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**Employment Law Section – January, 2007**

## **Grooming and Appearance Rules for Public Safety Workers**

### **Part One - Hair Regulations**

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Americans that have visited Europe in the last decade may have noticed a soldier with a prominent nasal or lip piercing. They may have seen a male police officer wearing a long earring or ponytail haircut.

In the U.S., appearance regulations have been the subject of litigation. Management has attempted to justify such regulations on grounds of safety, esprit de corps, or public acceptance and perceptions of uniformity.

This is multipart article. Part One addresses hair regulations for the fire, police and correctional services.

Part Two examines tattoos, piercings, dental ornamentation, jewelry, and cosmetics. A third part looks at religious emblems, symbols and headwear.

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Hair grows on the head at around 1.25 cm. or 0.5 in. per month, and if not trimmed, it can become several feet long on both sexes. It also grows on the face of males, and can be groomed into long sideburns, beards and moustaches.

## 1. Safety concerns

### a. Fire service

Among the first to challenge hair length regulations were firefighters. Although the fire service is para militaristic in many ways, firefighters are thought of as more communal and less authoritarian than law enforcement personnel.

Firefighters must wear breathing apparatus because of toxic smoke and vapors that are produced by fires. A tight facial seal is required in most cases. Although some breathing apparatus functions with a loose seal, the oxygen supply period is substantially shortened and could result in loss of consciousness and death.

Because moustaches and beards can interfere with a tight facial seal, management prefers that firefighters be clean shaven.



Some firefighters have volunteered to waive death, disability and pension benefits because of their facial hair preferences.

First, such a waiver is contrary to public policy, and is therefore unenforceable.

Secondly, firefighters who suppress structural fires work in pairs, and are responsible for the safety of their partners. See N.F.P.A. Standard 1500. It unfair to expose a coworker to injury or death because he needs to extricate another firefighter who has succumbed to toxic fumes.

The American National Standards Institute (ANSI) is the nation's leading body on the subject of safety standards. ANSI Standard # Z88.5(7.5) and its predecessor provided that:

“Devices shall not be worn when physical conditions prevent a good face seal. Such conditions are a growth of beard, sideburns, unusual facial contours, a skull cap that projects under the face piece.”

Two landmark cases arose in the Philadelphia Fire Dept. in the early 1970s. In

both, the firefighters lost. In one of the trials, the named plaintiff disputed that hair burns and gave a personal demonstration. His hair caught on fire because he forgot that he used hairspray to fashion his appearance.

- [Black v. Rizzo](#), #72-1781, 360 F.Supp. 648 (E.D. Pa. 1973).
- [Michini v. Rizzo](#), #73-1995, 379 F.Supp. 837 (E.D. Pa. 1974).

The Philadelphia decisions also rejected a vagueness defense. Not only was the regulation detailed, but it contained six model photographs. See [P.F.D. Directive 13](#).

More recently, an appellate court overturned the termination of a D.C. firefighter who refused to remove a handlebar mustache and beard. Management could not ban beards but could require them to be short and neatly trimmed. [Kennedy v. Dist. of Columbia](#), 65 FEP Cases (BNA) 1615, 654 A.2d 847 (D.C. App. 1994).

In the private sector, an arbitrator upheld a ban on wearing beards and long mustaches by employees who must wear OSHA mandated breathing apparatus. [Dyno Nobel and O.C.&A.W. Local 5-713](#), 104 LA (BNA) 376 (Hilgert, 1995).

## **b. Law Enforcement and Corrections**

Unlike the fire service, historically there was little dependence on breathing apparatus by police and corrections officers. More recently, homeland security training has used breathing apparatus in WMD training exercises.

There were five coordinated sarin gas attacks in the Tokyo subway system in 1995, resulting in 12 deaths and hundreds of injuries. That was followed by two waves of letters containing deadly anthrax spores in 2001.

Long hair, ponytails or beards can be grabbed by arrestees and inmates. On the street, a hostile person can overpower an officer and take his or her firearm. In the jail, the officer can be taken hostage.

However, officers that wear beards or long hair for religious reasons often prevail in their lawsuits. See Sec. 4, below.

## **2. Appearance conformity**

More than 35 years ago, federal appeals courts in three circuits concluded that the wearing of long hair is not protected by the First Amendment. [Richards v. Thurston](#), 424 F.2d 1281 (1st Cir. 1970); [Freeman v. Flake](#), 448 F.2d 258 (10th Cir. 1971); [Karr v. Schmidt](#), 460 F.2d 609 (5th Cir. en banc 1972). The Fifth

Circuit also upheld military hair length regulations at an air force base. Doyle v. Koelbl, 434 F.2d 1014, 1970 U.S. App. Lexis 6196 (5th Cir.).

Then, in 1976, the U.S. Supreme Court upheld a “paramilitary” image of uniformed public employees, and found that hairstyle regulations do not violate the federal constitution. Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440 (1976). The court wrote:

“Choice of organization, dress, and equipment for law enforcement personnel is entitled to the same sort of presumption of legislative validity as are state choices to promote other aims within the cognizance of the State’s police power. Thus, the question is not whether the State can ‘establish’ a ‘genuine public need’ for the specific regulation, but whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county’s method of organizing its police force, and the promotion of safety of persons and property.”

### 3. Pseudofolliculitis barbae (PFB)

**Appearance regulations** will generally fail if the employee can demonstrate a medical reason why he should be excused from a no beards policy. Pseudofolliculitis barbae (PFB) is a condition, primarily affecting black men and others with curly hair that can grow back into the skin -- causing inflammation and keloidal scarring.



In Maryland, an appellate court ordered reinstatement and back pay for an officer who refused to shave; he suffered from PFB. Univ. of Maryland v. Boyd, 1992 Md.App. Lexis 231, 3 AD Cases (BNA) 1471, 93 Md.App. 303, 612 A.2d 305, 3 AD Cases 1471 (1992).

Similarly, an arbitrator found that a U.S. Border patrol officer with PFB was improperly denied permission to grow a beard; the grievant presented satisfactory medical evidence of his skin condition. INS Border Patrol and AFGE L-1929, FMCS #92/16394, 100 LA (BNA) 1084 (Rezler, 1993).

PFB does not necessarily trump a *safety regulation*. A California appellate court rejected a suit against the state by a firefighter who lost his job because of a state

OSHA regulation banning facial hair, which he allowed to grow to alleviate PFB. [Vernon v. St. of California](#), #A101244, 116 Cal.App.4th 114, 2004 Cal. App. Lexis 224 (1st Dist. 2004).

#### 4. Religious considerations

If anyone doubts the power of the pulpit, they need look no farther than the 2004 Presidential campaign, where anti gay marriage ballot initiatives drove religious voters to the polls and resulted in Sen. John Kerry's close defeat.

- Citing the Pennsylvania Religious Freedom Protection Act of 2002, a Philadelphia trial court enjoined the city's fire dept. from disciplining a ***Muslim firefighter*** who refused to shave his beard. [DeVeaux v. City of Philadelphia](#), Docket #2005-3103, Control #021818, 2005 Phila. Ct. Com. Pl. Lexis 331 (Cm.Pl. Phila. Co. 2005).
- The Fourth Circuit revived a suit brought by a ***Rastafarian corrections officer*** who was repeatedly disciplined for wearing deadlocks. [Booth v. Maryland Dept. of Corr. Serv.](#), 02-1657, 2003 U.S. App. Lexis 8156 (4th Cir. 2003).
- In Ohio, the state's Supreme Court upheld appearance standards for corrections officers, but allowed an officer to have long hair for religious reasons, if concealed neatly under his hat. [Humphrey v. Lane](#), #99-206, 89 Ohio St.3rd 62, 728 N.E.2d 1039, 2000 Ohio Lexis 1283.

Later, an Ohio appellate court rejected a "non-theistic" freedom of religion claim by a corrections worker to have long hair. Sincere beliefs do not implicate religious rights. [Luken v. Brigano](#), #CA2003-01-007, 2003 Ohio 5116, 2003 Ohio App. Lexis 4609 (12th Dist. 2003).

Other notable wins, include the following:

- A Muslim N.Y. park ranger was reinstated and received \$25,700 in back wages. [Muhammad Ali v. N.Y. State Park Police](#) (2000).]
- A DC police officer won \$37,000 as a result of disciplinary action taken against him because of his deadlocks hairstyle. He was a practicing Nazarite, a sect that does not believe in haircuts. [Robinson v. Dist. of Col.](#), #1:97CV00787, 37 (1816) G.E.R.R. (BNA) 662 (D.D.C. 1999).
- The Third Circuit struck down a NJ police dept's no-beards rule in a suit brought by Muslim officers. [F.O.P. L-12 v. City of Newark](#), #97-5542, 170 F.3d 359, 1999 U.S. App. Lexis 3338, 79 FEP Cases (BNA) 323 (3rd Cir. 1999); cert. den., 1999

U.S. Lexis 5004.

- A U.S. District Court in Manhattan allowed Rastafarian NY corrections officers to wear dreadlock spikes. No nexus shown between the regulation and safety or security needs. Brown v. Keane, 888 F.Supp. 568, 1995 U.S. Dist. Lexis 7981 (S.D.N.Y.).
- A federal court in Chicago found that an Islamic detective was entitled to injunctive relief against Chicago police beard rule. Sharif v. City of Chicago, 530 F.Supp. 667, 27 FEP Cases (BNA) 1607 (N.D. Ill. 1982).

## **5. Duty to bargain**

Safety regulations generally override a duty to bargain with unions, but appearance regulations might not. An arbitrator ruled that Customs and Border Protection adopted a new Personal Appearance Standard without first bargaining with the union. He found no evidence that bargaining would impair the agency's mission. U.S. Bureau of Customs & Border Prot., and N.T.E.U., 43 (2133) G.E.R.R. (BNA) 1159 (Vaughn, 2005).

Similarly, a federal Administrative Law Judge found that management had a duty to bargain an appearance and clothing regulations with the union that represented security police officers at the Smithsonian Institution. National Gallery of Art and AFGE L-1831, FLRA #WA-CA-30380, FLRA ALJ Decis. #117, 1995 FLRA Lexis 7 (FLRA ALJ 1995).

However, the Minnesota Supreme Court held that a county sheriff's grooming policy was a "managerial prerogative" avoiding the necessity of bargaining with the certified union. Law Enforcement Labor Services v. Co. of Hennepin, 449 N.W.2d 725 (Minn. 1990). An appellate court decision was reversed.

## **6. Accommodation of women as a waiver for men**

A federal court in Ohio upheld a ban on long ponytails for male correctional officers. A officer's spiritual beliefs, as a Native American religion practitioner, and the fact that women officers are permitted to pin up their hair, is not dispositive. Blanken v. Ohio Dept. Reh. & Corr., 1996 U.S. Dist. Lexis 16540, 944 F.Supp. 1359, 72 FEP Cases (BNA) 887 (S.D. Ohio).

Another federal court rejected a damage suit, brought by six federal officers, that a new hairstyle policy caused a disparate impact on women. Batson v. Powell, 912 F.Supp. 565, 1996 U.S. Dist. Lexis 358 (D.D.C. 1996).

An Oregon ambulance service required paramedics to use a respirator for protection against tuberculosis and other airborne pathogens. Management switched to a respirator that could not be used by men with beards.

A bearded employee shaved and sued for sex discrimination. He argued that because only men grow beards, the no beard policy adversely impacts only on male paramedics. Management claimed the policy was a neutral grooming standard.

The judge noted that “the great weight of authority in federal courts holds that grooming and dress codes that distinguish between men and women are permissible and do not violate Title VII ... While it is true that only men can grow beards, it does not follow that a rule prohibiting beards amounts to sex discrimination.”

In this case, the plaintiff did not adopt a hairstyle for medical, religious or ethnic reasons. Barrett v. Amer. Medical Response, #CV-00-1539-ST, 2001 U.S. Dist. Lexis 7834, 85 FEP Cases (BNA) 1245 (D. Ore. 2001).

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Wayne W. Schmidt  
Employment Law Editor  
841 W. Touhy Ave.  
Park Ridge IL 60068-3351 USA  
E-mail: [wws@aele.org](mailto:wws@aele.org)  
Tel. 1-800-763-2802

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