

**THE BILL BLACKWOOD
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS**

**An Assessment of the Need for a Policy on the Licensed Carry of Handguns by Civilian Personnel
of the Brazos County Sheriff's Office**

**A Policy Research Project
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Abstract

While law enforcement agencies train, supervise, and regulate a peace officer's on- and off-duty use of a weapon, they have made scant progress in establishing guidelines for civilian employees. This is a pressing issue now, more than ever, with the recent passage of the concealed handgun statute in Texas. Uniformed correctional employees are a special concern for administrators. These employees may expose an agency to potential liability by obtaining a handgun permit and carrying a weapon to and from work or during off-duty hours. It is possible that a uniformed detention officer that acts negligently while using a handgun under the authority of the concealed handgun act could be recognized as a representative of their law enforcement agency. This would likely satisfy the "color of state law" requirement of *Title 42 U.S. Code, Section 1983* and expose the employee, their supervisor, and administrators to a civil rights lawsuit.

Section 1983 lawsuits are the second most commonly filed claims in federal courts today and result in billions of dollars in judgements. The purpose of this research is to provide administrators with information about the concealed handgun law and the potential civil liability it creates. Law enforcement administrators must limit liability by knowing the law, restricting officer discretion with rules and regulations, encouraging proactive supervision, and requiring detailed documentation. A review of the current practices of law enforcement agencies and pertinent case laws indicates that a policy concerning concealed handgun permits and civilian employees is necessary.

Introduction

The passage of the Concealed Handgun Law by the Texas Legislature has presented an important policy issue to law enforcement administrators. The issue of a civilian employee obtaining a concealed handgun permit is a special concern for county sheriffs with uniformed jail staff that are not licensed peace officers. The law enforcement administrator must consider this issue and answer several questions before they expose their agency to potential liability. Questions concerning whether civilian law enforcement employees can carry concealed weapons to and from their place of employment, on the job, while in uniform, or off-duty must be answered.

The purpose of this research project is to identify issues and guide in the creation of a policy relating to concealed handgun carrying by the civilian employees of the Brazos County Sheriff's Office. The primary intent of this project is to provide the Sheriff of Brazos County, administrators, and other Texas law enforcement agencies with accurate information concerning this issue.

The intended audience of this research is the Sheriff of Brazos County and other administrators of law enforcement agencies in Texas. It is specifically written with an emphasis on addressing the concerns of county sheriffs. This emphasis will deal with detention officers that obtain concealed handgun permits and may be involved in situations when they are carrying a weapon while in uniform. However, it also applies to law enforcement administrators of other Texas agencies where civilian employees involved in deadly force incidents could expose their departments to civil or criminal liability.

This research is based on three primary sources of information. It includes current statutes, case law, and current policy and procedures of law enforcement agencies of other states that have dealt with this issue. The information from these sources will be compared to the current policy and procedures of the Brazos County Sheriff's Office to determine if they are suitable. The scope of the research on current practices will be limited to county sheriff's departments, but information found should apply to any law enforcement agency in Texas.

If adopted, a policy on this topic would provide employees with information about when, where and how they could carry a concealed handgun without exposing the Brazos County Sheriff's Office to liability. This project should provide information for the administration and employees of the Brazos County Sheriff's Office to insure that it complies with all state statutes and avoids unnecessary liability resulting from the concealed carrying of handguns by licensed civilian employees.

Legal and Historical Context

The historical context of this topic is brief. The issue of handgun control has been discussed at both extremes with some advocates calling for a total ban on all firearms, while others fight to insure the right to bear arms. Out of this controversy arose a vast amount of new legislation. Gun control laws such as The Brady Bill and The Crime Bill were created to satisfy the call for increased restrictions on gun ownership. At the same time, a growing trend was emerging in states throughout the nation. Thirty eight states have passed legislation allowing private citizens to obtain permits and carry handguns. Law enforcement administrators have argued for and against these laws. Their main

consideration was either the safety of the public or officer safety. Few considered the effect these laws could have on employees of law enforcement agencies. Administrators are now faced with the issue of civilian employees carrying guns.

Legal issues are the most important concern for law enforcement administrators that are considering a policy that restricts an employee's ability to carry a handgun. *Title 42 U.S. Code* originally known as the Federal "Ku Klux Klan" Act of 1871 has had both a positive and negative impact on police policies and procedures (Schmidt, 226). The act caused law enforcement agencies to increase training, clarify policies and procedures, discharge unfit officers, and improve the officer selection process. Negative issues are a reluctance to use force when necessary and a hesitancy to admit mistakes (Schmidt, 227). *Title 42 U.S. Code, Section 1983* is commonly referred to as *Section 1983*. *Section 1983* lawsuits are the second most commonly filed claims in federal courts today and result in billions of dollars in judgements. Two Supreme Court cases had an enormous impact on law enforcement civil liability. Monroe v. Pape was a case that established guide lines for individuals to file claims. It outlined the "color of authority" as a necessary part of a successful suit. However, Monroe did provide local agencies and governments with sovereign immunity. In 1978, Monell v. Department of Social Services of the City of New York, the Supreme Court overruled Monroe and stated that law enforcement agencies can be held liable for the actions of their employees in certain circumstances. In this case, the Supreme Court declared that local agencies and governmental units are "persons" and could not claim sovereign immunity. "The statute clearly states that 'every person' (acting under color of state law) who causes another to be deprived of a federal constitutional or statutory right is liable, and therefor, can be sued under Section 1983" (Barrineau, 1987:29). Law

enforcement agencies are unable to avoid liability in these cases and must act to prevent behavior that can result in millions of dollars in judgements.

Law Enforcement agencies have the ability to prevent liability in these types of actions. They must recognize the seven primary reasons for law enforcement lawsuits (Grant, 1996):

- Negligent Hiring
- Negligent Retention
- Negligent Assignment
- Negligent Entrustment
- Lack of or improper Training
- Failure to Supervise
- Failure to Direct and Control (Policy)

Once these causes are identified, agencies can take action to protect themselves from most *Section 1983* cases.

For the purposes of this research, the failure to direct and control is an important issue. Law enforcement agencies can most effectively direct employee's actions by implementing policies and procedures. The primary justification for extensive law enforcement rules, policies, and procedures is the expressed need for management direction and control (Cordner, 17). Robert Grant's four tips for lawsuit prevention lists limiting officer discretion as a factor in reducing lawsuits. Officers discretion is most effectively limited with rules and regulations.

Four tips for lawsuit prevention (Grant, 1996):

- Know the law. It is expected.
- Limit individual officer's discretion with rules and regulations.
- Proactive Supervision - Know what your officers are doing.
- Document, Document, Document.

After an agency has recognized the seven primary causes of law enforcement lawsuits and implemented the four tips for lawsuit prevention, its liability for an individual officer's actions is reduced. "If the officer is in violation of departmental regulations, ...the officer may find that he is alone with regard to liability for actions taken while off-duty" (Barrineau, 1987:44). These precautions can not insure that an agency will be cleared of all liability in all cases, but it will demonstrate that they took action to prevent improper actions by their employees. "If department policy does not allow off-duty employment, or does not allow the use of uniforms, weapons, or other equipment issued by the department to be used in off-duty employment and an officer utilized it anyway, the department may be dismissed from the suit" (Barrineau, 1987:44). If law enforcement administrators ignore the need to address new issues confronting their agencies and refuse to update policy to reflect changes in legislation, they will likely find themselves standing in the courtroom facing litigation.

Review of Literature and Practice

This research did not reveal any literature that addressed the issue of civilian employees carrying handguns. However, volumes have been authored on civil liability ranging from pursuits, to negligent retention, to use of force. Throughout these sources ran a common factor: law enforcement agencies are responsible for the actions of their employees when the agency chooses to ignore issues that effect public safety. If an innocent third party is injured by an employee of the agency or as a result of the employee's actions, their supervisor and agency will likely be the target of a lawsuit.

Agencies often take affirmative action to protect themselves from these events. Most agencies have a written policy on pursuit and the use of force. These policies are intended to direct employees and to protect the agency or local governmental unit from liability.

A survey of sheriff's offices in Florida was conducted to determine if they had taken action on this issue. The Sheriffs were asked to respond to a letter requesting information about state licensed carrying of handguns by employees. They were asked to provide their departmental policy, case law, internal reports, and information about civil actions taken as a result of incidents involving state licensed civilian employees carrying handguns. Sixty-seven agencies were contacted and fifteen responded. Twelve agencies indicated that they do not allow civilian employees to carry handguns, however, they did not have a written policy. Several of the responding agencies seemed to dismiss the issue because they felt it was adequately covered by state law. Florida started issuing handgun permits in 1987 with the passage of the "Jack Hagler Self Defense Act". State law dictates when a civilian may carry a handgun and prohibits handguns in governmental buildings (Florida, 1995).

Of the respondents, only Manatee and Martin Counties had an explicit policy in place to restrict an employees' use or carrying of a handgun with a state permit. The Manatee County Policy provides notice that employees may apply for concealed handgun licenses and that they must comply with Florida State Statute Chapter 790 concerning permits. It strictly prohibits employees from carrying a concealed handgun while on duty if the only authorization to do so has been granted by the State issued permit. The policy reemphasizes this point by stating that the State issued permit is not authorization for employees to carry a firearm if they are not otherwise allowed to carry a firearm as part of their normal duties. Further the policy states "Employees who may be granted a permit by the State to carry a concealed firearm do not have the express consent of the Sheriff to carry/use the firearm in the conduct of their assigned duties. Any usage of the firearm pursuant to a permit issued by the State is not sanctioned by the Sheriff, and actions taken by the employee are done so just as if the employee were not an employee of the MCSO" (Manatee, 1996). The Martin County Policy specifically clarifies the issue of "color of authority". The policy states that civilian employees are prohibited from carrying firearms, but that it is not intended to interfere with the right of employees to carry firearms when off-duty, out of uniform, and not acting under the "color of authority" of the Martin County Sheriff's Office (Martin, 1993).

Discussion of Relevant Issues

The issue of whether an employee of the department may obtain a handgun permit and subsequently carry a handgun off-duty, to and from work, in uniform, or on-duty must be considered. There are several relevant issues to be considered by law enforcement administrators in determining the necessity of such a policy. Civilian employees are not normally trained in the use of firearms and could expose their agency to significant liability in any of these situations. Administrators must evaluate their ability to regulate these activities by policy while recognizing that indifference could be costly.

The most simple solution seems to be a policy that would prohibit a civilian correctional employee from obtaining a concealed handgun permit. A policy denying or restricting an employee's right to apply for and obtain a handgun permit would almost certainly be challenged legally. This would place law enforcement administrators in the position of attempting to implement a policy that would be unpopular with employees and that would probably conflict with state law. However, a law enforcement administrator could require departmental notification of a permit application or approval. This notification requirement would function much like current requirements for notification of off-duty employment. Agencies could also include a policy requirement stating that employees must comply with the provisions of the concealed carry application process and the applicable state regulations following issuance of a permit. Further, any policy on this issue should include a notice to permit holders that any use of a firearm under the authority of the concealed handgun act would not be sanctioned by the Sheriff. Any violation of this provision could be dealt with under normal

disciplinary procedures followed by the agency. For example, providing false information on the application or an arrest for criminal trespass as a result of carrying a handgun into a legally prohibited premises are situations that law enforcement policy manuals can easily adapt to cover.

The law enforcement administrator could also encounter resistance in making an attempt to regulate an employee's ability to carry a handgun after a permit has been issued. It is important to remember that handgun permit holders are only exempted from the general provisions against carrying handguns. They must comply with other statutes that may affect their ability to legally carry. Permit holders are prohibited from carrying handguns into a correctional facility by Section 46.03 of the Penal Code. Further, permit holders are prohibited from carrying concealed weapons on any property where they have been given notice that handguns are not allowed. This prohibition is criminally enforceable under Section 30.05 as Criminal Trespass.

The Brazos County Commissioners have taken action to prohibit handguns in the Brazos County Courthouse as well as some other county buildings. Employees that actually carry handguns into the courthouse would face criminal prosecution. These prohibitions would eliminate a detention officer's ability to carry a handgun while on-duty and would tend to support a policy that restated these restrictions. However, the primary concern is that a correctional employee that carries a handgun in their vehicle to and from work may be more likely to become involved in a deadly force confrontation. These situations could potentially expose the law enforcement agency to liability if the correctional employee is mistakenly recognized as a representative of the department. This particular issue is not specifically addressed by the concealed handgun law. While the statute says

that anyone may prohibit their employees from carrying a handgun on their property, it does not provide any authority for employers to prohibit concealed carry while not on the premises of the employer. Texas Attorney General Opinion DM-363 indicates that driveways, streets, sidewalks, parking lots or other parking areas are not defined as premises for the purposes of Section 46.035 and therefore it would not be a criminal offense to carry handguns to work at a correctional facility if the weapon was left in the vehicle.

One solution to this issue would be to prohibit correctional officers from carrying a weapon under the authority of the concealed handgun permit while in uniform. This policy provision would force permit holders employed by the department to make a decision of whether they wanted to wear their uniform to work or carry a weapon. Employees that carried a weapon would be forced to leave the firearm secured in their vehicle and change into their uniform prior to reporting for work. Restrictions on where employees may wear a uniform have been used in other situations such as when purchasing alcohol (Brazos, 1993).

The cost of implementing a policy on this issue is insignificant. The policies of effective law enforcement agencies are updated regularly to comply with court rulings and legislative actions. The only expected cost of implementing a policy would be the actual administrative costs of making the required changes to the policy manual. There are at least two potential benefits to addressing this topic. Law enforcement agencies would benefit from reduced exposure to liability and avoid misunderstandings about the agencies' expectations of correctional employees that are permit holders.

Conclusion

The law enforcement community has recognized the need to reduce the potential liability incurred by employees. Policies and Procedures have been written on pursuits, use of force, suicide prevention, and other critical issues. The issue of detention officers and other civilian employees carrying handguns by virtue of the Texas concealed handgun law is now a critical issue.

Law enforcement agencies that intend to deal with this issue should address several concerns. A comprehensive policy will include the agencies position on these topics:

- Should require department notification of a permit application
- Should require department notification if permit is issued
- Should require compliance with all state laws in the application process
- Should require compliance with all state laws after permit is issued
- Should prohibit any non-commissioned employee from carrying a weapon while displaying any departmental insignia, patch, hat, jacket, uniform, or while performing any function or duty of the agency.
- Should include a statement "Employees who may be granted a permit by the State to carry a concealed firearm do not have the express consent of the sheriff to carry or use the firearm in the conduct of their assigned duties. Any usage of the firearm pursuant to a permit issued by the State is not sanctioned by the Sheriff, and actions taken by the employee are done so just as if the employee were not an employee of the department"(Manatee, 1996).

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