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Regulation of Off-Duty Activities

Part Four – Sexual Conduct

Contents

This is the final article in a four-part series on the regulation of an employee's off-duty activities. The preceding articles are:

- Part One: Secondary Employment (Moonlighting) – In General
- Part Two: Secondary Employment (Moonlighting) – Special Issues
- Part Three: Participating in Unapproved Training Programs and/or Membership in Controversial Organizations or Events

Section H of Part Two discussed secondary employment in a sexually oriented business. This part focuses on off-duty sexual conduct in a non-commercial manner.

A. Higher standard of conduct required

Management often argues that public safety officers should be held to a higher standard of behavior than civilian workers. Ludlum v. Dept. of Justice, #01-3093, 278 F.3d 1280 (Fed. Cir. 2002) affirming 87 M.S.P.R. 56 (MSPB 2000).

At the same time, “law enforcement status does not preclude mitigation of the penalty.” Larry v. Dept. of Justice, #NY-0752-94-0708-I-1, 76 M.S.P.R. 348 at 361, 1997 MSPB Lexis 1014 at *25.

Officers and their unions are likely to assert the same rights as enjoyed by private sector employees. They “resent an employer’s attempts to dictate the terms of what is deemed appropriate and inappropriate conduct.” (IACP 1998).

In one early case, a federal judge noted that the police chief disapproved of police officers cheating on their wives, but failed to show that the off-duty conduct impaired an officer’s performance of duties. He wrote:

> “There is thus no justification for these police officials requiring this police officer to cease running around on his wife as a condition of being an employee of the Athens Police Department. Constitutionally, when off duty and out of uniform, he can do privately what he wishes to do until such time as it materially and substantially impairs his usefulness as a police officer.”

Smith v. Price, 446 F.Supp. 828 at 835-6 (M.D.Ga. 1977); reversed other grounds, #78-1007, 616 F.2d 1371 (5th Cir. 1980).

The federal Merit Systems Protection Board squarely faced the law enforcement standards issue in 2006. A GS-13 FBI agent had sex with three women and videotaped some of the sessions, without consent of the participants.

Two of the women were FBI employees and a third was not. Although one FBI employee had consented to videotaping of her sexual activities with the agent, he had videotaped her on one occasion when she did not consent. The other women did not consent to, and were not aware of the tapings.

He was fired and appealed to the MSPB. In a 2006 decision, the Board noted that a termination may be affected only if it will promote the efficiency of the service, and the agency must establish a nexus between the conduct and the efficiency of the service. They wrote:

> "As an FBI employee, the appellant was expected to behave in a manner that showed him to be honest and trustworthy, and to "so comport himself that his activities on and off duty would not discredit either himself or the FBI. ... The Board has held that the FBI has the right to hold its special agents to a high standard of conduct. ...
>
> "The charge against the appellant is not based on the morality of his relationships with the women he videotaped, however. Instead, it is based on conduct in which the appellant engaged during those relationships."

The Board concluded that the FBI established, by a preponderance of the evidence, a nexus between his off-duty conduct and his fitness for duty. Doe v. Dept. of Justice, #CH-0752-04-0620-I-2, 2006 MSPB 246, 103 MSPR 135, 2006 MSPB Lexis 4575.

The case was remanded for further proceedings, including the imposition of the appropriate penalty. An Administrative Judge noted that the FBI imposed only a three-day suspension of another special agent that took agency surveillance equipment to his home for the purpose of secretly viewing his wife's intimate activities with another man. He wrote:

> "I find the agency has failed to distinguish the severity of the appellant's morally wrongful off-duty conduct in his intimate relationships from the conduct of its other agents whose integrity in their off-duty personal relationships with their spouses or partners in adulterous affairs, or in other private matters, has not been found by the agency to form sufficiently serious offenses to warrant removal."

He reduced the penalty to a 120-day disciplinary suspension. Doe v. Dept. of Justice, #CH-0752-04-0620-B-1, 2007 MSPB Lexis 4549.

Management appealed. This time the Board faced the penalty issue. The Board noted that an "agency has primary discretion in maintaining employee discipline and efficiency." A reviewing authority must not displace management's responsibility. They wrote:

> "... the Board's role is not to decide what penalty it would impose, but rather, whether the penalty selected by the agency exceeds the maximum

> reasonable penalty ... The deciding official need not show that he considered all of the mitigating factors, and the Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty."

They found that termination was "within the tolerable bounds of reasonableness" and was not harsh or disproportionate to the offense. "The intentional, egregious and clearly dishonest nature of the appellant's misconduct" warranted his removal from the Bureau. Doe v. Dept. of Justice, #CH-0752-04-0620-B-1, 2007 M.S.P.B. 282, 2007 MSPB Lexis 7053.

Note: When the sexual conduct involves a business or compensation, it violates the agency's right to approve and regulate outside employment. See, Dible v. City of Chandler, #05-16577, 502 F.3d 1040; *amended at* 2008 U.S. App. Lexis 2257 (9th Cir. 2007)(nudity on a website) and City of San Diego v. Roe, # 03-1669, 543 U.S. 77, 125 S.Ct. 521 (2004)(sale of videos depicting a sexual act).

B. Privacy rights

Although it dealt with a state law prohibiting the sale of contraceptives, the Supreme Court recognized a constitutional right to privacy in Griswold v. Connecticut, #496, 381 U.S. 479 (1965).

Ten years later, a federal court in Michigan found that the termination of a married police officer for cohabitating with a married woman who was not his wife violated the officer's associational and privacy rights protected by the Constitution. Briggs v. North Muskegon Police Dept., 563 F.Supp. 585 (W.D. Mich. 1983).

C. Relations with coworkers or their spouses

- For a discussion of anti-fraternization rules, see Relatives and Romance: Nepotism and Fraternization, 2007 (7) AELE Mo. L. J. 201.

The Briggs decision was in marked contrast to another decision by the Fifth Circuit, also in 1983. In Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983) a three-judge panel concluded that unmarried police officers could be disciplined for cohabiting with each other. Over dissenting votes, the Supreme Court denied review of both cases.

A federal court in Chicago upheld the termination of a police sergeant that cohabited with a dispatcher. The court rejected his privacy claims. Kukla v. Village of Antioch, 647 F.Supp. 799 (N.D. Ill. 1986).

More recently in Texas, a trial and an appellate court found that a police officer was unfairly denied a promotion because he was sexually active with the wife of another officer. The chief failed to prove the sexual liaison had a detrimental effect on department morale or affected the officer's on-the-job performance. City of Sherman v. Henry, 910 S.W.2d 542 (Tex.App. 1995).

After the trial court ordered his reinstatement, he was promoted to sergeant. The issue, on appeal was really about money.

The Texas Supreme Court reversed. The justices noted that a sign had been placed on the station bulletin board that read, "If you can't trust another officer with your wife, how can you trust him with your life?" The chief believed that the officer would not command respect and trust from rank-and-file officers and that promoting him would adversely affect the efficiency and morale of the department.

The justices wrote that federal privacy rights did not protect his relationship. They added that the officer's adulterous conduct was the antithesis of marriage and family rights, because it "undermines the marital relationship."

Although Texas repealed its laws criminalizing adultery, "the mere fact that such conduct is no longer illegal in some states does not cloak it with constitutional protection." City of Sherman v. Henry, #95-1195, 928 S.W.2d 464, 1996 Tex. Lexis 96; cert. den. 1997 U.S. Lexis 1408.

Likewise, a military appeals court upheld the punishment of a senior Air Force officer for "conduct unbecoming" with a junior officer. The fellow officer was under his direct command and the relationship was obvious to coworkers and enlisted personnel. U.S. v. Rogers, #99-0838, 54 MJ 244, 2000 CAAF Lexis 1200 (CAAF 2000).

D. Associating with a prostitute or informant

A New York appellate court sustained the termination of a police officer that consorted with prostitutes, even though there was no payment of monies for sexual services. Ruiz v. Brown, 579 N.Y.Supp.2d 47 (1992).

The Merit Systems Protection Board concluded that a DEA agent was properly terminated for maintaining a sexual relationship with a criminal informant. Rackers v. Dept. of Justice, #CH-0752-97-0218-I-1, 79 M.S.P.R. 262, 1998 MSPB Lexis 870 (1998).

- **Note:** If the conduct constitutes a crime, such as sexual assault or indecencies with minors, the officer should be administratively charged with committing a crime, rather than "conduct unbecoming."

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