wrote:

“We conclude the speech at issue is a matter of public concern. After examining the content, context, and form of Sergeant Edwards’ speech as alleged in his second amended complaint, we have no doubt that the proper use and manner of carrying a concealed handgun in North Carolina is a subject in which the public or the community is likely to be truly concerned and interested. ...

“The content is of obvious concern to citizens on both sides of the often hotly debated issues surrounding the right of ordinary citizens to carry a concealed handgun. Furthermore, the context of Sergeant Edwards’ speech, an instructional setting for members of the public, obviously weighs heavily in favor of concluding his speech is a matter of public concern.”

Additionally, the chief was not entitled to qualified immunity for violating the officer’s First Amendment rights. The panel wrote:

“We need not look further than our December 20, 1985 decision in Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985), in order to determine whether the right at issue was clearly established.

“... we have no trouble concluding that in November 1995 it was clearly established that a police chief’s personal distaste of the content of a police officer’s off-duty instruction regarding concealed handgun safety is insufficient to justify conditioning a police officer’s continued employment upon the cessation of his protected off-duty expression.”

Edwards v. Goldsboro, 178 F.3d 231, 15 IER Cases (BNA) 333, 1999 U.S. App. Lexis 9088 (4th Cir.).

Working for Other Law Enforcement Agencies

- *Full time officers*

In Illinois, the chief of police required a full-time officer to quit his long-term part-time job with another village. A Circuit Court enjoined the order, but a three-judge appellate court reversed.

The appellate court noted that a police chief has a responsibility to secure "maximum efficiency from the police force," The actions of a police chief "should not be subject to review by the courts except to determine whether there was or was not good faith and a reasonable exercise of discretion."

The panel said that Warrenville chief had three bases for denying the plaintiff's application for secondary employment:

- (1) the loss of control over [the plaintiff] while he was engaged in police activities in Golf, noting specifically problems in the areas of access to confidential information and discipline for on-duty and off-duty infractions;
- (2) the appearance of impropriety in [the plaintiff's] retention of two police positions; and
- (3) the loss of [the plaintiff's] services if he were injured while acting as a police officer in Golf.

The justices wrote that the efficiency of public employees is a legitimate and substantial government interest, and is particularly strong with respect to police officers because of the need for them to act quickly and effectively to protect life and property. The Circuit Court was reversed. [Phillips v. Hall](#), 447 N.E.2d 418 (Ill.App. 1983).

- *Part-time officers*

An appellate court in Pennsylvania held that management can forbid part-time police officers from working for other departments. The panel did not list any policy reasons in support of the regulation. [Roper v. Borough of Versailles](#), 436 A.2d 1058 (Pa. Cmwlth. 1981).

C. Specimen Secondary Employment Regulations

AELE has compiled ten regulations on the secondary employment of police officers – from one state, two counties, and seven municipal agencies. AELE does not endorse the content or validity of specimen policies or regulations, which are included for illustrative purposes.

- [Arlington County, VA, Police](#)
- [Baton Rouge, LA, Police](#)
- [Craig, CO, Police](#)

- [Florida Highway Patrol](#)
- [Naperville, IL, Police](#)
- [Pueblo, CO, Police](#)
- [Richmond, VA, Police](#)
- [Suffolk County, NY, Police](#)
- [Syracuse, NY, Police](#)
- [Topeka, KS, Police](#)

AELE Monthly Law Journal

Wayne W. Schmidt

Employment Law Editor

841 W. Touhy Ave.

Park Ridge IL 60068-3351 USA

E-mail: wws@aele.org

Tel. 1-800-763-2802

© 2007, by the AELE Law Enforcement Legal Center

Contents may be downloaded, stored, printed or copied,
but may not be republished for commercial purposes.

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)