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WEAPONS—NO SPECIFIC OR IMPLIED AUTHORITY IN STATUTES TO AUTHORIZE PAROLE OFFICER TO CARRY CONCEALED WEAPONS—DEPARTMENT OF PUBLIC WELFARE—PERFORMANCE OF DUTIES.

## SYLLABUS:

There is no specific or implied authority in the statutes authorizing a parole officer in the Department of Public Welfare in the performance of his duties to carry concealed weapons.

Columbus, Ohio, August 26, 1949

Hon. J. H. Lamneck, Director  
Department of Public Welfare  
Columbus, Ohio

Dear Sir:

I have your request for my opinion, which reads as follows:

“Section 12819 of the General Code defines the offense of carrying concealed weapons and assesses the penalty. We quote this section and also references to Opinions of the Attorney General which may have a bearing on the question on which we respectfully request your opinion.

'Section 12819. *Carrying of Concealed Weapons Prohibited; Penalty.* Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act (G. C. §12819) shall not affect the right of sheriffs regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed when on duty. Provided further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond.'

'Probation officers appointed by a judge of the juvenile court authorized to appoint probation officers, may go armed, upon giving a bond under G. C. Section 12819.' 1929 O. A. G. No. 508

'Special policemen, duly appointed and qualified under the provisions of Sections 7925 and 7925-1, may lawfully carry concealed weapons while on duty, provided such appointees give bond in the sum of one thousand dollars, as required by provisions of Section 12819 of the General Code.' 1942 O. A. G. No. 4832

"On January 6, 1941 an order was issued by the Director of the Department of Public Welfare on this subject reading as follows:

'Each parole officer shall make his individual request for permit to carry firearms and should be implemented by letter from the Division of Probation and Parole approving such action, to assist them in securing permits. I believe that an admonitory letter should also go out with this approval, relative to the circumstances under which firearms might be used, to curb any unwarranted use of the same and to impress upon the officers that only in case of danger or peril to themselves should use be made of such weapons.'

"These parole officers are charged with the duty of supervising men on parole from penal and reformatory institutions and of apprehending parole violators and returning them to the

institutions. It is now considered that we need an opinion of the Attorney General on the right of parole officers of this department to carry firearms, and the procedure to be followed in their obtaining this right.

Query:

“May parole officers attached to the Bureau of Probation and Parole, Division of Corrections, Department of Public Welfare, carry firearms? If so, and a permit is required, how shall such permits be obtained?”

With reference to your quotations from Opinions of the Attorney General for 1929, No. 508, I wish to comment that the section of the Code in effect at that time, being Section 1663 of the General Code, with reference to a probation officer, reads in part as follows:

“\* \* \* He shall serve the warrants and other process of the court within or without the county, and in that respect is hereby clothed with the powers and authority of sheriffs. \* \* \*”

However, Section 1663 of the General Code was repealed and an analogous section, being Section 1639-19 of the General Code, was enacted and effective August 19, 1937, with the omission of the provision of Section 1663 above quoted, and there is a serious question in my mind whether, under the present provisions of Section 1639-19, the 1929 decision is now sound. However, since the question before the Attorney General at that time is not before me, it need not be considered here.

With reference to your quotation from Opinions of the Attorney General for 1942, No. 4832, the authority to carry weapons therein was acknowledged in Section 12819 of the General Code. That opinion was in regard to special policemen appointed under authority of Sections 7925 and 7925-1 of the General Code, which sections have been repealed effective September 16, 1943, approximately seven months after the opinion was written. Some statements in that opinion are very significant and are pertinent to the question now before me. Therefore, I wish to consider it here.

Section 7925, General Code, at that time read as follows:

“The board of trustees of Ohio, Miami, Ohio state, Bowling Green state, Kent state and Wilberforce universities, and the board of control of the Ohio agricultural experiment station are hereby authorized to designate one or more employes of the institution, as special policemen, and as such said employes shall

take an oath of office, wear the badge of office, and give bond to the state of Ohio for the proper and faithful discharge of their duties in such amount as the board of trustees may require.”

Section 7925-1, General Code, at that time read as follows :

“It shall be the duty of such officers to protect the property of such institution, suppress nuisances and disturbances and breaches of the peace, and enforce laws for the preservation of good order. Upon view or information they may arrest, without warrant, any person trespassing upon the grounds or destroying property of the institution, or violating a law of the state or violating a rule or regulation properly prescribed by the governing board of the institution, and particularly regulations regarding automobile or other traffic on the premises under the control of such governing board, and bring such person before the court of common pleas, or other local court of competent jurisdiction, or a magistrate within the county, to be dealt with according to law.”

It will be noted that the officers in question were specifically named special policemen, but were not authorized to carry arms or concealed weapons. They were not named police officers, regularly elected constables or special officers as referred to in Section 12819, *supra*. Sections 7925 and 7925-1 are not referred to in Section 12819.

In the 1942 opinion, *supra*, the then Attorney General stated in the body of said opinion, and I quote :

“While the type of special policemen authorized by Sections 7925 and 7925-1, *supra*, is not included in the specific exceptions enumerated in Section 12819, *supra*, viz., 2833, 4373, 10070, 10108 and 12857, you will note that Section 12819 expressly and specifically provides ‘that it shall be lawful for \* \* \* specially appointed police officers’ other than those referred to in the above enumerated sections, to go armed if they first give bond to the state of Ohio in the sum of one thousand dollars. This bond is, of course, additional to that required by the provisions of Section 7925, *supra*, which is a general official bond conditioned upon the proper and faithful performance of the duties of the position or office and not a bond especially pertaining to the carrying of concealed weapons.

“Certainly those institutional employes lawfully designated as special policemen are ‘specially appointed police officers,’ as that term is used in Section 12819. They are expressly so called in the statute. And they are required to take an oath of office, wear the badge of office, and give bond for the faithful discharge

of their duties. Moreover, they are broadly empowered in Section 7925-1 to suppress nuisances and disturbances and breaches of the peace, enforce laws for the preservation of good order, and upon view or information to arrest without a warrant any person trespassing upon the institutional grounds or destroying the property thereof or *violating a law of this state*. In addition, they are given peculiar powers with reference to regulations pertaining to traffic on the premises of the appointing authority.

“In the New Century Dictionary the word ‘police’ is defined as follows :

‘The regulation and control of a community, esp. with reference to the maintenance of public order, safety, health, morals, etc.; also, the department of the government concerned with this, esp. with the maintenance of order; also an organized civil force for maintaining order, preventing and detecting crime, and enforcing the laws; the members of such a force (construed as pl.); hence any body of men officially maintained or employed to keep order, enforce regulations, etc.; \* \* \*’

“In Vol. II, Hales Pleas of the Crown, p. 805 and 806, it is said that :

‘There are certain officers and ministers of public justice that, *virtute officii*, are empowered by law to arrest felons, or those that are suspected of felony; and that, before conviction, and also before indictment. \* \* \* The officers that I herein principally intend are (1) justices of the peace, (2) sheriffs, (3) coroners, (4) constables, (5) watchmen. And when I mention these I also include all that come in their aid and assistance; for every man in such cases is bound to be aiding and assisting these officers, upon their charge and summons in preserving the peace and apprehending of malefactors, especially felons.’

“In commenting upon this section, it was held in the case of Porter v. State, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N.S.) 730 (1905), the court quoting the above passage with approval, that the ‘term “policeman” has been held to be the legal equivalent of “watchman” at common law with respect to the power to arrest without warrant,’ citing with approval the case of The State v. Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669 (1900), in which the same conclusion was reached.

“While the above discussion has to do with the carrying of concealed weapons, that is, the type of weapon ordinarily carried by an officer of the law, it is noted that your request is concerned only with ‘firearms.’ In this connection it should be pointed out that there is nothing in the law of Ohio that prohibits or makes it a crime to carry a firearm in the open, that is, one that is not

concealed, except that by the terms of Section 12819-4, machine guns, light machine guns or sub-machine guns may only be owned, possessed, transported or carried by the officers named in such section and in accordance with the provisions thereof."

The Second Amendment to the Constitution of the United States reads as follows:

"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."

Article I, Section 4 of the Constitution of the State of Ohio reads as follows:

"The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."

From 41 O. Jur., Section 3, at pages 154 and 155, the following is quoted:

"This provision does not prevent the legislature from making such police regulations as may be necessary for the welfare of the public at large concerning the manner in which arms shall be borne. The constitutional right to bear arms is intended to guarantee to the people in support of just government such right and to afford the citizens means for defense of self and property. While this secures to a person a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised. If he wields arms which he ought to use for the safety and protection of his country, his person, and his property to the annoyance, terror, and danger of citizens, his act finds no vindication in the Bill of Rights. The guaranty is not intended as a warrant for vicious persons to carry weapons which terrorize others. A man may carry a gun for any lawful purpose, business, or amusement, but he cannot go about with that or any other dangerous weapon in order merely to terrify the people. The rule expressed by the maxim, 'every man's house is his castle,' does not prevent the statute from operating within an individual's home. The police power of the state cannot be thus stayed at the threshold of an individual's dwelling and be prevented from operation in the control of his conduct therein in the respect that such conduct affects, or may affect, the health and safety of the public at large. 'One of the objects of the law is the avoidance of bad influences which the wearing of a concealed deadly weapon may exert upon the wearer himself, and which in that way, as well as by the weapon's obscured con-

venience for use, may tend to the insecurity of other persons.' The maxim relates to the rights of an individual to defend his house against violence, and his person against death or great bodily harm in his house. If the circumstances and conditions are such as to justify carrying a weapon, the matter must be availed of as a defense under G. C. §13,448-4, which makes ample provision for the necessities of genuine self-defense."

The above quoted remarks are borne out by the decision in the case of *State of Ohio v. Nieto*, 101 O. S. 409.

The Legislature of Ohio, in its attempt to regulate the use of fire-arms, did however secure to the citizens their constitutional rights by enacting Section 13448-4 of the General Code, which reads as follows:

"Upon the trial of an indictment or information for carrying a concealed weapon, the jury shall acquit the defendant if it appear that he was at the time engaged in a lawful business, calling or employment, and that the circumstances in which he was placed justified a prudent man in carrying such weapon for the defense of his person, property or family."

The question as put forth in the last paragraph of your letter reads as follows:

"May parole officers attached to the Bureau of Probation and Parole, Division of Corrections, Department of Public Welfare, carry firearms? If so, and a permit is required, how shall such permits be obtained?"

If your question is interpreted literally, then your answer is contained in the section just above quoted.

Since such questions arise with reference to the carrying of concealed weapons, and since you refer to Section 12819 of the General Code, I will take the liberty to interpret your question as referring to concealed weapons within the purview of Section 12819 of the General Code, which reads as follows:

"Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected con-

stables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed when on duty provided further that it shall be lawful for deputy sheriffs and specially appointed police officers except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

Parole officers are in no manner referred to or within the contemplation of the Legislature in Sections 2833, 4373, 10070, 10108 and 12857 mentioned in the section just above quoted. The sections mentioned in Section 12819 refer to certain officers who may carry concealed weapons by giving bond.

The only source for authority for a person to carry concealed weapons in this state seems to me to be the Legislature. It is presumed that it gave thought to the various types of officers in the state when it enacted Section 12819. In that section the Legislature did not provide for parole officers to carry concealed weapons. As pointed out in 1942 Attorney General's opinion, above referred to, they may carry such weapons under the provisions of Section 13448-4, *supra*, but in doing so they exercise under no greater right or are they under any less obligation than any other citizen who may carry such weapons.

Section 2833, General Code, defines the powers and duties of the sheriff; Section 4373 refers to the mayor's powers to appoint additional patrolmen and officers for temporary service during an emergency; Section 10070 refers to officers of humane societies; Section 10108 refers to officers of a cemetery company or association and the appointment of night watchmen and Section 12857 refers to the power of a sheriff to deputize any person to assist him in carrying out his duties. All of the officers within the contemplation of Section 12819 are officers who are called upon to make arrests, seek and run down criminals and confine them. In other words, they are required to keep the peace regardless of the situation.

What are the duties of a parole officer who is involved in the question here? There is no specific definition of the duties set forth in the statutes,



but I call your attention to Section 2209-19 of the General Code which reads as follows :

“Persons conditionally pardoned or paroled shall be supervised by the commission and by the proper state parole and field officers and the purpose of such supervision shall be to require them to comply with the terms and conditions of their pardon or parole and to assist them to become law-abiding members of society.”

From such section I am not at all impressed that the parole officers' duties are to keep the peace, to detect and run down criminals or to perform such duties as may be required of officers within the scope of the provisions of Section 12819. As a matter of fact, it is my thought that an officer whose function is to supervise a parolee, whom proper authorities have decided is such a person fit to be returned to society, should not perform such supervision with a billy or knuckles in his pocket, or a pistol strapped to his shoulder. I can not conceive the wisdom of a method whereby an officer must be a small arsenal in order to rehabilitate one who it is hoped and expected will return to and be a peaceful and law-abiding citizen. I am unable to find any authority in the statutes where a parole officer specifically, or by implication, may carry concealed weapons. I believe I am further supported in this conclusion by the provisions of Section 2209-20, General Code, which is quoted in part as follows :

“\* \* \* For violation of the terms or conditions of a pardon or parole, any parole officer *may arrest* such violator, or, upon the written order of the commission or any parole officer having custody or charge of such violator, any sheriff, probation officer, constable or police officer *shall make the arrest*. A person so arrested may be confined in the jail or detention home of the county in which he is arrested, until released, re-paroled *or removed to the proper institution as provided by law*. \* \* \* The provisions of law governing the prosecution and transportation of convicts shall apply to the apprehension and return of violators.”  
(Emphasis added.)

Section 13455-6, General Code, provides for the transportation referred to in the section just quoted, and reads as follows :

“In transporting convicts to the penitentiary or reformatory, the sheriff may take one guard for every two convicts transported, if he deems it necessary, but the trial judge may authorize a

larger number upon written application of the sheriff, in which case a transcript of the order of said judge shall be certified by the clerk of the court under the seal thereof, and the sheriff shall deliver to the warden of the penitentiary or superintendent of such reformatory, with such convict. In order to reimburse the county for the expenses of transportation, the state shall pay the following fees: five cents a mile from the county seat to the state institution and return for the sheriff and each of the guards, and five cents a mile from the county seat to the state institution for each prisoner, the number of miles to be computed by the usual route of travel."

It will be noted that a parole officer *may* arrest a parolee, but he is not required to do so. That duty rests squarely on other officers specifically mentioned, and which officers shall transport such parolee when and if he is apprehended or arrested.

Therefore, in repetition, I am of the opinion that there is no specific or implied authority in the statutes authorizing a parole officer in the Department of Public Welfare in the performance of his duties to carry concealed weapons.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.