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## **Legal Aspects of Firearms Restrictions**

### **Part One - Management's Right to Restrict or Forbid an Officer from Carrying Firearms**

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## ❖ **Background and legal setting**

The offices of sheriff and constable are recognized at common law. (1) Their subordinates are *deputized* to perform the duties of the office holder. Most states have augmented the common law by defining the duties of sheriffs and constables.

Police officers, state troopers, park rangers and town marshals are *commissioned* as public employees, and hold an office created by statute. They have limited common law powers unless a statute provides that they shall possess the power and authority of county sheriffs in their respective jurisdictions.

The powers of a deputy sheriff are derivative – that is, they derive from the sheriff. (2) The same is true for deputy constables and deputy marshals. The powers of police officers, like those of notary publics, are independent, and date back to the 13th century. (3) However, the head of a police department, like the CEO of a corporation, has a duty to direct subordinates and the authority to impose or initiate disciplinary action. (4)

While state statutes exempt peace officers from laws prohibiting the carrying of firearms and other restricted weapons, there is no impediment to prevent a sheriff or other elected officer from restricting or limiting the authority of his or her *common law* deputies.

In the case of police officers and civil service deputies, it is sometimes claimed that the head of the agency cannot take away the statutory authority of subordinates, but only may discipline or terminate them for disobeying a lawful order. Put another way, an entry-level police officer might possess the authority to arrest a celebrity or to seize a large airplane, but the chief has the power to suspend and discipline him for exercising his independent authority in a way that contravenes agency policy, training directives or specific instructions.

The question is, therefore, can the head of a law enforcement agency lawfully order a subordinate, a statutory peace officer to disarm? The answer, generally, is yes – but there are exceptions:

1. When a collective bargaining agreement regulates the subject of armed officers, it limits management's power to prescribe conditions of employment. In those places, breaches of an agreement are subject to a final and binding arbitration review. Courts enforce arbitration awards, when that action is necessary.

2. Courts sometimes direct that a wrongfully terminated officer be returned to his or her prior assignment, with no loss of pay, powers or prestige. This also could arise when an involuntary transfer has been successfully contested. Courts are reluctant to do so when an officer is fired or transferred for using excessive force, but are less reticent when an officer has proved that disparate punishment was imposed because of race, gender or national origin.

### ❖ **Action following a high-profile shooting**

A New York court upheld the right of the NYPD Commissioner to reassign an officer to an unarmed assignment, after his acquittal from a controversial shooting – even though no disciplinary charges were ever brought against him.

An officer with seven years experience was indicted for and acquitted of wrongfully shooting [Amadou Diallo](#) in 1999. After his acquittal, the NYPD's Firearms Discharge Review determined that he had not violated the Department's firearms guidelines, but recommended that he be retrained in "cover and concealment" tactics and that he remain on "non-enforcement duty."

Management did not send him for retraining, nor initiate any disciplinary action against him, but kept him in an unarmed assignment. The officer sued, claiming that because he was exonerated criminally and administratively he was entitled to be restored to full duty status.

He maintained that his unarmed status was "unauthorized, punitive and stigmatizing," especially in light of six annual performance evaluations rating him "Extremely Competent" and "Highly Competent."

The Commissioner responded that an officer "must be able to communicate with the public and have the confidence and respect of the community served."

The judge ruled that state law, city ordinances, police regulations, and the NYPD Patrol Guide did not mandate automatic reinstatement upon acquittal and a favorable firearm discharge review. The Commissioner did not act "arbitrarily or capriciously" by declining to restore petitioner to full duty, because a full duty police officer ordinarily carries a firearm. The judge added:

“... the Commissioner rationally exercised his discretion by ... assessing the risks inherently posed by restoring petitioner’s firearms ... This Court cannot say that the Commissioner impermissibly or unreasonably considered the difficulty of defending the City against even unfounded claims that might arise from future conduct, e.g., that petitioner used excessive force, negligently made a judgment call or hesitated to use reasonable force.

“It is no violation of law, and no abuse of discretion and no criticism of petitioner for respondents to have rationally and practically analyzed the Department’s potential vulnerability and petitioner’s future effectiveness as an armed, full duty officer, in light of foreseeable scrutiny and claims of tort liability which members of the public or fellow police officers might bring.”

The judge wrote that a police chief exercises broad discretion to manage the force, because he “ultimately is responsible for protecting both the community and departmental personnel from foreseeable risks, and the department from potential liability, in tort or otherwise.” [Boss v. Kelly](#), #117531/02, 776 N.Y.S.2d 772, 2004 N.Y. Misc. Lexis 391 (N.Y. Co. Sup. Ct. 2004).

The officer deployed to Iraq with the Marine Corps. On his return he filed suit in federal court. Nicknamed “Kenny No-Gun” by his fellow officers, he again sought return of his service firearm. The District Judge rejected his claims:

1. He lacked a legally-recognized property right to wear a firearm while performing his police duties. “... to establish a property interest, a plaintiff must have more than an abstract need or desire for the property, he must, instead, have a legitimate claim of entitlement to it under state or federal law in order to state a § 1983 claim.”
2. The police commissioner enjoyed absolute immunity from defamation claims when he filed an affidavit in connection with the legal proceedings.

[Boss v. Kelly](#), #07Civ.2113, 2007 U.S. Dist. Lexis 62348 (S.D.N.Y.).

On appeal, the officer argued that “carrying a gun is a necessary component of being a police officer, and ... without a gun his employment has effectively been terminated.”

The Second Circuit affirmed, 3-to-0, noting that the plaintiff retains the title and base salary of a police officer. [Boss v. Kelly](#), #07-4104-cv, 2009 U.S. App. Lexis 520 (2nd Cir.).

- Another New York court held that the chief could pass over a promotional candidate because the minority community resented him after a shooting incident. [Larkin v. Sardino](#), 79 A.D.2d 1096, 435 N.Y.S.2d 843, 1981 N.Y. App. Div. Lexis 10044 (A.D. 1981).

## ❖ **Reinstated officers**

Officers are reinstated for a variety of reasons. Although occasionally a court will find insufficient evidence, more often it is a procedural violation. Management must worry about the negligent assignment of an officer with a propensity for violence or a history of exercising poor judgment.

A California appellate panel affirmed that a chief or sheriff could restrict the arrest and concealed weapons powers of officers who successfully appeal their removal.

While off-duty, a deputy used profanity and pointed his service weapon at a motorist that cut off his private vehicle. The sheriff later demoted the deputy to correctional officer. An arbitrator reversed, based on procedural impairments.

California peace officers are exempt from the concealed firearm law and have the authority to make an arrest. The sheriff then restricted his off-duty powers because of his “poor judgment.” His duty firearm was removed and he was prohibited from carrying a concealed firearm and from exercising peace officer powers during off duty hours.

The deputy sued to overturn the restrictions. A Superior Court rejected his suit, and an appellate panel affirmed, in part. A sheriff has the authority to administratively restrict a deputy’s powers to arrest and to carry a concealed firearm “when the deputy has shown he may present a danger to the public if he is allowed to exercise those powers.”

Although the public can be protected from an officer prone to overreaction, an officer could lodge an administrative appeal, contesting the legitimacy of any such restrictions. [Gordon v. Horsley](#), #A088568, 86 Cal.App.4th 336, 2001 Cal. App. Lexis 21, 102 Cal.Rptr.2d 910 (1st Dist. 2001).

## ❖ **Awaiting the outcome of litigation**

Management has sometimes waited until a civil lawsuit is resolved before taking disciplinary action. An Illinois Village waited five years before terminating an officer. (5)

During the course of a traffic investigation, another Illinois police officer fired his pistol and wounded the driver of one of the vehicles involved in the accident.

The motorist sued the officer and the Village. The Chief directed the officer to surrender his weapon and badge, pending final disposition of the investigation. He also placed him on paid, inactive duty.

Depressed after staying at home for many months, the officer sued the chief. A trial court entered an order placing the officer on active duty with badge and uniform, but without a gun, to perform duties that do not require a weapon.

The court also directed the chief to initiate disciplinary action or to restore the officer to full duties.

On appeal, a three-judge panel concluded that the

“... the trial court, while ordering the plaintiff’s reinstatement to active duty, properly imposed reasonable conditions on said reinstatement. The trial court properly took into consideration that the plaintiff was suffering from severe depression and anxiety, and being cognizant of the potential consequences of a person in such condition occupying the position of a police officer, the trial court correctly conditioned his access to a lethal weapon and to being placed in the position of day-to-day contact with residents of the Village.”

The court properly required that the reinstatement be confined to duties which do not require a weapon, such as clerical duties, and in this manner the plaintiff was able to return to work in uniform with his badge to perform an assignment at full pay and compensation. [People ex rel. Jaworski v. Jenkins](#), #76-1276, 56 Ill.App.3d 1028, 372 N.E.2d 881 (1978).

- AELE, at its police liability seminars conducted since 1974, has repeatedly stressed that management should not delay an internal investigation or the

initiation of disciplinary action because of a pending civil suit arising from the same incident.

### ❖ **Physical limitations**

A California city denied a police officer's application for disability retirement. Management placed him in a permanent modified light duty position within the police division. The city had also removed the officer's right to carry a concealed firearm and his power to make arrests.

The officer filed suit to overturn that action. Both the trial and appellate courts denied his petition.

The appellate panel wrote that a police officer, who is industrially incapacitated from the full performance of his in the field duties, may be placed in a permanent modified light duty position within the police division, even though he no longer has a right to carry a firearm or make arrests as a peace officer.

The court also held that a police officer has no fundamental or vested right to carry a firearm or exercise the power to make arrests when there is a proper medical reason involving his own safety and that of the public for removing those rights. [Stuessel v. City of Glendale](#), #66578, 141 Cal.App.3d 1047, 190 Cal.Rptr. 773 (1983).

### ❖ **Psychological fitness**

The Boston Police Dept. violated a state mental treatment law by asking about an officer's prior hospitalization for mental illness. The Massachusetts Supreme Court voted 5-to-0 to order the reinstatement of a police officer who was fired for falsifying information in his medical history record. Under oath, the officer stated he never had an "nervous, mental or emotional disorder of any sort." Additionally, he failed to disclose five inpatient visits to the VA hospital for psychological treatment.

The court noted the state's mental treatment law provides that "no application for employment shall contain any question or request for information concerning an applicant's admission to any facility for the care and treatment of mentally ill persons..."

Further, the justices reasoned that “the commissioner had no authority to discharge [the plaintiff] for giving false answers to questions that the commissioner under law had no right to ask, and he does not argue otherwise.” The statute made no exception for persons seeking employment as armed police officers, said the justices, and “we should not manufacture it judicially.”

The commissioner can determine whether and when subordinate officers can carry weapons. He could have conditioned the offer of employment on the results of medical and psychological examinations conducted solely for the purpose of determining whether the applicant, with reasonable accommodation, was capable of performing the essential functions of the job.

Additionally, the justices declined to grant the discretionary immunity defense as to damage claims. The trial court properly awarded compensatory damages for emotional distress and lost wages, along with attorney’s fees and costs. [Kraft v. Police Cmsnr. of Boston](#), 410 Mass. 155, 571 N.E.2d 380 (Mass. 1991).

The case was again taken to the state supreme court because the commissioner insisted on a psychological evaluation before restoring the officer’s firearm. Because there was no evidence of personal malice, the requirement was upheld. [Kraft v. Police Cmsnr. of Boston](#), #S-6247, 417 Mass. 235, 629 N.E.2d 995 (1994).

## ❖ **Stress considerations**

Although management has a responsibility to temporarily reassign officers that have used a firearm under questionable circumstances, officers who are involved in a shooting can be emotionally devastated. The IACP notes that an officer’s “shock disruption period” may last anywhere from a few minutes to a week or longer depending upon the individual “but usually it lasts two to three days.” (6)

An officer that is given a clerical assignment, without a weapon, often feels vulnerable and isolated. He also feels stigmatized and sometimes imagines he is the target of a biased inquiry or that his department regards him as guilty until proven innocent. (7)



Management also has an obligation to minimize those factors that acerbate job stress. Allowing the wearing of a weapon, while in uniform and performing stationhouse duties, is likely to reduce the stigma and isolation an officer is experiencing.

❖ **Notes:**

1. The office of sheriff “carries with it, both in England and America, all of the common law powers, duties and responsibilities attendant upon an office of such antiquity and high dignity, except, insofar as the same have been legally modified within the constitution ambit of legislative enactments.” 1 Anderson on Sheriffs, Coroners and Constables 4 (1941).
2. 80 Corpus Juris Secundum (West) 153, *Sheriffs and Constables* §2 (1953).
3. The Statute of Winchester (13 Edward I, Michelmas, Oct. 8, 1285) authorized the formation of a force of municipal watchmen to preserve the peace and apprehend criminals; statute reproduced in Douglas, *English Historical Documents: 1189-1327* at 460-462 (1981).
4. People v. Epperson, 519 N.Y.S.2d 991, 137 Misc. 2d 146 (1987).
5. Both compensatory and punitive damages were assessed by a federal jury. Grosse v. David Van Milligen, #83-cv-9334, 1987 U.S. Dist. Lexis 7837 (N.D. Ill.). The Illinois Supreme Court concluded that principles of laches did not bar the officer’s discharge, in spite of the five-year delay. Van Milligan v. Bd. of Fire & Police Cmsnrs. of Glenview, 158 Ill.2d 84, 630 N.E.2d 830 (1994).
6. IACP Post-Shooting Incident Procedures, *Concepts and Issues Paper*, Part II-A- 2, Physical and emotional reactions, p. 2 (1991).
7. Practical Police Psychology: Stress Management and Crisis Intervention for Law Enforcement, by Laurence Miller Ph.D., Charles C Thomas, Publishers (2006). See chap. 6 and 7.

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5. People ex rel. Jaworski v. Jenkins, 56 Ill.App.3d 1028, 372 N.E.2d 881 (1978).
6. Stuessel v. City of Glendale, 141 Cal.App.3d 1047, 190 Cal.Rptr. 773 (1983).

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## **AELE Monthly Law Journal**

Wayne W. Schmidt  
Employment Law Editor  
P.O. Box 75401  
Chicago, IL 60675-5401 USA  
E-mail: [wws@aele.org](mailto:wws@aele.org)  
Tel. 1-800-763-2802

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