LAW ENFORCEMENT MANAGEMENT INSTITUTE

LEGAL ISSUES REGARDING POLICE OFFICERS INVOLVED IN PRIVATE SECURITY: THE TEXAS ENVIRONMENT

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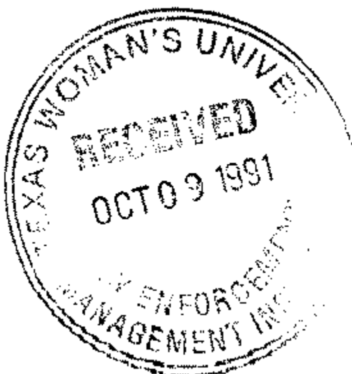

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Preface

The provision of security services by off duty police officers is well established in Texas. Most police officers assume that it simply flows from their work and never seriously consider the myriad legal issues involved. More often than not, the security work is sanctioned and regulated, to some extent, by the respective department.

This paper explores the major legal questions surrounding the issue in Texas. It does not proffer legal advice and should not be so construed. Nor should the paper be considered an exhaustive treatment on the legalities. This writing is offered to stimulate critical thinking on the issue and to facilitate informed decisions on the issue by law enforcement managers.

Finally, the issue of "extra jobs" is very sacred to most police officers; they depend on them for financial security. This paper is not intended to threaten that security in any manner --- only to examine critically the environment in which it occurs.

Introduction

The secondary employment of police officers in the provision of private security services presents police administrators with a multitude of management issues that require careful analysis for their effective resolution. Before a department administrator can address the numerous management concerns of police officers working in private security, he must first develop a thorough understanding of the legal framework that controls police officer employment in private security services.

The law, statutory and judicial, will provide the framework and basic structure wherein the activities will transpire. Without an understanding of the legal issues involved, the administrator will be poorly prepared to manage effectively the secondary employment of police officers. Because the pertinent law will vary from state to state it is especially important that administrators understand fully their respective state laws for proper analysis of private security employment issues.

With these thoughts in mind, this paper will focus on the major legal considerations that effect private security services, provided by police officers, in Texas. Ranging from relevant statutory law to case law interpretation, the framework that Texas administrators must function within will be outlined. The discussion represents more than a mere description and disecting of the law. While a mere delineation of the pertinent law can serve a useful purpose

for law enforcement management, commentary and critical analysis may serve to stimulate administrators to take an active stand on the legal issues, one way or another. At a minimum, perhaps administrators will begin to recognize the seriousness of the legal issues and their potential impact on management of secondary employment.

Private Security Regulation

Private security in Texas is regulated under the provisions of the **Private Investigators and Private Security Agencies Act.**[1] The Act covers a wide range of activities and is clearly designed to provide controls and accountability in the provision of security services.

The Act provides for the issuance of three types of licenses as follows:

* Class A - this is an investigations company license and allows any person so licensed to conduct investigations regarding stolen property, accidents, identity checks, damage suits, cause and origin of fires and numerous other incidents.

* Class B - this is a security services contractor license and covers any guard company, alarm company, armored car company, courier company or guard dog company.

* Class C - this is an all encompassing license that covers all operations included within a Class A and Class B license.[2]

The Act additionally requires that a surety bond for ten thousand dollars be posted with the state and that a policy of public liability insurance be obtained with minimum limits of one hundred thousand dollars per occurrence for bodily injury and property damage, and fifty thousand dollars per occurrence for personal injury. The policy must have a minimum total aggregate of two hundred thousand dollars for all occurrences.[3]

The Act is comprehensive in the areas it regulates, but it also has many exemptions. The most notable of these exemptions relates directly to police officers. Section 3(a)(3) of the Act states that the Act does not apply to:

> a person who has full-time employment as a peace officer as defined by Article 2.12, Code of Criminal Procedure, who receives compensation for private employment on an individual or an independent contractor basis as a patrolman, guard, or watchman if such person is:
> (A) employed in an employee-employer relationship; or
> (B) employed on an individual contractual basis;
> (C) not in the employ of another peace officer; and
> (D) not a reserve peace officer;[4]

As is the case with most laws, their interpretation and application are subject to conflicting perspectives. The exemption to the Act noted above has created its share of controversy as well. Much of the controversy has focused on the term "full-time" employment and the exclusion of a reserve peace officer from the exception.

In September 1988 the Texas Board of Private Investigators and Private Security Agencies responded to a request from the Fort Bend County District Attorney's office to

clarify these issues. The pertinent part of the response was drafted in a question and answer format and the key responses are summarized as follows:

* Working a few hours each week or month and receiving little or no compensation does not qualify as full time employment as a police officer

* Reserve peace officers are not exempt from the provisions of the Act

* Police officers are only exempt as a guard, patrolman, or watchman. They may not conduct private investigations without a license issued by the Board[5]

In June, 1983 the Harris County District Attorney, John B. Holmes, issued an opinion on this matter that reached the same conclusion.[6] Holmes stated that reserve officers must comply with the relevant statute as well as all non-fulltime officers. As recently as June, 1990 Holmes has pursued violations of the Act by non-fulltime or reserve officers. Three Harris County constables were brought before the 182nd grand jury to respond to alleged violations of the Act. Additionally, Holmes restated the pertinent sections of the Act in a letter to all law enforcement executives in Harris County.[7] The opposing views on this section of the Act have focused primarily on the lack of a definition of a full time officer. Until this issue is resolved there will continue to be different perspectives on whom is exempt.

Statutory Regulation

Except for the Private Securities and Agencies Act, there is little statutory regulation regarding police officers secondarily employed in private security. There certainly is not a comprehensive statute. The only restrictive statute noted deals with debt collection. Vernons Annotated Civil Statutes, Article 6252-24, prohibits a peace officer from undertaking the collection of any debt unless such collection or compensation for collection is done under process of law. Violations of the statute subject the offending officer to a fine up to five hundred dollars and potential removal from office.[8] Although this statute makes no direct reference to police officers secondarily employed in private security, its application in such instances appears relevant.

A second very interesting statute is found in the Local Government Code, Chapter 351, sections 351.061 through and inclusive of 351.067. The subchapter is entitled "Contracts For Law Enforcement Services On Fee Basis" and its key provisions are summarized as follows:

* The county may contract with a nongovernmental association for law enforcement services

* The commissioners court shall determine the appropriate fee, but must recover one hundred percent of its cost

* Deputies may be used and the sheriff retains super-

vising authority and in an emergency may reassign the deputies to duties not described in the contract

* Deputies working under the contract shall perform duties in the normal manner as if the contract didn't exist and they are considered county employees, entitled to all pertinent benefits[9]

The statute formalizes secondary employment in private security and is a pure example of the "Department Contract Model" as described by Reiss.[10] The statute is directed toward neighborhood subdivisions desiring increased police patrol that are willing to pay additional monies for the services. Deputies working under this arrangement are often referred to as contract deputies. The relative pros and cons of such a statute can make for an interesting discussion.

A recent Bill, introduced into the senate by Senator Gene Green, was designed to address specifically secondary employment in private security by police officers. The Bill, C.S.S.B. 511, was fairly comprehensive in scope. Even though it was motivated by special interest groups, Senator Green approached the issue from a broader perspective and included some sweeping regulatory provisions in the Bill. Some of the key components of the Bill are as follows:

* Provides a definition of off duty security employment

* Restricts off duty security employment to the political subdivision of the officers employment

* Mandates the prospective secondary employer to accept, in writing, all liability that may result from the officers employment

* Requires the secondary employer to provide workmans compensation coverage for the officer

* Requires the officer to submit a monthly report to his/her political subdivision detailing his secondary employment

* Requires an officer accepting off duty security employment to execute a fifty thousand dollar surety bond and to obtain a liability insurance policy

* Provides for penalties against a police officer for violations of the act, including revocation or suspension of his/her peace officer license

* Extends the police officer exemptions of the Private Securities and Agencies Act to Advanced Reserve Peace Officers[11]

The comprehensive nature of the Bill virtually guaranteed itself an organized opposition. The Bill was defeated in the committee on Intergovernmental Relations but was rewritten by the same committee and subsequently approved.[12] The Bill was short lived as it never made it to the floor for a vote. The Bill addressed many of the issues and concerns involving police officers working secondary jobs in private security. Although the Bill failed to make much progress in its first encounter in the political arena, the ice has been broken and the Bill, in one form or another,

is likely to appear again. Administrators should recognize the bill as a strong indicator of the probable trend towards comprehensive regulation in this area and should seize the opportunity to become active participants in future endeavors.

Status In Secondary Employment

It is probably safe to say that most police officers in Texas engaged in secondary employment in private security are truly full time police officers. Additionally, most of these officers are performing guard type services and are independently employed. Consequently, they are unquestionably exempt from the Private Security Act. This environment leads one to question the officer's actual "legal status" as follows: What then is a police officer's status while engaged in a private security function? Is he a police officer or a security guard? Is it possible to be both? The answers to these questions are found in statutory and case law.

The Code of Criminal Procedure, Article 2.13, states that it is the duty of every police officer to preserve the peace, suppress crime, make lawful arrests, and execute all lawful process.[13] The only stipulation found in Article 2.13 relates to the officer's jurisdiction. There is no reference to the officer's status, i.e., on duty or off duty. Two long standing court cases endorse Article 2.13. **Weatherford v. State** (1893) and **Ex Parte Preston** (1914)

state that an officer has a duty to prevent violations of the law in his presence and that the very purpose of the law is that peace officers shall do everything necessary to prevent and punish crime.[14] Once again, no distinction is made to the officer's status. The question that must be answered is does a police officer ever forfeit or surrender his official duty, power and authority? It appears that in Texas, a police officer is always a police officer and that he cannot discard his official responsibility. A review of several cases will bring this issue into perspective.

In **Simms** v. State[15] an off duty officer, in plain clothes and not working an extra job, interceded in a traffic accident that resulted in his assault. The officer had displayed his official identification and verbally identified himself as a Dallas police officer, saying that he would handle the incident until other officers arrived. The officer was subsequently assaulted and three participants were arrested and charged with aggravated assault on a police officer. The defense contended that the officer was not on duty as a police officer when he was assaulted and he could not have been in the discharge of any official duty imposed by law. The court disagreed, saying that it was the officer's duty under the law to take steps to prevent an assault from occurring regardless of whether he was on duty or in uniform.

In **Thompson** v. State[16] an off duty Houston police officer, secondarily employed as an apartment security guard,

responded to a loud party disturbance call. Upon his arrival at the apartment he identified himself as a police officer and was assaulted in the course of the incident. Three persons were arrested, charged and convicted of aggravated assault on a police officer. Two of the defendants appealed, contending that there was no evidence that the officer was in the lawful discharge of his duties. The criminal appeals court affirmed the verdict, stating that the jury obviously believed to the contrary and it was their right to do so.

In 1971 **Monroe v. State**[17] was decided and the court was explicit in its language. The case concerned two off duty Houston police officers, who were providing security services for a night club, and their arrest of the defendent for public intoxication. The suspect resisted arrest and assaulted the officers, resulting in the felony charge of aggravated assault. Once again the defendant claimed that the evidence was insufficient to show that the officers were in the performance of their official duty. The court bluntly stated that a police officer is a police officer twenty four hours a day and that he was in the performance of his duties. This position was restated in 1972 in the case of **Wood v. State**[18]. This case involved two off duty Dallas police officers who were directing traffic for a private concern. A passing motorist became upset over the traffic congestion and started hollering obscenities. The motorist was arrested and suffered a conviction. On appeal,

one of his issues was the off duty status of the officers. The court stated, "It is the law in this state that a police officer's "off duty" status is not a limitation upon the discharge of police authority in the presence of criminal activity."[19] A 1984 opinion by the Texas attorney general succinctly summarizes this issue in Texas.

> Although the peace officer was employed in a private capacity ... at the time ... he was nonetheless acting in furtherance of his official duties.... The moment that he observed a breach of the peace he was no longer acting in a private capacity. At that moment, his conduct was no longer subject to the control of the manager of the grocery store. Rather, it was dictated by his obligation as a police officer .... Had the peace officer been coincidently in the grocery store as a customer, for example, the duty to apprehend the suspect would clearly have devolved upon him. There is no question that, in such an instance, the peace officer would be acting within the scope of his employment...even if he was "off duty" at the time. In this instance, his private duty as an employee to guard and protect private property is incidental to his public duty to apprehend suspects committing felonies.[20]

The cases discussed all deal with some type of easily identifiable violation of the law. There are certainly instances where off duty actions would not be interpreted as official actions, whether secondarily employed as a security officer or otherwise.

Liability Considerations

It should be abundantly clear to police administrators that the actions of many officers while working in a private security function are "official actions", and as such are subject to the same liability concerns as if the offi-

cer was working his assigned tour of duty. Liability lawsuits have exploded against police officers and police departments in recent years and merit considerable attention, primarily from a perspective of prevention[21]. It is not the intent of this paper to review the liability spiderweb that confronts police administrators. A couple of aspects as they relate to secondary employment, however, are worthy of a brief comment.

Police departments have historically provided legal defense services for their officers for actions undertaken within the scope of their employment. This approach is predicated on different rationale, ranging from department policy, state statute, and court decisions. In Texas, for example, section 180.002 of the Local Government Code partially addresses this issue by providing for defense services to police officers employed by municipalities.

In summary, the statute states that the governing body shall provide a peace officer with legal counsel, at no cost to the officer, to defend the officer against a suit for damages. The relevant criteria for statute application are as follows:

* That the officer is employed by the municipality
* That the officer has requested legal counsel
* That the suit against the officer involves an official act of the officer within the scope of his authority[22]

The prior discussion of case law regarding the "status" of a police officer makes it clear that secondary

employment represents a significant and serious potential liability for many departments; an area worthy of immediate attention. Even though most suits against officers are non-productive, there is still considerable expense in defending against the suits.

A second liability concern for administrators, related to secondary employment, is workmans compensation benefits. If the officer suffers an injury while acting under color of law, even in the capacity of secondary employment, liability will possibly attach to the governing bodies workmans compensation policy. This point is clearly illustrated in **Travelers Insurance Agency of Hartford, Conn. v. Hobbs**[23]. A Corpus Christi police officer, off duty yet still in uniform, was walking with his wife along the side of the roadway, presumably going to the corner grocery store. A reckless motorist hit the officer, resulting in the officer's death. The wife filed for benefits under the workmans compensation policy and was denied an award because the officer was not on duty, acting under color of law, or within the scope of his employment. The Texas court of appeals disagreed. One of the key factors in the courts' decision was a city policy stating that its police officers were never off duty--simply relieved from their performance of duty. The court also commented on the deceased officer's actions just prior to being struck by the vehicle. Evidence indicated that the officer became aware of the imminent danger and took action to protect his wife

by shoving her out of the path of the car. The court reasoned that at that instant the officer was consciously acting within the scope of his employment in protecting a person from harm, even if the person was the officer's wife.

A different result was reached in Vernon v. City of Dallas[24]. In Vernon, the police officer was also off duty and was having dinner with his wife at a restaurant. The restaurant was in Garland, Texas, a suburb of Dallas. The officer identified himself to an unruly patron and asked the patron to calm down. The patron took exception to this and struck the officer in the face, resulting in a struggle and the subsequent injuries that formed the foundation for the workers compensation claim. The officer's claim was denied in district court and the decision was upheld on appeal. The courts' basic reasoning is outlined as follows:

* The off duty police officer had no duty to quell a disturbance outside the city in which he worked

* Even if a duty did exist, it should not define "course of employment" for workers compensation benefits[25]

Throughout the opinion, the court refers to the fact that the officer was outside his city of employment and that he had no more authority to intercede than the average citizen. Angel v. State,[26] decided in 1987, could possibly change the courts perspective. In Angel, the Court of Criminal Appeals clearly defined a city police officer's jurisdiction as being contiguous with the county boundaries.

Coupled with the line of cases clearly defining a police officers authority and responsibility in an off duty capacity, it is hard to imagine that Vernon will withstand the test of time. Additionally, the Code of Criminal Procedure, article 14.03, section (c), states that a peace officer may make an arrest outside his jurisdiction, without a warrant, for any felony or violation of Title 9, Chapter 42, Penal Code, that is committed in his presence.[27] The section also provides the proper format for the disposition of any subjects so arrested. This section clearly demonstrates the legislatures' intention that police officers not be handcuffed, regarding official actions, by territorial boundary lines.

The issue of workers compensation, as it relates to secondary employment by police officers in private security, is worthy of serious attention. The slightest difference in a fact issue in a case can change a courts' ruling. Administrators should not only be cognizant of the general crisis in the field of workers compensation, but also should recognize related aspects such as loss work time by the officer, lower level of work performance (light duty), and the possible loss of officers through disability retirement.

Todays society is very litigious and administrators often devote considerable time and effort toward reducing the departments exposure to liability. If, however, such efforts fail to properly entertain secondary employment as

a high risk liability area, the department's vulnerability is greater than believed or warranted.

Discussion

The information presented, in summary, clearly depicts an environment that appears to be heavily canted toward benefiting the individual police officer. This is evidenced by several factors:

* The police officers exemption from certain provisions of the Private Securities and Agencies Act

* The potential attachment of civil liability to the officers governing body regarding "official actions" in secondary employment

* The possible application of workers compensation benefits to the police officers governing body

Texas police officers are very fortunate to work in such a supportive environment. The availability of the above potential benefits, when secondarily employed in private security, functions like a large hidden magnet--continually drawing officers into its fold. The overall merit of this magnet is certainly debatable. A fair question to pose would be: How many officers would be involved in private security if their employment was contingent on (a) complying with the requirements of the Private Security Act, including liability coverage, and (b) the secondary employer providing workers compensation coverage? In the

same vein, one could ponder the question: How many officers would be involved in private security if their official status was not available? The answers are abstract in nature but certainly thought provoking (especially from an ethical perspective). Not all police officers enjoy such a supportive environment in private security.[28]

The existing environment is evolutionary in nature and is not the result of deliberate actions or a master plan on any one entities' behalf. Several factors have led to the conditions as they currently exist:

* Legislative process
* Case law development
* Special interest lobbying
* Administrative apathy

The state legislature is charged with the ultimate responsibility for the creation of statutory law in all matters. The pipeline for all Bills is very arduous and the process is very political. Without constituent motivation one can hardly expect legislators to pursue blanket legislation in an area subject to a hue and cry from police officers across the state. Very closely related to legislative inaction is special interest lobbying. Although blanket legislation may be rare, narrowly defined Bills and riders are much easier to address from a legislative perspective. Special interest lobbying can be quite intense and very effective, leading to a piecemeal or splintered approach on many issues. This is not an indictment of the

system, but merely cognitive recognition of the process.

Case law development, although very instructional, is dependent on existing statutes for application and interpretation--thus the cycle begins. Our judges are restrained, to a certain extent, by the result of the legislative process, statutory law. If this is an accurate process analysis, in general, then we are brought to my final point, administrative apathy. Police administrators are in the position to lead the way in necessary statute reform. Independently and collectively, through various professional associations, police administrators can work toward forging a concensus on numerous issues related to the police officers work environment. Once a consensus is formed, it must then be subjected to the rigors of the political process of the state legislature; thus our chiefs can become their own special interest lobbying group. Taking an apathetic stance only promotes crisis management. It is understood that police administrators are subjected to huge and demanding burdens; they must begin, however, to confront the larger issues effecting police in general and their respective governmental entities as well.

It also must be noted that police officers themselves will have to rethink their position as a police officer and the relative ethics of special exemptions from state statutes as well as diversion of personal liability responsibility.

The answers are not easy and will require a cooper-

ative effort on everyones part. All parties have valid motivations to work toward a mutual resolution of the issue. Police stand to lose extra income if they should lose the ability to work secondary jobs in private security. Governmental entities risk a concurrent demand for increased salaries for police.

Perhaps the entire issue of secondary employment of police officers in private security services is worthy of a state wide forum; with a ultimate goal of state wide legislation. This would provide an opportunity for all interested parties to present and argue their positions. Equally important would be the opportunity for all the various issues to be properly addressed and for support to be forged for draft legislation. Any effort in this direction will obviously require the active involvement and cooperation of various police groups, private security associations, insurance representatives and certainly governmental agency representatives. The groups task would not be easy, but once achieved would represent positive and directed growth in this important area.

Notes

1. Texas Board of Private Investigator and Private Security Agencies Act, V.A.C.S. 4413(29BB) (Austin, Texas, 1987).

2. Ibid, 1, 2, 18.

3. Ibid, 29.

4. Ibid, 4.

5. Larry R. Shimek to Sam W. Dick, "Off duty employment by full time and reserve officers", September 27, 1988, Austin, Texas, 3-4.

6. John B. Holmes to Chief L. C. Guillot, Opinion regarding reserve peace officers working extra jobs, June 10, 1983, 3.

7. Ibid, generally.

8. V.A.C.S., Article 6252-24.

9. V.T.C.A., Local Government Code, Sections 351.061 - 351.067, 811-813.

10. Albert J. Reiss Jr., _Private Employment of Public Police_, U.S. Department of Justice (Washington, D.C.: GPO, 1987), 11.

11. "Senate Bill Analysis", C.S.S.B. 511, Committee on Intergovernmental Relations, March 18, 1991.

12. Texas Congress, Senate, _An Act Relating To The Off Duty Security Employment Of Advanced Reserve Law Enforcement Officers Of Certain Counties And Municipalities_, 72 Legislature, C.S.S.B. 511.

13. _Texas Criminal Laws_ (Department of Public Safety, 1989), Austin, Texas, 126.

14. See Weatherford v. State, 21 S.W. 251 and Ex Parte Preston, 161 S.W. 115.

15. Simms v. State, 319 S.W.2d 717 (Tex. Crim. App. 1958).

16. Thompson v. State, 426 S.W.2d 242 (Tex. Crim. App. 1968).

17. Monroe v. State, 465 S.W.2d 757 (Tex. Crim. App. 1971).

18. Wood v. State, 486 S.W.2d 771 (Tex. Crim. App. 1972).

19. Ibid

20. David J. LaBrec, Police "Off-Duty" Employment, a paper presented to the TML Police Liability Institute, San Antonio, Texas, July 30, 1990, citing Texas Attorney General Opinion No. JM-140, (1984).

21. This is evidenced by the recent case of Travis, Individually, et al. v. City of Mesquite, Texas, et al., No. C-8576, where summary judgement for the city and two officers was reversed. (The two officers in question were off duty, working an extra job, and initiated the incident)

22. V.T.C.A., Local Government Code, Section 180.002, 447-448.

23. Travelers Insurance Agency of Hartford, Connecticut v. Hobbs, 222 S.W.2d 168 (Tex. App. - San Antonio 1949).

24. Vernon v. City of Dallas, 638 S.W.2d 5, (Texas Appeal - Dallas, 1982).

25. Ibid

26. Angel v. State, 740 S.W.2d 727 (Tex. Crim. App. 1987).

27. Texas Criminal Laws, 151.

28. California and Oklahoma, for example, make a distinction between on duty actions and off duty actions, as cited in Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, Plaintiffs-Appellees v. T.G.& Y. Stores, INC., an Okalhoma corporation; City of Lawton, Oklahoma, a municipal corporation; Charles Gent; Steve Wertz; and Kent Dunegan, Defendants-Appellants and also William H. Traver, Plaintiff-Appellee v. David Meshriy et al., Defendants-Appellants.

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Travis, Individually, et al. v. City of Mesquite, Texas, et al., No. C-8576.

V.A.C.S. 4413(29bb).

V.A.C.S. 6252-24.

V.T.C.A., Local Government Code. Section 180.002.

V.T.C.A., Local Government Code. Sections 351.061 - 351.067.

Vernon v. City of Dallas, 638 S.W.2d 5 (Tex. Appeal - Dallas, 1982).

Weatherford v. State, 21 S.W. 251

William H. Traver, Plaintiff-Appellee v. David Meshriy et al., Defendants-Appellants.

Wood v. State, 486 S.W.2d 771 (Tex. Crim. APP. 1972)