

FIREARMS PROHIBITION POLICY

*Presentation by Patricia T. Castle
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I.

CONCLUSION AND RECOMMENDATION

It is not clear whether firearm and other weapons prohibitions in the Penal Code apply to county offices of education, district offices, and other administrative buildings. Assuming the firearms prohibitions apply, it seems clear they apply only to buildings, and not to outdoor facilities such as parking lots, maintenance and transportation yards, and facilities like Camp KEEP. In addition, persons holding a valid license to carry a concealed weapon are exempt from criminal prosecution under all applicable firearm prohibitions, and do not commit a crime if they possess a loaded, concealed firearm at a K-12 school, county office of education, district office or any other location owned or operated by a public school.

Relying on an Attorney General opinion, our office has issued a model policy prohibiting employees and nonemployees who are not authorized law enforcement officers from possessing firearms in any county office of education or district work place, even if the individual has a valid CCW license. To address the uncertainties in the Penal Code, the policy expansively defines the term “work place,” to include parking lots and locations other than buildings.

II.

ANALYSIS

A. Firearm Prohibitions Under the Gun Free School Zone Act.

The Gun Free School Zone Act of 1995 is codified at Penal Code section 626.9 (Exhibit 1). For K-12 locations, the statute establishes that in California it is a crime for any person to possess a firearm in a place that the person knows or reasonably should know is a school zone (Penal Code section 626.9(b)). The term “school zone” is defined as “an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of a public or private school” (Penal Code section 626.9(e)(1)).

For post-secondary locations, the statute prohibits any person from bringing or possessing a loaded firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property, unless

it is with the written permission of specified university or college officials (Penal Code section 626.9(h)-(l)).

Under the principal that penal statutes are to be construed in favor of the defendant, it is questionable whether the Gun Free School Zone Act applies to a county office of education, district office or other related K-12 administrative facility, for two reasons. First, the statutory language covering K-12 institutions makes no mention of administrative buildings or grounds, but defines the proscribed area for firearms possession as in or on the grounds of a public or private *school*, or within 1,000 feet of the grounds of a public or private *school*. In contrast, the statutory language covering post-secondary institutions expressly defines administrative grounds and buildings as proscribed areas for loaded firearms possession. That difference in the statutory language could be construed to indicate that K-12 administrative locations are not covered by the Gun Free School Zone Act.

B. Firearm Prohibitions in State or Local Public Buildings Under Penal Code Section 171b.

Penal Code section 171b establishes that in California it is a crime for any person to bring or possess a firearm or other designated weapon within any state or local public building or at any meeting required to be open to the public pursuant to the Brown Act (Penal Code section 171b(a); (Exhibit 2)). Although Section 171b expressly exempts buildings or facilities, or parts thereof, that are referred to in the Gun Free School Zone Act, it expressly applies to “a building or part of a building owned or leased by the state or local government, if state or local public employees are regularly present for the purposes of performance of their duties” (Penal Code section 171b(c)(1)-(2)).

Without a comprehensive analysis of the legislative history of Section 171b, it is not clear whether a county office of education, district office, and other K-12 administrative building is covered by Section 171b. Possibly, when the Legislature passed Section 171b, it was aware of the uncertainties in the Gun Free School Zone Act, and intended to include county offices of education, district offices, and other K-12 administrative buildings in the prohibitions of Section 171b.

However, note that Section 171b expressly applies only to *buildings*, and not to grounds. So, if Section 171b applies to county offices of education, district offices and other K-12 administrative buildings, it seems clear it does not cover *outdoor facilities* like parking lots, maintenance and transportation yards, and facilities like Camp KEEP.

C. Exemption of CCW License Holders from Firearms Prohibitions.

It is also important to note that both the Gun Free School Zone Act and Section 171b expressly do not apply to CCW license holders: persons holding a valid license to carry a firearm issued pursuant to Penal Code section 12050 et seq. (Penal Code sections 626.9(c)(4); 171b(b)(4)). Thus, it is not a crime under these statutes for an employee or

nonemployee with a valid CCW license to possess a loaded or concealed firearm at a K-12 school, county office of education, district office, or other administrative facility.

D. Attorney General Opinion as Authority for Policy Prohibiting Non-Peace Officers from Possessing Firearms at Any County Office of Education or District Work Place, Even If the Individual Has a Valid CCW License.

In 1998, the California Attorney General (“AG”) issued an opinion which concluded that the Director of Toxic Substances Control may prohibit a non-peace officer employee from carrying a firearm while at work, including an employee who has a valid license to carry a firearm (81 Op. Atty Gen. Cal. 63); (Exhibit 3).

In its analysis, the AG first noted the Director’s broad statutory power to regulate the conduct of the department’s employees. The AG then analyzed statutes which provide that CCW license holders are exempt from criminal prosecution for possessing a firearm in a school zone¹; bringing or possessing a firearm within any state or local public building²; carrying a concealed weapon³; or carrying a loaded firearm in a public place⁴.

The threshold question considered by the AG was whether the legislative exemption of CCW license holders from criminal prosecution limited the Director’s authority over his employees. The AG concluded that nothing in the CCW criminal prosecution exemption statutes limited the Director from prohibiting an employee from carrying a firearm while at work, even if the employee had a license to carry the firearm.

As in the case analyzed by the AG, school district governing boards and county superintendents of schools have broad statutory powers to discipline or dismiss employees for cause, and to regulate the safety of school sites and work sites, including the right to exclude parents or other citizens who disrupt the educational environment or interfere with the peace or safety of a school campus (Education Code sections 44811, 44810, Penal Code sections 626.6, 626.7). Relying on the authority of the AG opinion, our office, in an attempt to address the uncertainties in the penal statutes, has issued a model policy that prohibits employees and nonemployees, except authorized law enforcement personnel, from possessing firearms in any work place of a county office of education or K-12 school district (Exhibit 4).

¹ Penal Code section 626.9(l).

² Penal Code section 171b(b)(3).

³ Penal Code sections 12025, 12027(j).

⁴ Penal Code section 12031(b)(6).

Exhibits:

Penal Code section 626.9

Penal Code section 171b

81 Ops.Cal.Atty.Gen. 63

KCSOS Firearms Prohibition Policy

CALIFORNIA PENAL CODE

§ 171b. Possessing weapon in state or local public building or public open meeting

(a) Any person who brings or possesses within any state or local public building or at any meeting required to be open to the public pursuant to Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of, or Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of, the Government Code, any of the following is guilty of a public offense punishable by imprisonment in a county jail for not more than one year, or in the state prison:

(1) Any firearm.

(2) Any deadly weapon described in Section 653k or 12020.

(3) Any knife with a blade length in excess of four inches, the blade of which is fixed or is capable of being fixed in an unguarded position by the use of one or two hands.

(4) Any unauthorized tear gas weapon.

(5) Any taser or stun gun, as defined in Section 244.5.

(6) Any instrument that expels a metallic projectile, such as a BB or pellet, through the force of air pressure, CO₂ pressure, or spring action, or any spot marker gun or paint gun.

(b) Subdivision (a) shall not apply to, or affect, any of the following:

(1) A person who possesses weapons in, or transports weapons into, a court of law to be used as evidence.

(2)

(A) A duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, a retired peace officer with authorization to carry concealed weapons as described in subdivision (a) of Section 12027, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, or any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer.

(B) Notwithstanding subparagraph (A), subdivision (a) shall apply to any person who brings or possesses any weapon specified therein within any courtroom if he or she is a party to an action pending before the court.

(3) A person holding a valid license to carry the firearm pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4.

(4) A person who has permission to possess that weapon granted in writing by a duly authorized official who is in charge of the security of the state or local government building.

(5) A person who lawfully resides in, lawfully owns, or is in lawful possession of, that building with respect to those portions of the building that are not owned or leased by the state or local government.

(6) A person licensed or registered in accordance with, and acting within the course and scope of, Chapter 11.5 (commencing with Section 7512) or Chapter 11.6 (commencing with Section 7590) of Division 3 of the Business and Professions Code who has been hired by the owner or manager of the building if the person has permission pursuant to paragraph (5).

(7)

(A) A person who, for the purpose of sale or trade, brings any weapon that may otherwise be lawfully transferred, into a gun show conducted pursuant to Sections 12071.1 and 12071.4.

(B) A person who, for purposes of an authorized public exhibition, brings any weapon that may otherwise be lawfully possessed, into a gun show conducted pursuant to Sections 12071.1 and 12071.4.

(c) As used in this section, "state or local public building" means a building that meets all of the following criteria:

(1) It is a building or part of a building owned or leased by the state or local government, if state or local public employees are regularly present for the purposes of performing their official duties. A state or local public building includes, but is not limited to, a building that contains a courtroom.

(2) It is not a building or facility, or a part thereof, that is referred to in Section 171c, 171d, 626.9, 626.95,

or 626.10 of this code, or in Section 18544 of the Elections Code.

(3) It is a building not regularly used, and not intended to be used, by state or local employees as a place of residence.

§ 626.9. Possession of firearm in school zone or on grounds of public or private university or college; Exceptions

(a) This section shall be known, and may be cited, as the Gun-Free School Zone Act of 1995.

(b) Any person who possesses a firearm in a place that the person knows, or reasonably should know, is a school zone, as defined in paragraph (1) of subdivision (e), unless it is with the written permission of the school district superintendent, his or her designee, or equivalent school authority, shall be punished as specified in subdivision (f).

(c) Subdivision (b) does not apply to the possession of a firearm under any of the following circumstances:

(1) Within a place of residence or place of business or on private property, if the place of residence, place of business, or private property is not part of the school grounds and the possession of the firearm is otherwise lawful.

(2) When the firearm is an unloaded pistol, revolver, or other firearm capable of being concealed on the person and is in a locked container or within the locked trunk of a motor vehicle.

This section does not prohibit or limit the otherwise lawful transportation of any other firearm, other than a pistol, revolver, or other firearm capable of being concealed on the person, in accordance with state law.

(3) When the person possessing the firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. Upon a trial for violating subdivision (b), the trier of a fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

(4) When the person is exempt from the prohibition against carrying a concealed firearm pursuant to subdivision (b), (d), (e), or (h) of Section 12027.

(d) Except as provided in subdivision (b), it shall be unlawful for any person, with reckless disregard for the safety of another, to discharge, or attempt to discharge, a firearm in a school zone, as defined in paragraph (1) of subdivision (e).

The prohibition contained in this subdivision does not apply to the discharge of a firearm to the extent that the conditions of paragraph (1) of subdivision (c) are satisfied.

(e) As used in this section, the following definitions shall apply:

(1) "School zone" means an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school.

(2) "Firearm" has the same meaning as that term is given in Section 12001.

(3) "Locked container" has the same meaning as that term is given in subdivision (c) of Section 12026.1.

(4) "Concealed firearm" has the same meaning as that term is given in Sections 12025 and 12026.1.

(f)

(1) Any person who violates subdivision (b) by possessing a firearm in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, shall be punished by imprisonment in the state prison for two, three, or five years.

(2) Any person who violates subdivision (b) by possessing a firearm within a distance of 1,000 feet from the grounds of a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, shall be punished as follows:

(A) By imprisonment in the state prison for two, three, or five years, if any of the following circumstances apply:

(i) If the person previously has been convicted of any felony, or of any crime made punishable by Chapter 1 (commencing with Section 12000) of Title 2 of Part

4.

(ii) If the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

(iii) If the firearm is any pistol, revolver, or other firearm capable of being concealed upon the person and the offense is punished as a felony pursuant to Section 12025.

(B) By imprisonment in a county jail for not more than one year or by imprisonment in the state prison for two, three, or five years, in all cases other than those specified in subparagraph (A).

(3) Any person who violates subdivision (d) shall be punished by imprisonment in the state prison for three, five, or seven years.

(g)

(1) Every person convicted under this section for a misdemeanor violation of subdivision (b) who has been convicted previously of a misdemeanor offense enumerated in Section 12001.6 shall be punished by imprisonment in a county jail for not less than three months, or if probation is granted or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(2) Every person convicted under this section of a felony violation of subdivision (b) or (d) who has been convicted previously of a misdemeanor offense enumerated in Section 12001.6, if probation is granted or if the execution of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(3) Every person convicted under this section for a felony violation of subdivision (b) or (d) who has been convicted previously of any felony, or of any crime made punishable by Chapter 1 (commencing with Section 12000) of Title 2 of Part 4, if probation is granted or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(4) The court shall apply the three-month minimum sentence specified in this subdivision, except in unusual cases where the interests of justice would best be served by granting probation or suspending

the execution or imposition of sentence without the minimum imprisonment required in this subdivision or by granting probation or suspending the execution or imposition of sentence with conditions other than those set forth in this subdivision, in which case the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by this disposition.

(h) Notwithstanding Section 12026, any person who brings or possesses a loaded firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property, unless it is with the written permission of the university or college president, his or her designee, or equivalent university or college authority, shall be punished by imprisonment in the state prison for two, three, or four years. Notwithstanding subdivision (k), a university or college shall post a prominent notice at primary entrances on noncontiguous property stating that firearms are prohibited on that property pursuant to this subdivision.

(i) Notwithstanding Section 12026, any person who brings or possesses a firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property, unless it is with the written permission of the university or college president, his or her designee, or equivalent university or college authority, shall be punished by imprisonment in the state prison for one, two, or three years. Notwithstanding subdivision (k), a university or college shall post a prominent notice at primary entrances on noncontiguous property stating that firearms are prohibited on that property pursuant to this subdivision.

(j) For purposes of this section, a firearm shall be deemed to be loaded when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm. A muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

(k) This section does not require that notice be posted regarding the proscribed conduct.

(l) This section does not apply to a duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer, a member of the military forces of this state or of the United States who is engaged in the performance of his or her duties, a person holding a valid license to carry the firearm pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4, or an armored vehicle guard, engaged in the performance of his or her duties, as defined in subdivision (e) of Section 7521 of the Business and

Professions Code.

(m) This section does not apply to a security guard authorized to carry a loaded firearm pursuant to Section 12031.

(n) This section does not apply to an existing shooting range at a public or private school or university or college campus.

(o) This section does not apply to an honorably retired peace officer authorized to carry a concealed or loaded firearm pursuant to subdivision (a) or (i) of Section 12027 or paragraph (1) or (8) of subdivision (b) of Section 12031.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Opinion No. 97-816

1998 Cal. AG LEXIS 27; 81 Ops. Cal. Atty. Gen. 63

February 13, 1998

QUESTION:

THE DEPARTMENT OF TOXIC SUBSTANCES CONTROL has requested an opinion on the following question:

May the Director of Toxic Substances Control prohibit a non-peace officer employee from carrying a firearm while at work, including an employee who has a license to carry a firearm?

OPINION BY: DANIEL E. LUNGREN, Attorney General; Anthony Da Vigo, Deputy

OPINION:

CONCLUSION

The Director of Toxic Substances Control may prohibit a non-peace officer employee from carrying a firearm while at work, including an employee who has a license to carry a firearm.

ANALYSIS

The Department of Toxic Substances Control ("Department") is a part of the California Environmental Protection Agency (Health & Saf., Code § 58000) n1 and is under the control of the Director of Toxic Substances Control ("Director"). Section 58002 provides in part:

"The Department of Toxic Substances Control is under the control of an executive officer known as the Director of Toxic Substances Control, who shall be appointed by the Governor, subject to confirmation by the Senate, and hold office at the pleasure of the Governor."

In order to accomplish the purposes of the Department, the Director has all of the powers of a head of a department, including the power to appoint officers and employees, who unless expressly excepted are members of the state civil service. (§§ 58003, 58006, 58008.)

n1 All section references prior to footnote 2 are to the Health and Safety Code unless otherwise expressly designated.

The inquiry presented for resolution is whether

the Director may prohibit a non-peace officer employee from carrying a firearm while on duty, including an employee who has a license to carry a firearm. We conclude that he may do so.

Preliminarily, we note that an officer of the state has only such powers as have been conferred by law, expressly or by necessary implication. (75 Ops.Cal.Atty.Gen. 1, 5 (1992) [Secretary of State]; 69 Ops.Cal.Atty.Gen. 168, 183-184 (1986) [Director of Fish and Game]; 67 Ops.Cal.Atty.Gen. 325, 330 (1984) [Director of Industrial Relations]; 65 Ops.Cal.Atty.Gen. 467, 468 (1982) [Governor]; 63 Ops.Cal.Atty.Gen. 840, 841 (1980) [State Treasurer].)

As the head of the Department, the Director controls the actions of Department employees since the Department has no other means of functioning. (See, e.g., Gov. Code, §§ 19990 [Director may determine those activities which, for employees under his jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees], 19570, 19572, 19574 [Director may dismiss, demote, or suspend an employee for designated causes, including willful disobedience or any other failure of good behavior either during or outside of duty hours that is of such a nature that it causes discredit to the appointing authority or the person's employment].) In different contexts, the Legislature has defined the term "employee" as ". . .

. a public officer and any individual who performs services subject to the right of the employer to control both what shall be done and how it shall be done." (Code Civ. Proc., § 706.011, subd. (c); see 75 Ops.Cal.Atty.Gen. 149, 151 (1992).)

We entertain no doubt that the Director is fully authorized to regulate the conduct and comportment of the Department's employees. (See also Gov. Code, § 11152; *Gilmore v. State Personnel Board* (1958) 161 Cal.App.2d 439, 448; 39 Ops.Cal.Atty.Gen. 261, 264 (1962); 36 Ops.Cal.Atty.Gen. 43, 44 (1960).)

A. License To Carry a Firearm

The present inquiry refers specifically to a Department employee who is licensed to carry a firearm. Do the statutes under which licenses are granted contain a limitation upon the Director's authority to prohibit his employees from carrying firearms while on duty? Penal Code section 12050 n2 provides in part as follows:

"(a)(1) The sheriff of a county or the chief or other head of a municipal police department of any city or county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person" n3

Having a license issued pursuant to section 12050 exempts the individual from criminal prosecution for carrying a concealed weapon or loaded firearm. (See 80 Ops.Cal.Atty.Gen. 100 (1997).) Subdivision (a) of section 12025 provides in part as follows:

"A person is guilty of carrying a concealed firearm when he or she does any of the following:

"(1) Carries concealed within any vehicle . . . any . . . firearm capable of being concealed upon the person.

"(2) Carries concealed upon his or her person any . . . firearm capable of being concealed upon the person."

Subdivision (j) of section 12027 exempts from the section 12025 prohibition any person who has a license issued pursuant to section 12050. Similarly,

section 12031 states:

"(a)(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

". . . .

"(b) Subdivision (a) shall not apply to any of the following:

". . . .

"(6) The carrying of pistols, revolvers, or other firearms capable of being concealed upon the person by persons who are authorized to carry those weapons pursuant to . . . Section 12050

". . . ."

More specifically, section 171b provides in part as follows:

"(a) Any person who brings or possesses within any state or local public building . . . any of the following is guilty of a public offense punishable by imprisonment in a county jail for not more than one year, or in the state prison:

"(1) Any firearm.

". . . .

"(b) Subdivision (a) shall not apply to, or affect, any of the following:

". . . .

"(3) A person holding a valid license to carry the firearm pursuant to . . . Section 12050"

n2 All section references hereafter are to the Penal Code unless otherwise expressly designated.

n3 We reject the suggestion that a Department employee is exempt from the necessity of licensure by virtue of section 12026, subdivision (b), which states:

"No permit or license to . . . carry, either openly or concealed, shall be required of any citizen . . . to . . . carry, either openly or concealed, a . . . firearm capable of being concealed upon the person within the citizen's . . . place of residence, place of business, or on private property owned or lawfully possessed by the citizen . . ." (Italics added.)

. . .
". . . .
"The policy of the State of California in the matter of its employees is reflected in its constitution and in a comprehensive system of laws pertaining specifically to state employment. [Citation.] Such an integral, comprehensive regulatory scheme is, in itself, an indication that the provisions of a general statute were not intended to apply. [Citation.]"

An employee's workplace is generally not his "place of business" within the meaning of section 12026. (*People v. Barela* (1991) 234 Cal.App.3d Supp. 15, 20 [only employees with a possessory interest in their workplace "who have the right to control activities there, may carry concealed weapons at work without a permit or license"].).

As section 12050 makes no express reference to the carrying of firearms by public employees while on duty, and since a construction that would secure such a right would impair the state's power to regulate such conduct by its employees, the statute may not be so construed. (Cf. *Regents of the University of California v. Superior Court* (1976) 17 Cal.3d 533, 536; *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 276-277; 66 Ops.Cal.Atty.Gen. 217, 218 (1983); 65 Ops.Cal.Atty.Gen. 267, 272-273 (1982).)

While a license exempts the holder from criminal prosecution under sections 12025, 12031, and 171b, it does not purport to exempt the holder from reasonable restrictions imposed by lawful civil authority. In 80 Ops.Cal.Atty.Gen. 191 (1997), for example, we concluded that the presiding judges of the superior court and municipal court could not prohibit the possession of firearms by deputy district attorneys going to and from their offices located in a criminal justice facility that included courtrooms, where the deputies were licensed to carry such firearms and would not be carrying the firearm on any floor of the facility containing a courtroom. In effect, we observed that while the judges could control their own courtroom floors regardless of the licenses held by the deputies (*id.*, at pp. 194-195), it would be the district attorney who would have control over the offices of the deputies, again regardless of their individual licenses to carry firearms. Moreover, in 63 Ops.Cal.Atty.Gen. 24, 27-28 (1980), we noted in a different context:

Nothing in the statutes governing the issuance of licenses to carry weapons precludes the Director from prohibiting his employees from carrying firearms while on duty.

B. Constitutional Considerations

Having concluded that a Department employee may not assert a statutory right to carry a firearm while at work, we next consider whether any constitutional right may be asserted to overcome the Director's prohibition.

1. Property Interest

In *Erdelyi v. O'Brien* (9th Cir. 1982) 680 F.2d 61, the court held that an individual did not have a property or liberty interest in obtaining a license to carry a concealed weapon in California. The court stated in part:

"It is manifest that the relationship between a public employer and its employees affects the fundamental purposes and functions of the governmental body. [Citations.] It has been stated in this regard that governments perform their functions through their officers and employees elected or appointed for that purpose.

"Property interests protected by the Due Process Clause of the Fourteenth Amendment do not arise whenever a person has only 'an abstract need or desire for,' or 'unilateral expectation of,' a benefit. [Citation.] Rather, they arise from 'legitimate claim[s] of entitlement . . . defined by existing rules or understandings that stem from an independent source such as state law.' [Citations.]

"Concealed weapons are closely regulated by the State of California. See Dangerous Weapons Control Law, Cal. Penal Code §§ 12000-12094. Whether the statute creates a property interest in concealed weapons licenses depends 'largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [issuing authority] to deny licenses to applicants who claim to meet the minimum eligibility requirements.' [Citation.] Section 12050 explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements. Where state law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, initial applicants do not have a property right in such licenses protected by the Fourteenth Amendment. [Citation.] Erdelyi therefore did not have a property interest in a concealed weapons license." (*Id.*, at p. 63.)

In discussing the concept of liberty within the purview of the constitutional due process clause, the court noted that the concept includes the right to be free from actions that impose a stigma or other disability that would foreclose one's freedom to take advantage of employment opportunities. (*Ibid.*; see also *Soderback v. Siler* (9th Cir. 1979) 610 F.2d 643, 646.) Here, the prohibition against carrying a concealed firearm would not effectively preclude employment with the Department. On the contrary, employees of the Department have been and are functioning effectively without firearms in their possession. Nor would the prohibition be based upon some charge to which would be attached a stigma impairing other employment opportunities.

O'Brien, as noted above, involved an application for a concealed weapons license. The principle that there is no property or liberty interest in a gun license applies as well to an acquired permit. In *Gross v. Norton* (8th Cir. 1997) 120 F.3d 877, an assistant city attorney named Gross contended that the city deprived him of a property or liberty interest in violation of due process by adopting and enforcing a policy prohibiting city employees other than police officers from carrying dangerous weapons at work. "Because local authorities have broad statutory

discretion to withhold a permit to carry a pistol in public [citation], Gross has no constitutionally protected property interest in his permit under Minnesota law." (*Id.*, at p. 878.) Similarly, here, a Department employee may not assert a constitutionally protected property interest in carrying a firearm while on duty by virtue of possessing a license.

2. Right To Bear Arms

A constitutionally protected interest in liberty or property may also stem from a constitutional source. The Second Amendment to the Constitution of the United States provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *United States v. Miller* (1939) 307 U.S. 174, the United States Supreme Court sustained a conviction under the National Firearms Act for interstate transportation of a sawed-off shotgun. It was contended that the possession of the weapon was authorized by the Second Amendment. The court rejected the argument, stating:

"In the absence of any evidence tending to show that the possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." (*Id.*, at p. 178.)

The rule resulting from *Miller* is that "absent a showing that the possession of a certain weapon has 'some reasonable relationship to the preservation or efficiency of a well-regulated militia,' the Second Amendment does not guarantee the right to possess the weapon." (*United States v. Hale* (8th Cir. 1992) 978 F.2d 1016, 1019; see also *Cases v. United States* (1st Cir. 1942) 131 F.2d 916, 922, cert. den. 319 U.S. 770 (1943).) Here, the possession by employees of the Department of firearms is not reasonably related to a well-regulated militia. (See *United States v. Hale*, *supra*, 978 F.2d at 1020.) The Second Amendment thus provides no impediment to the Director's proposed prohibition.

3. Substantive Due Process

It is well established, as a matter of substantive due process, that no person may be denied government employment because of factors unconnected with the responsibilities of that employment. (*Pickering v. Board of Education* (1968) 391 U.S. 563, 572; *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 234; 77 Ops.Cal.Atty.Gen. 1, 2 (1994) [race, ethnicity, gender]; 66 Ops.Cal.Atty.Gen. 486, 487 (1983) [sexual orientation]; 66 Ops.Cal.Atty.Gen. 367, 370 (1983) [outside employment]; 64 Ops.Cal.Atty.Gen. 837, 842 (1981) [physical fitness]; 63 Ops.Cal.Atty.Gen. 583, 586 (1980) [sexual preference]; 62 Ops.Cal.Atty.Gen. 180, 181-182 (1979) [physical disability].)

The prohibition against the carrying of firearms by employees of the Department while on duty has a rational basis in the Director's legitimate interest in preserving public safety during the course of employee interaction with members of the public, as well as safety in the workplace. (See *Gross v. Norton*, supra, 120 F.3d at 879; *Love v. Peppersack* (4th Cir. 1995) 47 F.3d 120, 123; *Baer v. City of Wauwatosa* (7th Cir. 1983) 716 F.2d 1117, 1123.) Hence, no denial of substantive due process may be asserted here by a Department employee.

C. Restrictions Upon Peace Officer Employees

Finally, we note that a contrary result would be

incongruous vis-a-vis employees of the Department who are peace officers. Section 830.3 provides in pertinent part:

"The following persons are peace officers . . . for the purpose of performing their primary duty These peace officers may carry firearms only if authorized and under those terms and conditions as specified by their employing agencies:

". . . .

"(h) All investigators of . . . the Department of Toxic Substances Control . . . provided that the primary duty of these peace officers shall be the enforcement of the law relating to the duties of his or her department" (Italics added.)

Consequently, even an employee of the Department who is a peace officer may not carry a firearm while on duty unless expressly authorized by the Director. It would be irrational to suggest that a state agency has less authority over its non-peace officer employees than over its peace officer employees with respect to the carrying of firearms while on duty.

It is concluded that the Director may prohibit a non-peace officer employee from carrying a firearm while at work, including an employee who has a license to carry a firearm.