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OPINION	:	No. 82-205
of	:	<u>DECEMBER 30, 1982</u>
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	:	

THE HONORABLE JOHN T. DOOLITTLE, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following question:

May local peace officers wear their official uniforms while privately employed?

CONCLUSION

Local peace officers may not wear their official uniforms while privately employed as private investigators, private patrol operators or reposseors. In other private employment situations, the official uniform may be worn only if wearing it involves no conflict of interests, unlawful misrepresentations or other violations of law.

ANALYSIS

Local peace officers, such as members of a police or a sheriff's department, are usually required to wear official uniforms when performing their law enforcement duties. Often these uniforms are distinctive in styles, colors and insignia. We are asked whether or not local peace officers may wear such official uniforms while they are privately employed.¹

We must examine statutes and court rulings to determine whether or not any specific prohibitions exist to the wearing of official peace officer uniforms in private employment situations.

If the employment is that of a private investigator or private patrol operator, a license is required by the Private Investigator Act. (Bus. & Prof. Code, §§ 7512-7590.) Section 7538 of that act prohibits certain activities by those engaged in such occupations including:

¹ Since the question presented concerns private employment this opinion does not address what might be termed secondary public employment, i.e., work by a peace officer for another *public* entity during times he or she is not on duty with the public agency which employs him or her as a peace officer. As to secondary public employment we note that chapter 1300, Statutes of 1982, has added the following provision to Penal Code section 70 which proscribes receipt of funds by public officers for the performance of official acts:

"Nothing contained in this section shall preclude a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from engaging in or being employed in, casual or part-time employment as a private security guard or patrolman for a *public entity* while off duty from his or her principal employment and outside his or her regular employment as a peace officer of a state or local agency, and exercising the powers of a peace officer concurrently with such employment, provided that such peace officer is in a *police uniform* and subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (l) and (m) of Section 7522 of the Business and Professions Code. Notwithstanding the above provisions, any and all civil and criminal liability arising out of the secondary employment of any peace officer shall be borne by such officer's secondary employer. It is the intent of the Legislature by this paragraph to abrogate the holdings in *People v. Corey*, 21 Cal.3d 738, and *Cervantez v. J.C. Penny Co.*, 24 Cal.3d 579, to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for assault on peace officers who are employed, on a part-time or casual basis, *by a public entity*, while wearing a police uniform as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with such employment." (Emphasis added.)

"(e) No licensee, or officer, director, partner, manager, or employee of a licensee shall use a title or *wear a uniform*, or use an insignia, or use an identification card, or make any statement with the intent to give an impression that he is connected in any way with the federal government, a state government, or any political subdivision of a state government." (Emphasis added.)

In 1979 the Legislature added section 7522(l) (Stats. 1979, ch. 411, § 1, p. 1504) which provided that the act, and consequently section 7538(e) thereof, did not apply to

"[a] peace officer of this state or a political subdivision thereof while such peace officer is employed by a private employer to engage in off-duty employment in accordance with the provisions of section 1126² of the Government Code."

However, section 7522(l) was amended in 1980 (Stats. 1980, ch. 1340, § 1, p. 4718) to include this qualification:

"However, nothing herein shall exempt such peace officer who contracts for his or her services or the services of others as a private investigator or private patrol operator."

Private investigators are defined in Business and Professions Code section 7521(a) to include persons, other than insurance adjusters, who conduct certain investigations for consideration; private patrol operators are defined in Business and Professions Code section 7521(b) to include watchmen, guards, patrolmen and others employed to protect persons or property. Accordingly, when a peace officer accepts work in a private capacity as a private investigator or a private patrol operator he or she is subject to the Private Investigator Act and, under section 7538(e), may not wear his or her peace officer uniform when performing such work.

Legislative intent is determined by looking first to the language used, giving words their ordinary and common meaning. (*Moyer v. Workmen's Comp. Appeals Board* (1973) 10 Cal.3d 222, 230.) It is our view that the plain meaning of section 7522(l) is to exempt peace officers from the strictures of the Private Investigator Act only when the private employment is other than that of a private investigator or a private patrol operator.

² Government Code section 1126 prohibits a local public officer or employee from engaging in inconsistent or incompatible employment. This section will be discussed subsequently.

This meaning is consistent with other provisions of the Private Investigator Act. Section 7514.3 provides that a "city, county, or city and county may regulate the uniforms and insignias worn by uniformed employees of a private patrol operator and vehicles used by a private patrol operator to make the uniforms and vehicles clearly distinguishable from the uniforms worn by, and the vehicles used by, local regular law enforcement officers." This indicates a legislative intent that uniformed private patrol operators not be confused with uniformed peace officers.

In section 7522(m) the Legislature has provided that a *retired* peace officer is not subject to the Private Investigator Act when privately employed if such employment is approved by the chief law enforcement officer of the jurisdiction where the employment takes place and if the retired officer is "in a uniform of a public law enforcement agency," has registered with the Bureau of Collection and Investigative Services and has met established training requirements for security personnel. This provision was enacted at the same time section 7522(l) was last amended. (Stats. 1980, ch. 1340, § 1, p. 4718.) However, consistent with section 7522(l), a retired officer is not exempt from the provisions of the act if he "contracts for his or her services or the services of others as a private investigator or private patrol operator." Consequently, retired peace officers may not wear official uniforms when working as private investigators or private patrol operators.

Peace officers employed as reposseors are also prohibited from wearing their official uniforms. The Reposseors Act, enacted in 1981, has special provisions regulating reposseors. (Bus. & Prof. Code, §§ 7500-7511.) Section 7508.3(a) of that act prohibits:

"The false representation or implication that the individual is vouched for, bonded by, or affiliated with the United States or with any state, county, city, or city and county, including the use of any badge, *uniform, or facsimile thereof.*" (Emphasis added.)

Other statutes place restrictions upon peace officers wearing their uniforms while involved in private activities, for compensation or otherwise. Under Penal Code section 12590 the uniform may not be worn when the peace officer is engaged in picketing or other informational activities in a public place relating to a concerted refusal to work. Moreover, Government Code section 3206 prohibits an officer or employee of a local agency from participation in "political activities of any kind" while in uniform. (See also Gov. Code, § 3302(a).)

When a peace officer is engaged in his or her off-duty employment, the actions of such officer within the scope of that employment are those of a private person

and not of a public officer or employee. We discussed this distinction in 62 Ops.Cal.Atty.Gen. 626, 630 (1979) where we determined that members of the Wildlife Protection Branch of the Department of Fish and Game retain their peace officer authority during their off-duty hours "except at such times as they are acting within the course and scope of some private employment for compensation." Our analysis was as follows:

"The Supreme Court has carved out an exception to the *Derby* case [*People v. Derby* (1960) 177 Cal.App.2d 626] rule that a peace officer may exercise his peace officer authority to apprehend criminals at all times. In *People v. Corey* (1978) 21 Cal.3d 738, the court held that the enhanced punishment provision for battery of a peace officer engaged in the performance of his duties does not apply to peace officers who are assaulted within the course and scope of their private employment as security guards. The court then stated, 'We do not suggest that a peace officer's official duties necessarily cease at the end of his normal working hours [citing the *Derby* case], where there are no private contractual duties of the nature involved herein.' Similarly in *Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, the court held that in making an arrest for shoplifting while working as a private security guard for Penneys during his off-duty hours as city police officer he was performing private rather than official duties. The court observed at page 588, 'It is thus the fact of private employment which operates to prevent a peace officer from acting in what would otherwise be his official capacity.' The court then reiterated its statement in the *Corey* case quoted above. The court explained that the determinative rationale for its exception to the *Derby* rule was Penal Code section 70 which makes it unlawful for any public employee or officer to receive any "emolument, gratuity or reward, or promise thereof . . . for doing an official act.' Since he is forbidden from receiving private payment for the performance of his official duties, the court concluded the officer must have been performing private rather than official duties while acting within the course and scope of his private employment as a security guard during his off-duty hours. (*Id.*, p. 588)"

Since the officer wearing the public agency uniform in off-duty employment is performing private services, he or she must not unlawfully represent himself or herself as a public officer in violation of Penal Code sections 146a or 538d.

Penal Code section 146a provides:

"Any person who falsely represents himself to be a public officer, or investigator, inspector, deputy or clerk in any state department and in such assumed character arrests or detains or threatens to arrest or detain, or

otherwise intimidates any person or searches the person, building, or other property of any person, or obtains money, or property, or other thing of value, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both."

Similarly, Penal Code section 538d states:

"Any person other than one who by law is given the authority of a peace officer, who willfully wears, exhibits, or uses the authorized badge, insignie, emblem, device, label, certificate, card, or writing, of a peace officer, with the intent of fraudulently personating a peace officer, or of fraudulently inducing the belief that he is a peace officer, is guilty of a misdemeanor.

"Any person who willfully wears, exhibits, or uses, or who willfully makes, sells, loans, gives, or transfers to another, any badge, insignie, emblem, device, or any label, certificate, card, or writing, which falsely purports to be authorized for the use of one who by law is given the authority of a peace officer, or which so resembles the authorized badge, insignie, emblem, device, label, certificate, card, or writing of a peace officer as would deceive an ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer, is guilty of a misdemeanor."

Consequently, the uniformed officer when employed off-duty must make it clear to those subject to his or her actions that he or she is acting in a private rather than a public capacity. (See *In re Deborah C.* (1981) 30 Cal.3d 125, 130-134; *People v. Zelinski* (1979) 24 Cal.3d 357, 366-368.)

Must local peace officers be authorized by their employing agencies and local governments to wear official uniforms in private employment situations when not otherwise forbidden from doing so by law? We conclude that they must have appropriate authorization and approval under Government Code sections 1126 and 1127.

Government Code section 1126 provides in part as follows:

"(a) Except as provided in Section 1128, a local agency³ officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed. Such officer or employee shall not perform any work, service, or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board, or commission of his or her employing body, unless otherwise approved in the manner prescribed by subdivision (b).

"(b) Each appointing power may determine, subject to approval of the local agency, and consistent with the provision of Section 1128 where applicable, those outside activities which, for employees under its jurisdiction, are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees. An employee's outside employment, activity, or enterprise may be prohibited if it: (1) involves the use for private gain or advantage of his or her local agency time, facilities, equipment and supplies; or the badge, *uniform*, prestige, or influence *of his or her local agency office or employment . . .*" (Emphasis added.)

Consequently, the private employment of a local peace officer may be prohibited if the employing agency and the local government determines that such employment involves the use of the official uniform. The question, however, is whether or not that agency and government, having considered a possible conflict of interests regarding the private use of the uniform and finding none, may allow that officer to wear the uniform in private employment when no other law prohibits such use.

Government Code section 1126, as interpreted in *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141, 153, prohibits incompatible employment "*unless otherwise approved in the manner prescribed by subdivision (b).*" Subdivision (b) of section 1126, as we have seen, provides that "[e]ach appointing power may determine, subject to approval of the local agency, those outside activities which, for employees . . . are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees." Using the procedure of section 1126, a peace officer's employer and local government might properly conclude in particular circumstances that

³ A local agency is defined as "a county, city, city and county, political subdivision, district, or municipal corporation." (Gov. Code, § 1125.)

the wearing of the uniform by the officer in private employment would be compatible with the officer's public employment.

We observe that the law does not prohibit peace officers from undertaking private employment related to and compatible with their public duties. Indeed, Government Code section 1127 provides:

"It is not the intent of this article [incompatible activities] to prevent the employment by private business of a public employee, such as a peace officer, fireman, forestry service employee, among other public employees, who is off duty to do work related to and compatible with his regular employment, or past employment, provided the person or persons to be employed have the approval of their agency supervisor and are certified as qualified by the appropriate agency."

Accordingly, we conclude that local peace officers may not wear their official uniforms while privately employed as private investigators, private patrol operators or repossessors. In other private employment situations, the official uniform may be worn only if wearing it involves no conflict of interests, unlawful misrepresentations or other violations of law.
