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Regulation of Off-Duty Activities
A Multipart Series

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2. Secondary Employment (Moonlighting) - Special Issues
3. Participating in Unapproved Training Programs and/or Membership in Controversial Organizations or Events
4. Sexual Conduct

This is the second of a multipart series that addresses the legal right of management to regulate off-duty activity of public safety employees. 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)
(*Last Month*)

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D. Bargaining Requirements

In jurisdictions with collective bargaining laws, [1] management has a duty to bargain over new rules, regulations or procedures that affect wages, hours and the conditions of employment. The remedy is to file an Unfair Labor Practice charge (ULP) with the state agency that oversees public sector labor relations.

- In Vermont, the state Labor Relations Board held that a municipality could not forbid its police officers from working secondary jobs as deputy sheriffs, without negotiating the new restriction with the union. Local 2413, AFSCME v. Town of St. Johnsbury, #89-40, 13 VLRB 75 (1990).

More often, the issue is raised by grievance, and an arbitrator looks to the employer's past practices. See section G, below.

E. Grievance Procedure as Mandatory

Does a full time public employee have a right to work a secondary job? Generally, the answer is no if the employer bans all moonlighting. The answer is murkier when some permits are approved and others are denied. The courts will generally apply the rational relationship test to judge a refusal.

Some agencies have a regulation specifically allowing approved outside employment up to a stated number of hours. Some courts have interpreted such rules as an entitlement.

A Pennsylvania appellate court ruled that a police officer had a reasonable "expectation of entitlement" to secondary employment, arising from the township's Rules of Conduct. "They provide that officers have the right to off-

duty employment if that employment meets certain criteria. Therefore, Officer M__ has a reasonable expectation in off-duty employment ..."

However, the Officer's appeal lacked merit because he was a party to a bargaining agreement -- which provided for the resolution of grievances by arbitration. The court wrote:

> "Arbitration is a solemn and serious undertaking for the attainment of justice and when the parties ... agree to settle by arbitration all differences which may arise between them, they are bound by their commitment as much as if they had entered into a stipulation in Court."

McKenna v. No. Strabane Twp., #407 C.D. 1996, 700 A.2d 577, 1997 Pa. Commw. Lexis 391. (*The case must be saved and opened in WordPerfect*).

F. Injury Liability & Indemnity

Public employers are rightfully concerned that an officer's off-duty job might generate a lawsuit. Not only are they likely to insist that security work be covered by liability insurance, but they often also require the secondary employer to defend and indemnify the governmental entity if it is named in a lawsuit arising from the secondary employment.

The other important issue is which employer is liable if an off-duty officer is injured in the course of the secondary job. If a moonlighting officer falls down a flight of stairs while working as a store detective, there is no public policy reason to shift the burden of compensation to the public entity.

But a number of courts have held that if a moonlighting officer is injured **while performing a law enforcement duty**, the public employer is primarily liable for workers' compensation benefits, even if a contractual agreement says otherwise.

- An Ohio appeals court held a city responsible for compensating an off-duty officer who was injured while arresting a shoplifter, even though the claimant was not in uniform, he was paid as a part-time security guard, the outside employment activity was not approved, and the city required moonlighting officers or their employers to carry their own insurance. Cooper v. City of Dayton, 696 N.E.2d 640, 120 Ohio App.3d 34, 1997 Ohio App. Lexis 2495; cert. den., 1997 Ohio Lexis 2848.

- In New Jersey, a federal court held that a city could **not** require off-duty police officers that also worked security jobs to obtain indemnity

agreements from their secondary employers for their actions as police officers. Bowman v. Twp. of Pennsauken, #87-87, 709 F.Supp. 1329, 1989 U.S. Dist. Lexis 3079 (D.N.J.).

- In Arizona, an appellate court concluded that a city must pay death benefits to a moonlighting police officer that was killed by a robbery suspect, even though officer was being paid by motel. City of Phoenix v. Industrial Cmsn. of Arizona, 154 Ariz. 324, 742 P.2d 825, 1987 Ariz. App. Lexis 525.

- A Louisiana appellate court invalidated requirements that secondary employers assume tort liability and responsibility for off-duty injuries to police officers. Benelli v. City of New Orleans, #CA-0850, 478 So.2d 1370, 1985 La. App. Lexis 10216.

- A Pennsylvania appellate court found that the city, not the secondary employer was responsible for W.C. benefits. City of Monessen v. Workmen's Compensation Appeal Board, #727 C.D. 1977, 387 A.2d 1000 36 Pa. Commw. 226, 1978 Pa. Commw. 1134.

A divided appellate court in Kentucky issued a contrary opinion. It held that a police chief could prohibit outside employment that might cause a conflict of interest or lower the public's image of officers, and that a governmental agency may lawfully require moonlighting officers "to provide insurance and indemnity for benefit" of the primary entity." A prior approval provision was struck down because there were no standards or appellate procedures. Puckett v. Miller, #90-SC-662, 821 S.W.2d 791, 1991 Ky. Lexis 194.

G. Past Practices

Most bargaining agreements contain a past-practices clause.[2] The theory is that a formal agreement would be too voluminous if it memorialized all of the accepted and understood aspects of employment with the agency. Contract violations are usually resolved through a grievance procedure and the final stage is binding arbitration.

- Suppose, for example, a city had an unwritten but long-standing practice of allowing off-duty officers to escort funeral processions without geographic limitations, and the police chief signed an order confining vehicular escort services to funeral homes (or churches) and cemeteries wholly within the city limits. Such an order would appear to violate a past practice and an arbitrator would annul enforcement. The parties would then have to go to the bargaining table.

An actual example from Ohio is when a police chief banned outside employment as a private investigator. Previously, the grievant had been allowed to perform that work and the bargaining agreement contained a past practice clause.

The arbitrator upheld the grievance, writing:

> "So long as Officers so engaged have not performed law enforcement functions or attempted to or actually encroached upon private rights by using their police authority in any fashion, they have been permitted to do private investigation work.
>
> "Sergeant S__ has been permitted to do this work in the past and there is no suggestion on record that he somehow abused that privilege in any respect, put himself or the City in any conflict of interest situation, or improperly interfered with the interests of any private business or affairs whatsoever.
>
> "The mandates upon which the City relies here are utterly inapplicable to the facts and no blanket denial of permission was warranted based upon anything the Chief imagined as a potential problem."

City of Columbus and FOP L-9, FMCS Case #01/07379, 116 LA (BNA) 1672 (Duff, 2002).

- Another Ohio arbitrator held that a state agency had just cause to discipline an employee for violating a prohibition on outside employment. However, the suspension was reduced from 10 to 3 days, because a former supervisor had given him permission to do moonlighting in the past, and this contributed to employee's conduct. State of Ohio Bur. of Workers Comp. and Ohio Civil Serv. Employees Assn. AFSCME L-11, 119 LA (BNA) 1121 (Murphy, 2004).

H. Sexually Oriented Businesses

Few things are more embarrassing to a sheriff, police chief or mayor than to read in the newspapers that off duty law enforcement officers are operating a sexually oriented business. The business may be completely lawful and the officers may be in full compliance with zoning and licensing laws. But officials worry about public perception and whether the publicity "discredits" the agency and their administration.

- In 2004, the Supreme Court upheld the termination of a San Diego police

officer that had operated in a sexually oriented business.

Using the eBay name Code3stud@aol.com, he sold videos of himself, stripping off a generic police uniform and masturbating. One video showed him in a tan police uniform pulling over a citizen to issue a traffic citation, and then masturbating. San Diego officers wear tan uniforms. He also sold "used" underwear on the eBay site.

Without hearing oral argument, the Court rejected his First Amendment claim noting that Roe "took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer."

The justices said that while government employees do not relinquish their First Amendment rights because they work for the government, a public employer may impose restraints on the speech of its employees that would be unconstitutional if applied to the general public.

"The debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute," they wrote. City of San Diego v. Roe, #03-1669, 2004 U.S. Lexis 8165 (2004).

- In Florida, three deputy sheriffs were fired for engaging in sexually explicit conduct, available for "pay-per-view" on the Internet, and without obtaining approval for off-duty employment.

The officers appeared in scenes showing acts of intercourse, masturbation, and oral sex with multiple partners. Other scenes depicted a marked sheriff's car. The graphics were posted on several pornographic websites on the Internet.

The deputies contended that their off-duty participation in explicitly sexual or pornographic pictures and videos, for which they were compensated, was protected speech under the First Amendment. They sued in federal court seeking reinstatement.

The District Court granted the sheriff's motion to dismiss and the deputies appealed. A three-judge panel affirmed, holding:

1. The deputies were subject to the regulations of the sheriff's office, which required them to obtain prior written approval before engaging in off-duty employment. They did not seek or obtain prior written approval from the sheriff before their participation in the pornographic pictures and videos for compensation.

2. The First Amendment was not implicated because their freedom of expression did not involve a matter of public concern.

3. Their conduct could adversely affect the efficiency and reputation of the sheriff's office.

4. While intimate sexual conduct between the deputies and their spouses would have been entitled to First Amendment protection if it had occurred in the privacy of their homes, the constitutional right of privacy was lost when they engaged in sex with others in a hotel room, where the sexual acts were photographed, videotaped, and posted on the Internet for public viewing for pay.

Thaeter v. Palm Beach County Sheriff's Office, #03-13177, 449 F.3d 1342, 2006 U.S. App. Lexis 13308 (11th Cir. 2006).

- In Colorado, a federal appeals court panel ruled that a police chief could not require off-duty officers to remove sexually explicit films from the video store they lawfully operated.

Two officers operated a video rental store, which also offered adult titles. In upholding their right to do so, they wrote:

> "The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future.
>
> "The Supreme Court has squarely rejected what it refers to as the heckler's veto as a justification for curtailing offensive speech in order to prevent public disorder. ... The record is devoid of evidence of actual or potential internal disruption caused by plaintiffs' speech."

The court concluded that plaintiffs' interest in operating their business outweighed the city's interest in preventing it. Flanagan v. Munger, #86-2076, 890 F.2d 1557,

1989 U.S. App. Lexis 18571 (10th Cir.).

It should be noted that a California appellate court upheld the suspension of off-duty officers who ran "XXX" rated videotape store. But after reaching that result, the court ordered their opinion to be depublished and not citable. Heise v. Gates, #69258, 149 Cal.App.3d 1111, 197 Cal.Rptr. 404, 1983 Cal. App. Lexis 2512; (as modified Jan. 3, 1984).

I. Retaliatory Punishment

Although courts will typically enforce reasonable restrictions or prohibitions on outside employment, it is another matter when the reason for the denial is to punish an officer.

Management will claim the matter is not appealable to a civil service authority because the action is non-disciplinary – meaning it was not a demotion, suspension or termination.

- In Illinois, a federal court allowed a civil rights suit for interfering with a police officer's secondary employment. A political motivation was alleged. McNamara v. City of Chicago, #87-CV-509, 700 F.Supp. 917, 1988 U.S. Dist. Lexis 14331 (N. D. Ill.).

What if the action is intended to be punishment?

A Maryland officer engaged in secondary work as a security officer without obtaining the necessary approval. A hearing board recommended, as a penalty, a three-month ban on secondary employment. The union challenged the punishment, when imposed by the chief.

The state's highest court ruled, 7-to-0, that the penalty was improper because it was not among the disciplinary actions allowed under the department's disciplinary regulations. Fraternal Order of Police v. Mehrling, #86-1995, 343 Md. 155, 680 A.2d 1052, 1996 Md. Lexis 80 (1996).

Notes:

1. A list of states with public-sector bargaining laws and labor relations agencies is at http://www.afscme.org/members/11073.cfm

2. The opposite of a past-practices clause is a "zipper" provision. A zipper clause provides that the written contract embodies the entire agreement of the parties.

Matters that were negotiated, but not agreed to, and matters that could have been discussed during bargaining, but were not, are not part of the agreement.

- *Example*: "The Parties agree that all negotiable items have been discussed during the negotiations leading to this Agreement, and, therefore, agree that negotiations will not be reopened on any items, whether contained herein or not, during the life of this Agreement, unless by mutual agreement of both Parties."

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