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LEGAL CONSTRAINTS IMPOSED ON SECURITY FORCE PERSONNEL*

by

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This paper is a discussion about legal constraints imposed on security force persons. The general thrust of this paper is to try to dispel some of the commonly held misconceptions as to why security can not do their job because of "legal problems." Because the law deals with so many variables the discussion will be general in nature. The only time a discussion of this nature can be specific is when there are specific facts to be considered.

Legal problems or constraints occur when security persons do their job. This raises the question: What is the primary function of the security force at a nuclear facility? It is hard to remember when you are up to your armpits in alligators that your job is to drain the swamp. In a similar fashion it is hard for security force persons to remember in the face of constant daily problems that the primary purpose that caused them to be there in the first place and continues to keep them there, is that they are to protect life and property, and more specifically from NRC's viewpoint, prevent sabotage. Let's list some of the security activities that may conflict with the desires and activities of nonsecurity persons and consequently cause legal constraints to be imposed on security choices.

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Security persons run into this conflict when they are engaged in:

1. Arrest
2. Stop
3. Detain
4. Frisk
5. Search
6. Background preemployment check
7. Fitness for duty checks
8. Preserve the peace (stop fights, gambling, etc. in parking lot)
9. Prevent crimes
   - Violent crimes: sabotage, arson, assault with deadly weapon
   - Petty crimes: trespass
10. Federal civil rights violation 42 USC 1983

The general rules or threads of legal constraint that run throughout this list are that the security person must;

- Act reasonably and not in a negligent manner, and
- Realize that if a mistake is made the usual remedy is money.

Why are we interested in this area if all we have to worry about is the paying of a fine by management? The principle concern is that security people may hesitate to protect lives and property because they regard inaction as legally safer than action. In a sense, security is right. However, based on the premise that most people want to do their job and do it right, this can be corrected by spending at least as much time training people about when to arrest, as is spent on how to arrest; spending as much time on when to shoot, as how to shoot; spending as much time on when to search, as how to search.

The obvious solution is a lawyer in every locker room.

Let us pursue this theme of conflict between your security action and the desire and actions of others.

There is a famous saying which you may have heard, it goes like this "your right to swing your fist ends where my noise begins!!"

Your right to stop an employee and to inquire about his private affairs ends where his right to privacy begins. But you say, I am protecting a nuclear power plant and the importance of preventing sabotage and theft make this person's desire and need for privacy look pretty silly. However persuasive that argument is we still have to deal with the legal system as it currently exists; so let's look at the system again.

Where does the nuclear security person fit into this legal, criminal and constitutional system? First let us assume that the security person is a private person with no statutory peace officer or police officer status.

What does this mean and is it bad?

First, it is not bad and it means very simply that a nuclear security person cannot make a reasonable mistake and get away with it like a policeman can.

It means that you cannot recite the definition of probable cause like a policeman can and without threat of a law suit say, sorry I made a mistake when I arrested you. The court then punishes the policeman by refusing to admit evidence or punishing the bad guy. So when does this difference become important? Usually this difference is most important in arrest and use of deadly force to make an arrest.

Does this mean you can rely upon a good faith defense like the Supreme Court and other courts are now considering? No, it does not.

It means that when you make an arrest or use deadly force to make an arrest you must be right about 1) believing there was a crime committed, and 2) that this arrested person committed the crime.

Does this mean that the private person's arrest doesn't work? Certainly not. The law books are full of cases where FBI agents make citizen's arrests for violations of state crimes. Police officers do it outside their jurisdictions, store owners do it every day; store detectives do it every day; private security does it all over the country.

Let's assume that you made an arrest and you made a mistake and the party sues you for false arrest. What does he want in his suit? Can he put you in jail? Since this is not a criminal matter, he can't put you in jail; he can only ask for money. False arrest or false imprisonment, as lawyers call it, is a civil matter. A suit for money would be against the security person, his supervision, the utility and everyone else that the arrested person's lawyer could connect with the event. There is the doctrine that lawyers call the deep pocket. You must be sure to name and sue the person with the money (the deep pocket). In this case the utility has the deep pocket. If a suit is won by the arrested person, the judge will probably say that the named persons are jointly or severally liable. This means that the winner can collect the judgment award from any one person or from the several persons. If you have a clause in your contract with the utility, as you should have, which says that the utility will provide legal representation and pay all fines or judgements which you reasonably incur during the scope and course of your employment, then don't worry, the management will pay the judgement and cost of lawyers.

This area becomes a problem depending on whether you are management or a security person and whether you regard paying occasional judgements as part of the cost of doing business and providing security.

Keep in mind that we are talking about reasonable conduct under the circumstances as they seem at the time and not negligent, thoughtless horseplay or a total disregard of basic common law.

What if you stop a person to make inquiries and you detain him too long? The result of a detention that is too long is, that it turns into an arrest and the same argument used earlier regarding an arrest can now be used here.

What if during the stop you are given reason to believe that the pe on has a weapon concealed on his person and you give him a frisk?

You are entitled to frisk a person anytime you have a reasonable basis to fear for your safety. A suspicious bulge would be grounds for a frisk. A frisk is only an exterior patdown, not a reaching into the pockets or an intrusive search. What happens if you discover some contraband or a weapon and the jury determines that you did not have a justifiable basis for a frisk? The result is a civil award of money damages based on several legal theories and if you found contraband, you couldn't use it as evidence.

I hope I have made a good case for the argument that the penalty for most mistakes made by security is the payment of money by the utility.

There are a few crimes which can be committed by the security person while he is doing his job. These are criminal assault (there is a civil version), battery (there is a civil version), and manslaughter. You have to look at the specific state statutes to define each of these criminal acts. But, in general, there must have been a criminal intent, or a guilty mind as it is called, for a

crime to be committed. This is why I said at the beginning that your greatest protection is to act reasonably and not in a negligent or outrageous manner.

Let's talk about criminal charges about which security officers worry. Most criminal charges arise out of the use of force. Force can cause a charge of criminal assault, (we talked about civil assault before), or a charge of manslaughter.

These charges are avoided if the security officer uses only that minimum force necessary under the circumstances to overcome the force used by the person to be arrested. Force is, or at least should be, used only in conjunction with making an arrest or defending yourself.

Before we go on to some remarks about search and seizure, let me summarize this section. We have said that most of the law suits which can be brought against the security person are civil in nature and can be satisfied by paying money. Furthermore, most of these situations can be avoided by the security person acting reasonably and not in a negligent manner. He or she must not be an aggressor and may use only that minimum force necessary to overcome the force used by the person being arrested.

Let us discuss search and seizure law. Many security people seem frozen into inaction because they are afraid that they will violate the law by making a search. Let's look at what might happen in the case where you make a so-called unlawful search.

The first thing that happens is that any evidence, contraband or material discovered by an improper search cannot be used as evidence to convict the person involved. Is lack of conviction bad? Police departments think it is bad, however, I maintain and U.S. DOE agrees that persons who are charged with preventing nuclear sabotage and theft of SNM have done their jobs when sabotage

and theft are prevented. Conviction, however desirable, should be secondary to the mission of protection. The lesson here is that it is better to search and not get a conviction than it is not to search.

What else can happen if you conduct an improper search? At worst, you will get a law suit for money damages for invasion of privacy, or battery. Battery is, as you know, a civil offense which is an offensive touching of the person of another.

The IVth Amendment of the Constitution enacted in 1791 says, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Even though the Constitution says that no searches are to be made without a search warrant. The Supreme Court has said there are many instances when a search can be made without a warrant and that you, as a private person, may make a search without a search warrant, 1) when it is incident to a valid arrest, 2) in searching a car under certain conditions, and 3) in seizing evidence in plain view.

Let me tell you something which you may find unbelievable and then qualify it several times. First, the constitutional requirement of a search warrant and the Supreme Court requirement of Miranda warnings do not apply to private persons who are not police officers. The qualification of this statement is that you, in some cases, may be regarded as agents of the state or the Feds and will for purposes of the IVth amendment be treated as police officers by the courts.

Let me give you the bottom line. If you don't want to use the fruits of your search as evidence in court then you can search to your heart's content

as long as you don't violate the (civil) reasonable expectation of privacy of the person searched.

The history of the constitutional proscription against unreasonable search and seizure is as follows:

Prior to 1949, the Supreme Court thought that the Fourth Amendment applied only to federal police officers and not to searches made by state or city police officers or citizens.

In 1949, in Wolf v. Colorado, the Supreme Court made the search restrictions applicable to state or city police but not to citizens. However, it was not until 1961 in Mapp v. Ohio that the Supreme Court developed the exclusionary rule to prevent evidence obtained in violation of the Fourth Amendment to be excluded from being used in court. This exclusionary rule is a principle developed from the Fourth Amendment addressed to government and not to private persons.

What does all this mean and are you as security persons private persons? A number of cases say that when a private person is enforcing laws in an industry which is pervasively regulated and controlled by government, he will be regarded as a state agent and will be required to observe all constitutional guidelines. This means that you probably are state agents for IVth Amendment search and seizure limitations if you want a conviction. There are no cases yet which say that you are state agents. The catch is, what happens if you don't observe these requirements? Basically nothing happens except that you can't obtain a conviction.

If your primary function as security person is to prevent sabotage and theft, then getting a conviction would be less important than providing protec-

tion. Now I didn't say getting a conviction was unimportant; I said it was less important than preventing sabotage.

All this means is that your hands are not tied when it comes to searching. If you make a search in violation of the constitution and you fail to give Miranda warnings and you are consequently found to be a state agent, you will lose the use of the evidence in court and you will not get a conviction, however you will have protected the facility. If you are found to be a private person you may even get a conviction because the court will recognize that you did not have to follow the constitutional guidelines set up for the state, city and federal officers.

The purpose of this discussion was to try to illustrate that knowledge of the law obtained by training can make your job easier and remove some of the so-called legal constraints to security. Most of the constraints are a legalist way of saying you must act reasonably and that the end does not justify the means.

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