

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
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May 12, 2009

Opinion No. 09-75

Secondary employment of commissioned members of the Department of Safety

**QUESTIONS**

1. Is it constitutional for the Department of Safety to prohibit commissioned members of the department from seeking secondary employment working as armed security even if the member has separate certification, is licensed to carry a handgun separate from the member's training for his or her position within the department, and the employment does not interfere with the member's duties as an employee of the department?

2. If the department allows certain outside security jobs, but not others, will this fact change the answer to question number one?

3. Is it constitutional for the Department of Safety to require any secondary employer of a commissioned member to sign a liability waiver release that holds the department and the state of Tennessee harmless from any claims arising out of the secondary employment before allowing the member to be employed by such employer?

**OPINIONS**

1. Yes. It is the written policy of the Department of Safety to permit its members to engage in secondary employment with certain exceptions. Pursuant to those exceptions, the Department of Safety may prohibit some types of secondary employment.

2. No. As long as the department's policy disallowing some forms of secondary employment is rationally related to a legitimate governmental interest and is not arbitrarily or capriciously applied, it will likely withstand challenge.

3. Yes. The Department of Safety may require a liability waiver agreement from a secondary employer as a condition of permitting a commissioned officer to engage in secondary employment.

## ANALYSIS

1. The first inquiry asks whether it is constitutional for the Department of Safety to prohibit commissioned members from engaging in secondary employment. This office has previously opined that law enforcement agencies “may constitutionally restrict or prohibit their law enforcement officers from engaging in secondary employment during off-duty time if, at the time in question, the agency had a clear policy restricting or prohibiting such employment and if the agency can articulate how its policy is rationally related to a legitimate government interest.” *See* Op. Tenn. Att’y Gen. No. 01-075 (May 8, 2001). That opinion remains a correct statement of the law.

According to Department of Safety policy:

It is the policy of the Department of Safety to permit members to engage in Secondary Employment, providing it does not interfere with the performance of their duties and obligations incurred as employees of the Department, and the employment is pursuant to and in compliance with the provisions and procedures of this Order. Under no circumstance shall a member work in excess of a combined total of sixteen (16) hours per day. This includes when working scheduled grant overtime or Secondary Employment in addition to the regularly scheduled eight (8) hour shifts. The Department will not enter into any contractual Secondary Employment agreement with any person or private business entity whereby members are paid through state payroll. No employee shall receive any supplements to their Tennessee Department of Safety salary from any private source as compensation for the employee’s services to the Department. The provisions of this policy shall apply to all ranks in the commissioned structure.

*See* Department of Safety General Order Number 250 (Jan. 31, 2009). Additionally, this office has previously opined that “state law does not preclude law enforcement personnel from engaging in private employment . . .” *See* Op. Tenn. Att’y Gen. No. 00-166. In fact, a federal court in Tennessee has upheld disciplinary action for violation of the secondary employment policy. *See Triplett v. Shelby County Government*, No. 05-2432-STA-dvk, 2008 WL 2437670 (W.D. Tenn. June 16, 2008).

Other jurisdictions have upheld restrictions or even prohibitions on secondary employment set by law enforcement agencies, finding that rules prohibiting employees from secondary employment absent prior approval are not void for vagueness, or overbroad, and do not violate equal protection or due process rights. *See* 63 C.J.S. Municipal Corporations § 497(citing *Allison v. City of Southfield*, 172 Mich. App. 592, 432 N.W.2d 369 (1988); *Martin v. Mattys*, 149 Ill. App.3d 800, 501 N.E.2d 286 (1<sup>st</sup> Dist. 1986)); 63C Am. Jur.2d Public Officers and Employees § 253; Op. Tenn. Att’y Gen. No. 01-075 (May 8, 2001). Additionally, “a regulation limiting the types of off-duty work in which officers can engage has been upheld as against contentions of violation of due process and equal protection.” *Id.* (citing *Decker v. City of Hampton, Va.*, 741 F. Supp. 1223 (E.D. Va. 1990)); *see also Fraternal Order of Police, Local Lodge 73 v. City of Evansville*, 559 N.E.2d 607 (Ind. 1990).

Accordingly, it is the opinion of this office that the Department of Safety may prohibit commissioned members from engaging in secondary employment absent prior approval or if such secondary employment conflicts with other policies of the department.

2. The second inquiry addresses the concern that some forms of secondary employment will be allowed while others will be disallowed. Based upon the policy, as written, it is likely that some secondary employment requests will be approved while other requests will not be approved. As long as the department's policy disallowing some forms of secondary employment is rationally related to a legitimate governmental interest and is not arbitrarily or capriciously applied, it will likely withstand challenge.

3. The third inquiry arises from the concern that the Department of Safety and the state may be held liable for the actions of a commissioned member while engaging in secondary employment. Because the department can ban secondary employment altogether, it may also impose reasonable restrictions on the privilege of secondary employment when it is permitted. Requiring a liability waiver agreement would protect the department from liability in suits initiated by a secondary employer for the acts of the commissioned member.

There is no constitutional bar against requiring the secondary employer to execute a liability waiver releasing the Department of Safety from any liability in a suit brought by the secondary employer. Such an agreement would effectively prevent the secondary employer from initiating a lawsuit against the Department of Safety for the actions of a commissioned member engaged in secondary employment. A secondary employer does not have a constitutional right to employ commissioned members of the Department of Safety. The Tennessee Constitution does not prevent the state from entering into agreements that prevent or bar secondary employers from suing the state. The state may enter into a contract as long as the contract is validly executed pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(L).

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