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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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**Part Two - Management's Right to Restrict or Forbid a  
Class of Officers from Carrying Firearms;  
Bargaining and Arbitration Rights**

*Contents- Part Two (this issue)*

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[Part One](#) focused on restricting or forbidding a particular officer from wearing a firearm because of a specific lack of confidence. This part addresses policies and directives that apply to an entire agency or a defined group.

Two additional sections are in Part Two, dealing with the enforceability of arbitration awards and bargaining requirements.

### ❖ **The failure to arm officers who work dangerous assignments**

A firearm is safety equipment to a law enforcement officer. State statutes typically provide that employers must issue necessary safety equipment to workers, at no cost to the employee. *Oakland Police Officers Assn. v. City of Oakland*, 30 Cal.App.3d 96, 106 Cal.Rptr. 134, 1973 Cal. App. Lexis 1140 (1973) interpreting [Labor Code § 6401](#).

An appellate court in Wisconsin rejected a safety equipment lawsuit filed by an unarmed campus police officer. The plaintiff was assigned to perform a full range of patrol duties, but was prohibited from carrying a firearm. She sued under the state's occupational health and safety laws, claiming that the potential for violent encounters is a "recognized hazard likely to cause death or serious physical harm of the type meant to be addressed by [the] statute," [Wis. §101.055](#), *Public employee safety and health*.

She argued that once a college makes the decision to require campus police to perform patrol activities and arrest of criminals, they must "properly equip "officers to carry out these tasks by permitting them to carry weapons."

A three-judge appellate panel concluded, as a matter of law, the safety code did not include this right. They looked for guidance in federal OSHA decisions and said that OSHA deals with specific perils, such as toxic waste and other hazards.

They wrote that the "abstract threat" faced by an unarmed police officers is "not the type of workplace issue Congress had in mind when it passed OSHA," because is not connected to a "tangible hazard." [West v. Dept. of Commerce](#), #98-1693, 230 Wis.2d 71, 601 N.W.2d 307, 1999 Wisc. App. Lexis 916 (1999).

An earlier California appellate court also concluded that firearms are not necessary safety devices for campus police officers. *Calif. State Empl. Assn. v. Way*, 135 Cal.App.3d 1059, 185 Cal.Rptr. 747, 1982 Cal. App. Lexis 1985 (1982). However, a specific California statute gave college administrators the right to decide whether campus officers should be armed; [Penal Code §830.31](#). Specific legislation trumps general legislation.

Subsequently, an administrative law judge said that a state college had no duty to bargain with police aides, who assisted campus police officers, when it ordered them to disarm.

The union unsuccessfully testified that the removal of the police aides' weapons had a direct impact on their safety and the safety of the other officers with whom they worked. [L.A.C.C.D. Police Officers Assn. v. L.A. Comm. Coll. Dist.](#), 12 PERC (LRP) ¶ 19,174, 1988 PERC (LRP) Lexis 171 (1988).

The sheriff in Rochester, N.Y. did not arm the deputies assigned to the civil process bureau. The deputies association grieved, and an arbitrator sustained the grievance. The arbitrator noted that civil deputies enforce court orders, evict occupants, seize property, and “must restrain combative, suicidal, argumentative or mentally disturbed people.”

He noted that civil deputies wear ballistic vests and carry handcuffs. It would be “irresponsible” to deny them “the equipment they need to meet the greatest threats to their safety.”

The sheriff sought judicial review. A trial court judge found that the award, requiring the arming of civil deputies, was contrary to public policy. On further review, a five-judge appellate panel unanimously reversed.

The panel did not discuss the merits of the award, but did note that “an arbitrator is selected by both labor and management because of his or her expertise in the area of labor disputes,” and that both sides trust his judgment.

Here, there were no overriding public policy concerns that would interfere with the arbitration award, and the courts were therefore bound to enforce it as written. [Matter of Arb. Monroe Co. Dep. Sheriff's Assn. and Monroe Co. Sheriff](#), #CA 02-00998, 752 N.Y.S.2d 457, 300 A.D.2d 993, 2002 N.Y. App.Div. Lexis; appeal denied, 303 A.D.2d 1060, 755 N.Y.S.2d 691 (2003).

In California, a union succeeded in overturning a policy that county airport law enforcement officers, deputy coroners and court service officers could not carry concealed firearms while off duty.

The penal code exempts “any peace officer, whether active or honorably retired, other duly appointed peace officers...” from prohibitions against the carrying of concealed firearms.

An appellate court said the restrictions ran afoul of state law, and public employers must seek legislative relief if restrictions are sought. [Orange Co. Employees v. County of Orange](#), 14 Cal.App.4th 575, 17 Cal.Rptr.2d 695 (App. 1993).

The city of Minneapolis adopted a policy that prohibited employees, other than police officers, from carrying dangerous weapons in the workplace. An assistant city attorney,

who possessed a state concealed weapons permit, protested the regulation. He declined the city's offer to allow him to store the weapon in a safe during working hours.

He took extended sick leave, claiming the lack of a firearm caused him headaches. When his sick leave was exhausted, he was terminated. He responded by suing the city in federal court, asserting Due Process and Second Amendment claims. The District Court denied him relief on all counts in his complaint. An appellate panel affirmed, 3-to-0.

The city (a) had the power to withhold approval of the granting of his state permit, there is (b) no "property right" to carry a concealed weapon, an employer (c) has a legitimate interest in maintaining workplace safety, there is (d) no legally-recognized liberty right to self defense, and (e) the Second Amendment applies solely to the preservation of a properly organized militia. [Gross v. Norton](#), #96-3365, 120 F.3d 877, 1997 U.S. App. Lexis 19929 (8th Cir. 1997).

In Michigan, an arbitrator determined that a firearm was not necessary safety equipment for uniformed weighmasters, even though they stopped and cited drivers. [City of Novi and Teamsters L-214](#), 103 LA (BNA) 132 (Brown, 1994).

### ❖ Are management's decisions arbitrable?

Provisions pertaining to the carrying of firearms can be contained in a bargaining agreement. More often, the agreement is silent, but if there has been a past practice of allowing officers to carry firearms, on or off duty, that practice is just as enforceable as if it was memorialized in the written contract. (1) Unresolved grievances usually are concluded with final and binding arbitration.

A Boston police officer had threatened three civilians with his service revolver while he was intoxicated and off duty. The police commissioner suspended him for one year, followed by a one-year probationary period. During his probationary period the officer conducted himself in an exemplary manner while serving in an administrative and clerical capacity. It appeared to those associated with him that he had overcome his problem with alcohol.

On the basis of his performance during his probationary period and the recovery from his illness, the officer, upon completion of his probation, requested his superiors to reissue his service revolver to him so that he would be eligible for overtime assignments and paid details. He grieved when the request was denied.

An arbitrator found that the deprivation of the officer's service revolver after completion of his suspension and probationary period constituted extended punishment and that the collective bargaining agreement did not provide for additional sanctions once an officer

has been allowed to return to duty. Based on this rationale, the arbitrator concluded that the commissioner lacked authority to withhold the officer's revolver from him. He ordered the commissioner to return the gun to the officer.

The city commenced a civil action seeking to vacate the arbitration award; the association moved to confirm the award. A state appellate court panel concluded that it was within the managerial powers of the police commissioner, to require that a police officer who had been suspended to submit to a psychiatric evaluation as a condition of the reissuance of the officer's service revolver.

The arbitrator's award that the officer's service revolver be returned to him was "in excess of his powers" under state bargaining laws. [City of Boston v. Boston Police Patrolmen's Association](#), 8 Mass. App. Ct. 220, 392 N.E.2d 1202 (1979).

In 2000, a Newark police officer was involved in the shooting of a civilian. Management confiscated the officer's weapon and he was put on stress leave. A few months later, the city's psychologist found him fit for duty, but he was not re-armed. A year later, both the city and the officer were sued by the civilian who was shot.

In 2003, the FOP filed a grievance asserting that the city's failure to re-arm the officer violated the bargaining agreement. The city denied the grievance and the FOP demanded arbitration. At that time, the citizen's lawsuit was still ongoing.

The city appealed to the state's *Public Employment Relations Commission* for an order staying arbitration. Management argued that whether or not police officers should carry firearms while on duty is a managerial prerogative that implicates how a public service is performed. Additionally, because the civil litigation was still pending, there was "potential liability for the consequences of re-arming an officer prior to the completion of all litigation."

The Commission agreed, and held that "the decision whether or not to arm a police officer is a policy decision not subject to mandatory negotiations." An arbitration award requiring management to re-arm an officer would "substantially limit the city's policymaking power to determine the conditions under which it is proper for its police officers to be armed." [City of Newark v. F.O.P. Lodge 12](#), #SN-2004-13, P.E.R.C.#2004-36, 2003 NJPER (LRP) Lexis 176, 29 NJPER 174 (N.J. PERC 2003).

A jury found a Cleveland police officer guilty of domestic assault; he was sentenced to 3 days in jail, 7 days home confinement, and 170 days of suspended confinement. The officer was terminated and the union grieved the separation.

The arbitrator found that a disciplinary breach occurred. In nine prior instances, the city fired some and not other officers for committing misdemeanors. He labeled the incident as a “unique chance event” and said there was no history of violent behavior.

He ordered the city to reinstate the officer, but without paying lost wages. [City of Cleveland and Clev. Police Patrolmen’s Assn.](#), 108 LA (BNA) 912 (Skulina, 1997).

The problem is that the [1966 Lautenberg Amendment](#) prohibits persons convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is no exception for persons who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces.

Although the city raised the federal gun-ban as justification for affirming the termination, the arbitrator did not address that issue in his opinion, because the collective bargaining agreement precludes arbitrators from interpreting the law.

### ❖ Bargaining requirements

In the case of state and local bargaining decisions, there is no body of nationally-recognized law as to what constitutes a managerial prerogative. That is because the [National Labor Relations Act](#) exempts state and local government employers, 29 U.S. Code §152(2) (1935). Thirty-five states have enacted a public employment relations law, administered by a board or commission. AFSCME maintains a list at [www.afscme.org/otherlnk/weblnk28.htm](http://www.afscme.org/otherlnk/weblnk28.htm)

In a few states without a statewide public sector bargaining apparatus, various municipalities have adopted local bargaining.

- Each state PERB or commission decides what terms or conditions of employment are subject to mandatory bargaining, permissive bargaining, or involve prohibited subject matter (such as strikes by emergency service workers). It is not unusual for two states arrive to opposite findings on contentious issues, or even for a state to reverse a prior holding adopted by another administration.

Officials at the General Services Administration concluded that Federal Protective Service police officers lacked the authority to carry their weapons when commuting to and from work in the District of Columbia. D.C. has very restrictive gun laws.

The GSA Federal Protective Service management unilaterally discontinued a practice of allowing special police officers to carry their firearms between their homes and duty stations. It cited a 1973 court decision which held that an off-duty FPS officer who

carried a concealed firearm while on a personal trip was not exempt from the D.C. weapons law. (2)

The Federal Labor Relations Authority reversed the policy, in a 2-to-1 decision. The panel agreed with the GSA that management can unilaterally discontinue an unlawful policy. The majority held, however, it was unclear that FPS officers lack the authority to carry firearms while commuting. The 1973 decision did not involve commuter travel.

The right to carry a firearm while commuting is a “term and condition of employment” and is a mandatory bargaining topic. However, if management can prove a custom or practice is illegal, it is unnecessary to bargain a policy change to conform to the law. [G.S.A. Federal Protective Service Div. and AFGE L-1733](#), 50 FLRA No. 90, 1995 FLRA Lexis 79.

Management is especially sensitive to a union’s intrusion into weapon-carrying policies. The Federal Labor Relations Authority, like clever arbitrators, has sometimes split the issues, to the confusion or frustration of both parties.

For example, in 1993 the U.S. Border Patrol sought to implement a revised use of force policy which included use of a side-handle baton. The union demanded that management begin bargaining sessions over the issue; the INS refused.

In 1996 an Administrative Law Judge rejected management’s claim that the policy change was “necessary for the functioning of the agency.” He also resisted the argument that to prove necessity, management must demonstrate only a “rational basis” for a policy.

The ALJ concluded that while the INS was not obligated to bargain over the substance of its use of force policy, management had a duty to bargain over the “impact and implementation” of that policy. On appeal, a FLRA panel of three adopted the ALJ’s findings, conclusions, and remedy.

Because a use of force policy affects conditions of employment, INS was ordered to cease and desist from refusing to bargain over the impact and implementation of its use of force policy and to rescind the policy implemented in 1994. [INS and AFGE](#), #WA-CA-50048, 55 F.L.R.A. 892, 1999 FLRA Lexis 251, 55 FLRA No. 151 (1999).

As a result of the union’s actions, less than 15% of all Border Patrol agents were authorized to use a side-handle baton and the rest were without an intermediate force baton. In late 1998 the parties agreed to an immediate implementation of the ASP collapsible steel baton, but continued to bargain over use of OC spray.



- In summary, management was given the right to adopt or change a use of force policy, but was required to bargain over the “impact and implementation” of that policy. Is that a distinction without a difference, or vice-versa?

In New Jersey, the state’s Public Employment Relations Commission held that a municipality did not have to bargain with the union over the types of firearms, other weapons and ammunition issued to officers. Twp. of So. Brunswick and P.B.A. L-166, NJ-PERC #86-115, 12 NJPER (LRP) P17,138 (1986).

In New York, the state’s Public Employment Relations Board concluded that a city has no duty to bargain with the union over the issuance of shotguns in patrol cars. City of Albany and Albany P/O Union L-2841, 7 NY-PERB 3132 (1974), and Police Assn. and City of New Rochelle, 10 NY-PERB 3077 (1977). The New York PERB held that “the selection of weapons and their tactical deployment is such a management prerogative.”

## Notes:

1. Richard Mittenenthal, Past Practice and the Administration of Collective Bargaining Agreements, 59 (7) Mich. L. Rev. 1017-1042 and at 1961 Dispute Resolution in the Workplace 30, on the *National Academy of Arbitrators* website:  
<http://www.naarb.org/proceedings/pdfs/1961-30.pdf>

The existence of the following four factors will indicate that a past practice exists:

- a. The practice was clear and applied consistently.
  - b. The practice was not a special, one-time benefit or meant at the time as an exception to a general rule.
  - c. Both the union and management knew the practice existed and management agreed with the practice or, at least, allowed it to occur.
  - d. The practice existed for a substantial period of time and occurred repeatedly.
2. Middleton v. U.S., 305 A.2d 259 (D.C. App. 1973). “*Defendant’s trip to Baltimore on the night of his arrest was a personal one totally unrelated to his duties as a Federal Protective Service officer, and as such placed him outside the exemption provided for on duty law enforcement officers as contained in D.C. Code §22-3205.*”



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