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Regulation of Off-Duty Activities – Part Three
Participating in Unapproved Training Programs, Membership in Extremist Organizations and Participation in Controversial Activities

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A. Participating in Unapproved Training Programs

In 2005, the Palmyra N.J. police chief issued a memorandum advising that "no personnel will attend any police related schools whether it be on your time and expense or the Borough's time and expense unless authorized by the Chief of Police."

An officer filed suit in federal court alleging a violation of his First Amendment rights to freedom of speech and freedom of association, as well as his due process and equal protection rights under the Fourteenth Amendment.

In his deposition, the police chief "testified that the rationale behind this directive was to prevent the Palmyra Police Department from incurring liability from the actions of a Palmyra police officer acting under color of law while attending a police-related school."

The chief asked the court for a summary judgment, on three grounds:

1. The refusal to allow an officer to attend a training program, even if on his own time and personally funded, is not a deprivation of a constitutional right – because it is not an "adverse employment action."

2. Due to civil liability concerns, the agency's interest in regulating training "outweighs the interest of the officer in obtaining that training."

3. The litigants are parties to a bargaining agreement, and the plaintiff should have challenged the approval process by filing a grievance.

Management emphasized that the plaintiff was free to attend schools and programs that were not police-related, and the chief had approved funding for three out of four training requests filed by the plaintiff – and allowed him to attend the fourth program without funding.

The court found that the plaintiff failed "to meet the threshold requirement for First Amendment protection" because attending a training program "is a matter of personal, rather than public concern."

The personnel directive concerned only the ability of Palmyra police officers to attend police-related training without approval from the chief, and therefore "could not be categorized as a political, social or other matter of community concern."

As for the due process challenge, the court held that while the plaintiff had a property interest in his position, the directive did not deprive him of that interest because he was never terminated or otherwise subject to an adverse employment action.

Moreover, he offered no evidence that under New Jersey law he had a property interest in being able to attend police-related schools. The judge wrote:

> "… the Constitution provides no fundamental right to education. Thus, [the plaintiff] has no fundamental right to attend police-related schools without approval."

Johnson v. Bor. of Palmyra, #1:04cv5370, 2007 U.S. Dist. Lexis 56628 (D.N.J. 2007).

Police chiefs, sheriffs and wardens are especially sensitive to use of force complaints. Various tactics are prohibited by some agencies, such as:

1. Neck restraints;
2. Use of unapproved weapons and ammunition;
3. Firing warning shots;

4. Hogtying.

Some tactical programs teach procedures that are inconsistent with agency policy or offend community groups.

B. Membership in Extremist Organizations

Florida

In 1983 a federal court in Florida found that the expression "blue by day and white by knight" reflected a public perception that members of the Klan served as law enforcement officers. See Finding 24 in McMullen v. Carson, #82-572-Civ-J-12, 568 F. Supp. 937 (M.D. Fla. 1983).

The district court sustained the termination of a records clerk in the Jacksonville, FL Police Dept. who served as a recruiter for the local Klan. A three judge appellate panel affirmed, writing:

> "Two critical factors surface in this case: the first involves what this record shows as to the nature, both actual and perceived, of the Klan as a violent, criminal, and racist organization dedicated to the sowing of fear and mistrust between white and black Americans.
>
> "The second critical factor here is that plaintiff was employed by a law enforcement agency, the members of which are subject to greater First Amendment restraints than most other citizens."

The panel noted that there was evidence that the city's black community "would categorically distrust" the police "if a known Klan member were permitted to stay on ***in any position***." McMullen v. Carson, #83-3579, 754 F.2d 936 (11th Cir. 1985).

Kentucky

A Jefferson county officer was fired for distributing hate literature targeting blacks and Jews, and for lying about selling tickets to Klan-sponsored functions. His termination was upheld. Young v. McDaniel, 664 F. Supp 263, 265 (W.D. Ky. 1986).

He later sought employment with the Louisville Police. After his rejection, he filed a suit in federal court raising First Amendment freedom of association claims.

The plaintiff alleged that he was rejected because of his former membership in the Klan; the city denied that assertion, and replied that his rejection was based on his termination from the county police force. The city was given a summary judgment, and the Sixth

Circuit affirmed. Young v. City of Louisville, #92-6261, 1993 U.S. App. Lexis 22647 (Unpub. 6th Cir.).

Nebraska

More recently a state court in Nebraska overturned an arbitration award that reinstated a state trooper who was fired for his active membership in the Klan. State of Nebraska v. Henderson, Lancaster Co. Nebr. Dist. Ct.; Nebr. Ct. App. #A-07-000010 (Appeal pending).

Connecticut

The Connecticut Dept. of Correction learned that several officers were associated with the Outlaws Motorcycle Club. An Oct. 2002 report from the National Drug Intelligence Center indicated that the Outlaws was expanding and a rival to the Hell's Angels. The NDIC report claimed that the Outlaws "was considered a major drug producer and trafficker that had used extreme violence to protect and expand its territorial influence."

Moreover, "Outlaws members were known to associate with self-proclaimed militias and white supremacist groups," traffic in stolen auto parts and to launder its illegal proceeds. RICO prosecutions had been instituted against Outlaws in Florida, Indiana, North Carolina, and Wisconsin and a number of Outlaws members had been convicted of felonies.

Three officers were charged with failing to cooperate fully and truthfully in an internal investigation and for "lying or giving false testimony during the course of a departmental investigation."

Two officers who were perceived as truthful during the internal investigation were required to receive counseling "because of the security, safety, and conflict of interest issues raised by their association with ... a gang or criminal enterprise." All five filed suit in federal court.

The District Court concluded that the rational basis test was "unquestionably met." Although there was no testimony that any of the plaintiffs were involved in any criminal activity, the judge wrote:

> "... the DoC has sound reasons for not wanting its correctional officers to become members of or associate with groups such as the Outlaws that have been accused of criminal activity on a national basis and are known to have long-standing feuds with other groups that are present in the prison population, such as the Hell's Angels. ...
>
> "... Outlaws have been criminally prosecuted under the RICO statute in other states and ... the Federal Bureau of Prisons has placed the Outlaws on its designated security risk list. ...
>
> "While there was no testimony that Plaintiffs' membership in the Outlaws had actually impeded work performance to date ... membership or association with a known gang could seriously disrupt prison operations and security."

The judge ruled that the officers were not entitled to a preliminary injunction against disciplinary action. Piscottano v. Murphy, #3:04cv682, 2005 U.S. Dist. Lexis 17140 (D. Conn. 2005); prior decis. at 317 F.Supp.2d 97, 2004 U.S. Dist. Lexis 8614 (2004).

On appeal, a three-judge panel affirmed. They wrote that justification for restricting freedom of association "may include such considerations as maintaining efficiency, discipline, and integrity, preventing disruption of operations, and avoiding having the judgment and professionalism of the agency brought into serious disrepute."

Although the officers emphasized that no member of the Connecticut Outlaws has been convicted of a crime, it is affiliated with the national organization, and a public employer need not wait for a disruption of the agency before taking action.

Because of rivalry between the Outlaws and the Hells Angels, a correctional officer who is associated with the Outlaws might be tempted to deny fair treatment to an inmate who was a Hells Angels. Piscottano v. Murphy, #5-3716, 2007 U.S. App. Lexis 29541 (2nd Cir. 2007).

Note: There is a difference between membership in a "hate group" or a criminal organization and membership in a group that has unorthodox beliefs. The First Amendment's freedom of association clause protected a practicing nudist, who was rejected for employment as a Baltimore city police officer. Bruns v. Pomerleau, 319 F.Supp. 58, 1970 U.S. Dist. Lexis 9814 (D. Md. 1970).

C. Participation in Controversial Activities

Oregon

In Portland, Oregon, a black security guard died after a white officer had used a carotid

restraint on him. The police chief responded by banning the maneuver.

Two white officers responded to the ban by designing and selling T-shirts depicting a smoking gun and the phrase, “Smoke ‘em - Don’t choke ‘em.”

The shirts provoked anger from the black residents, and the officers were fired. The union supported their grievances and the matter went to binding arbitration.

The mayor and police chief had acted to ameliorate racial tensions – which were poor – because an arbitrator had reinstated two other officers after they threw dead possums in front of a black-owned restaurant.

The arbitrator found that the creation and sale of the T-shirts was “a very serious offense and violation of professional conduct.” He then wrote:

> “... these officers gave little or no thought to the effect that their venture might have on the [family of the deceased], the problems besetting their fellow officers, who were involved in the [carotid restraint] death and the general reputation of the Police Bureau.”

He ruled that the First Amendment did NOT protect their message, but they had acted without a malicious intent. The punishment must be different for those who act recklessly and those who intend to do harm.

The punishment was reduced from termination to a six-month disciplinary suspension. City of Portland and Portland Police Assn. (Hanlon, 1985); addnl. facts recited in Koch v. City of Portland, #A39374, 94 Ore App. 484, 766 P.2d 405 (1988).

New York

A NYPD officer and FDNY firefighters participated in a Labor Day parade. In each of the nine years preceding 1998, a prize was awarded for the funniest float,

Floats that often featured racial, ethnic, or other stereotypes won the prize. A 1996 float, called “Gooks of Hazard,” depicted Asian stereotypes, and in another year a float called “Happy Gays” made fun of gay men. None of previous floats generated any controversy or public attention.

In the 1998 parade, participants in the “Black to the Future” float covered their faces in black lipstick and wore Afro wigs. The float featured buckets of Kentucky Fried Chicken and one of the participants (not a plaintiff) ate a watermelon.

After a home video was aired on TV, Mayor Giuliani announced that any police officer or firefighter who was “involved in this disgusting display of racism should be removed from positions of responsibility immediately ... They will be fired.”

The police officer was charged with conduct prejudicial to the good order, efficiency and discipline of the Department” by participating in a Labor Day parade float “which depicted African-Americans in a demeaning and offensive manner” and “knowingly associat[ing] with person(s) or organization(s) advocating hatred, or oppression of, or prejudice toward a racial or religious group.”

The firefighters were charged with “engaging in an activity instrumental in arousing racial hatred” and conduct unbecoming. Represented by the New York Civil Liberties Union and others, they sued in federal court to regain their jobs.

They argued that their participation in the float was a humorous commentary on a matter of public concern and was fully protected speech under the First Amendment. The District Judge agreed and ordered their reinstatement, with back pay.

On appeal, a three-judge panel said that the burden is on the City to make two showings: (1) that the employee’s activity was likely to interfere with Government operations and (2) that the Government acted in response to that likely interference and not in retaliation for the content of the speech. They quoted from another case:

> "The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias.
>
> "If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired.
>
> "Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged."
>
> Pappas v. Giuliani, 290 F.3d 143 at 146-147 (2d Cir. 2002).

Reversing, the panel concluded that the city fired the plaintiffs "out of a reasonable concern for disruption, and that this concern outweighed the plaintiffs' individual expressive interests." Locurto v. Giuliani, #04-6480, 447 F.3d 159, 2006 U.S. App. Lexis 10748 (2nd Cir. 2006).

Maryland

An off-duty Baltimore police officer performed a musical act, which included an impersonation while wearing blackface makeup. He was not compensated and did he hold himself out as an officer. After complaints by minorities, management ordered him to cease performances wearing the makeup.

He filed suit in federal court, alleging First Amendment infringements. The district court found that the city's interest in promoting racial harmony outweighed the officer's artistic rights.

Reversing, the appellate court held that the performance in blackface was constitutionally protected speech and that the city was not justified in taking disciplinary action for his performances.

The American Civil Liberties Union of Maryland represented the officer. The officer settled the suit with the city for $200,000. Berger v. Battaglia, 779 F.2d 992 (4th Cir., 1985).

Finally, it should be noted that a police officer applicant cannot be rejected for being a community activist – and may not be terminated for taking part in anti-police or anti-military demonstrations before he or she is hired – unless the employee was untruthful in the application process. Purdy v. Cole, 317 So.2d 820, 1975 Fla. App. Lexis 13837.

D. Summary

1. Management has the right to pre-approve outside law enforcement training.
    a. It makes no difference if the training is attended during off-duty hours;
    b. The fact that an employee personally pays for the training does not excuse pre-approval.
    c. Rejection of a training request must not be for an improper reason, e.g. political considerations, race, gender, age, or other protected categories.

2. Management does not have a right to pre-approve educational programs or training that is not job-related, e.g., a community organization's class on minority relations or karate training open to the general public.

3. The federal Constitution does not specifically mention a freedom of association, but the courts will generally protect that right under the First Amendment.
    a. Law enforcement and correctional personnel must avoid membership in or attendance at meetings of groups that advocate violence or promote hatred of others, especially when directed against racial groups and other minorities.
    b. The First Amendment protects participation in parades, comedy acts and other public performances, and a public employer must demonstrate that the activity directly and negatively impacts on law enforcement, corrections or public safety.

4. In jurisdictions that mandate collective bargaining, management probably has a legal duty to negotiate new or revised policies that restrict off-duty attendance at schools or seminars, or participation in civic events.

This short article is not intended to be legal advice or comprehensive. Consult local counsel before taking any action.

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