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OPINION	:	No. 79-319
	:	
of	:	<u>June 1, 1979</u>
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SUBJECT: USE OF TEAR GAS—Private security guards may carry and use tear gas only if such security guards comply with the restrictions and requirements of Penal Code section 12403.7.

Kip Skidmore, Chief, General Administration, Department of Justice, has requested an opinion on a question which we have rephrased as follows:

Does Penal Code section 12403.5 permit an “in house” security guard who possesses a firearm certificate issued pursuant to Penal Code section 12033 to carry tear gas or tear gas weapons when employed by a private person, not licensed as a private patrol operator by the Department of Consumer Affairs?

CONCLUSION

Penal Code section 12403.5 does not permit an “in house” security guard who possesses a firearm certificate issued pursuant to Penal Code section 12033 to carry tear gas or tear gas weapons when employed by a private person, not licensed as a private patrol operator by the Department of Consumer Affairs. A security guard may carry a tear gas

aerosol spray, authorized pursuant to Penal Code section 12403.7, if he or she meets the specific requirements of that section.

ANALYSIS

Chapter 4, title 2, of part 4 of the Penal Code (§ 12401 *et seq.*) sets forth provisions regulating the use of tear gas and tear gas weapons. Section 12401 defines “tear gas,”¹ while section 12402 defines the term “tear gas weapons.”²

Penal Code section 12403 generally makes possession or transportation of tear gas or tear gas weapons a crime. Certain exemptions permitting possession and transportation of tear gas or tear gas weapons by military, law enforcement, and Department of Health personnel are set forth in Penal Code sections 12403, 12403.1, and 12403.6.

Penal Code section 12403.7 sets forth a limited exemption whereby a person may possess and use for self-defensive purposes a tear gas aerosol spray of a type specifically approved by the Department of Justice, if such person: (1) successfully completes a course of training approved by the Department of Justice, (2) is not a minor, (3) has not been convicted of a felony, (4) is not addicted to any narcotic drug, (5) has not been convicted of any crime involving assault, and (6) has not been convicted of misuse of tear gas under that section.

The other exemption set forth in Chapter 4 is found in Penal Code section 12403.5 which provides:

¹ Penal Code section 12401 provides:

“‘Tear gas’ as used in this chapter shall apply to and include all liquid, gaseous, or solid substances intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air, but does not apply to, and shall not include, any substance registered as an economic poison as provided in Chapter 2 (commencing with Section 12751) of Division 7 of the Agricultural Code provided that such substance is not intended to be used to produce discomfort or injury to human beings.”

² Penal Code section 12402 provides:

“The term ‘tear gas weapon’; as used in this chapter shall apply to and include:

“(a) Any shell, cartridge, or bomb capable of being discharged or exploded, when the discharge or explosion will cause or permit the release or emission of tear gases.

“(b) Any revolvers, pistols, fountain pen guns, billies, or other form of device, portable or fixed, intended for the projection or release of tear gas except those regularly manufactured and sold for use with firearm ammunition.”

“Notwithstanding any other provision of law, a person holding a license as a private investigator or private patrol operator issued pursuant to Chapter 11 (commencing with Section 7500), division 3 of the Business and Professions Code, or uniformed patrolmen employees of a private patrol operator, may purchase, possess, or transport any tear gas weapon, if it is used solely for defensive purposes in the course of the activity for which the license was issued and if such person has satisfactorily completed a course of instruction approved by the Commission on Peace Officer Standards and Training in the use of tear gas.”

By its express terms the tear gas exemption provided in Penal Code section 12403.5 applies only to: (1) a person holding a license as a private investigator, (2) a person holding a license as a private patrol operator, or (3) uniformed patrolmen employees of a private patrol operator. It is asked whether this section may be construed to include “in house” security guards who have a firearm certificate issued pursuant to Penal Code section 12033. By “in house” security guards we understand the requestor to mean “uniformed security guards, regularly employed and compensated as such by persons engaged in any lawful business, while actually engaged in protecting and preserving the property of their employers.” (Pen. Code, § 12031, subd. (d) (5); see also Bus. & Prof. Code, § 7514, subd. (f).) Since “in house” security guards are not necessarily included in one of the three exempt categories specified in Penal Code section 12403.5, the answer to the question is no.

A basic rule of statutory construction is that in the absence of countervailing considerations, it must be assumed that the Legislature intended a statute to mean what it says. (*Tracy v. Municipal Court* (1978) 22 Cal. 3d 760, 764.) “Words may not be inserted in a statute under the guise of interpretation.” (*In re Miller* (1947) 31 Cal. 2d 191, 199; *Kirkwood v. Bank of America* (1954) 43 Cal. 2d 333, 341; *Gilbert v. City of Los Angeles* (1973) 33 Cal. App. 3d 1082, 1087.)

“Another familiar rule of construction is that where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned.” (*Shelby v. Southern Pacific Co.* (1945) 68 Cal. App. 2d 594, 599.) When a statute sets forth an exception to a rule, the exception is to be narrowly construed; other exceptions not mentioned may not be added under the guise of statutory construction. (*Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal. App. 2d 181, 189; *Harris v. Alcoholic Bev. Control Appeals Board* (1962) 201 Cal. App. 2d 567, 571–572.)

Penal Code section 12031, subd. (d) (5) authorizes “in house” security guards who have a certificate (attesting completion of a training course in the use of firearms and the

law of arrest) issued pursuant to Penal Code section 12033 to carry a loaded firearm. It does not purport to authorize the possession or use of tear gas, a subject governed by chapter 4, title 2, part 4 of the Penal Code (commencing with § 12401). Thus, a private “in house” security guard may carry and use tear gas, only if he or she complies with the restrictions and requirements of Penal Code section 12403.7.
