

SECURITY ACT FOR NUCLEAR POWER PLANTS

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House Bill 5282 as enacted
Public Act 113 of 2014
Sponsor: Rep. Al Pscholka

House Committee: Energy and Technology
Senate Committee: Energy and Technology

Second Analysis (4-16-14)

BRIEF SUMMARY: The bill would:

- Authorize security officers at nuclear power plants to use physical force, and in some circumstances deadly force, to deter intruders, thieves, or saboteurs.
- Require power plants to post notices at entrances and around the perimeter warning that security officers have authority to use physical or deadly force.
- Provide immunity from lawsuits to security officers, their employers, and the owner and operator of a nuclear power plant for an officer's conduct in providing security that is lawful under the bill.
- Define terms.

According to the United States Nuclear Regulatory Commission (NRC), its licensees (which include owners and operators of nuclear power plants) are required to use armed responders to defend nuclear facilities against an attack. The bill would enable security personnel at nuclear facilities to comply with their duties under NRC regulations.

FISCAL IMPACT: House Bill 5282 would not have a significant fiscal impact on the Department of Licensing and Regulatory Affairs as it pertains to civil liability or to the licensure of private security guards. The bill would have no fiscal impact on the Michigan State Police.

THE APPARENT PROBLEM:

Recently, a question has arisen as to how the protections under common law and the state's Self-Defense Act pertain to security officers who guard the state's three nuclear power plants from trespassers. On one hand, a power plant is a privately-owned business and so would appear to have the same protections under the law as any other business defending its premises against intruders. On the other hand, because an act of sabotage or theft can threaten the public health and safety on a large scale, nuclear facilities are required by the U.S. Nuclear Regulatory Commission to have an approved security plan that includes securing their perimeters to deter intruders and having an armed response at the ready sufficient to repel a heavily armed terrorist attack that comes by land, air, or water (plants are situated by a body of water such as a large lake, river, or ocean). But, what if an unarmed trespasser did get past the extensive fencing and other barriers used to secure the perimeter of a nuclear facility and was on the grounds and approaching

a sensitive area? Or, what if a person is seen cutting through a fence and doesn't stop when a warning is issued over the public address system? How much force could the heavily armed security officers lawfully use to deter the intruder (and under what circumstances could the force be used) without inadvertently triggering criminal or civil penalties?

In general, the level of force that may be used in stopping trespassers or intruders, or for self-defense, is established in both Michigan common law and statute and provides that the level of force that a person may use against a trespasser or someone engaging in criminal behavior must be proportionate to that other individual's actions. Further, under the Self-Defense Act, persons do not have to retreat from a place they have a legal right to be and can use physical or deadly force if they reasonably believe there is an imminent danger of death, serious bodily harm, or sexual assault to themselves or to another. A person may also use physical or deadly force against an intruder who is breaking and entering into a dwelling or building premises, or who has broken into the premises and is still present. Under such circumstances, a rebuttable presumption is created that the person was acting in self-defense. Unless a prosecutor or a plaintiff in a civil action can overcome the appropriate level of proof showing otherwise, a person is not likely to face criminal prosecution or be liable in a civil action.

Applying this to a nuclear facility, it seems clear that once an intruder breaches a physical wall of a structure, the provisions under the Self-Defense Act would apply since the protections extend to other buildings or structures within the yard surrounding the main premises. But would the extensive grounds of a nuclear facility be considered a "yard?" Further, not every sensitive installation at a nuclear facility has walls to be "breached." And what if the trespasser/intruder is in more danger of self-harm because the person is about to encroach into or onto something that could cause death or injury? At what point could force be used by a nuclear security guard to repel any further advancement toward a sensitive area, especially if the person appeared to be unarmed? Would the armed security guard come under the protection of the Self-Defense Act or common law if the guard stopped and then physically restrained the trespasser until the police arrived? Or would the guard be exposed to either criminal or civil liability since the guard was armed and the trespasser wasn't? In a recent incident, a Michigan man was charged with felonious assault for detaining an unarmed trespasser on his rural property while holding an unloaded, open shotgun until law enforcement arrived.

Simply put, it appears that the NRC regulations require a higher level of response on the part of security guards at a nuclear power plant than the protections against criminal or civil liability may afford under the Self-Defense Act or common law. Legislation has been offered in both the Senate and House to address this issue.

THE CONTENT OF THE BILL:

House Bill 5282 creates a new act to clarify the rights and duties of officers who provide security at the state's nuclear power plants. The bill would define "an officer providing security at a nuclear generating facility" to mean a security officer employed by or under contract with a nuclear facility who is employed as part of an NRC-approved security plan and who is performing duties under that plan. The bill would take effect 90 days after enactment.

Under the bill, an officer may:

- ❖ Use physical force *other than deadly force* if the officer honestly and reasonably believes the physical force is necessary to prevent or terminate a person's unlawful trespass under Section 552 of the Michigan Penal Code. (Section 552 makes trespassing upon the lands or premises of another a 30-day misdemeanor.)
- ❖ Use physical force, *including deadly force*, if the officer honestly and reasonably believes the use of physical or deadly force is necessary:
 - To prevent or terminate an individual from breaking and entering (or attempting to do so) into the business premises of a nuclear generating or nuclear storage building or structure with the intent to commit a crime involving the infliction or threatened infliction of serious physical harm to any individual.
 - Deter a threat of radiological sabotage.
 - Deter a threat of theft or diversion of special nuclear material.
- ❖ Threaten to use physical force, *including deadly force*, if the officer honestly and reasonably believes the use of physical or deadly force is necessary to protect the officer or another individual from the potential use of physical or deadly force on the part of another person, or to deter a threat of radiological sabotage or a threat of theft or diversion of special nuclear materials.

Notice. A notice of the authorization to use physical and/or deadly force must be posted conspicuously at all entrances to the business premises of a nuclear generating or nuclear storage building or structure, as well as at intervals along the perimeter in such a manner as to provide reasonable notice of the authorization to persons about to enter.

Civil immunity. An officer providing security, the officer's employer, and the owner and operator of a nuclear generating facility would be immune from civil liability for the security officer's conduct in providing security at the facility that is lawful under the bill. Except as otherwise provided in the bill, the bill would not modify Michigan common law (case law) in existence on the effective date of the bill regarding the use of deadly force.

Definitions. "Nuclear generating facility" would include currently operating nuclear power plants, power plants that no longer generate electricity but that store special nuclear material, the land surrounding those facilities, and any nuclear generating or nuclear storage building or structure located on those lands.

"Business premises of a nuclear generating or nuclear storage building or structure" would include a building or structure used to generate electricity using nuclear power, or used to store special nuclear material associated with or resulting from that generation. The term would also include appurtenant buildings or structures and any barrier or barrier system surrounding those structures designed to protect against radiological sabotage or theft or diversion of special nuclear material and which are required to be designated and posted against trespassing under federal law.

"Special nuclear material" would mean material capable of a self-sustaining fission chain reaction.

ARGUMENTS:

For:

Ever since the "9-11" attacks in 2001, the NRC has ramped up security protocol at the nation's power plants. Considering the threat posed to public safety by a release of radiation or theft of radiologic material that could be used in a dirty bomb, it is understandable why a higher level of response is necessitated. Facilities are required to have heavily armed guards at the ready to repulse an attack or to deter any threat of sabotage or theft of radiological materials. Most of the men and women employed to provide security at the nuclear facilities are ex-military or ex-law enforcement. All receive extensive background checks and intensive training, including when to (or not to) engage in force.

Recently, however, questions have arisen as to whether an armed nuclear security guard who restrains, or attempts to do so, an intruder on the grounds of a nuclear facility until the local police arrive would be open to criminal or civil penalties for exceeding allowable use of force provided under common law and the Self-Defense Act. Also, some wonder if those training the guards, those who write the training curricula, and even the utilities who own and operate the facilities could be held responsible for the conduct of a security guard. Where some scenarios are clear, such as if an intruder refuses to comply with verbal orders to stop and weaponry is visible, others are not. Complicating matters is that the security plan required of nuclear facilities by the NRC requires a response level that does not appear to comport with current Michigan common law and statutes related to defense of self and others.

The bill would address these issues by first clarifying the level of force that could be used in scenarios that security guards may face at the state's three nuclear power plants and also by clarifying that the premises of a power plant for which the authority to use force applies extends to the facility's perimeter. The bill does not give blanket immunity to guards to shoot anyone who didn't come in through the front gate with full security clearance. It does provide parameters for the level of force appropriate to a situation consistent with federal requirements. Protection from criminal or civil actions would only be triggered if certain conditions were satisfied. For example, the security guard's actions would have to be within the NRC-approved security plan. And, the bill applies to nuclear security guards the same *reasonable person* threshold of believing that danger is imminent that is required of individuals defending themselves or others under common law and the Self-Defense Act. If the guard's actions were outside the authority granted by the security plan, a prosecutor would still be able to charge a security guard with assault or murder and an injured person or, in case of a death, the person's estate, could sue a guard or the owner of the power plant in a civil action.

Response:

Isn't the bill elevating nuclear security guards, who are employees of a private business, to the same level of immunity as police officers? Also, it is conceivable that despite the fences and barriers, a person could unintentionally find themselves on the grounds of a nuclear facility. Would passage of the bill endanger the lives of such citizens?

Rebuttal:

Part of the problem faced by nuclear security guards is that they are trained and required to function in a manner similar to that of SWAT teams and soldiers but without the governmental immunity available to those men and women for the very reason that they are not government employees. So, though the bill's protection may be similar to those in law enforcement, the bill is just tweaking protections available to all citizens and business owners under the self-defense laws to fit the characteristics unique to the nuclear industry. A guard's conduct outside the bill's parameters would still be actionable.

Regarding unintentional trespassing, just because someone is seen on the grounds does not mean that guards would immediately open fire without warning. The bill would require additional notices to be posted around the perimeter warning of the authority to use force, including deadly force, against anyone found on the grounds without permission. And, the NRC security plan protocol would need to be followed. Moreover, part of the guards' training involves the appropriate level of force available to contain a situation based on threat assessment. However, it is important to note that it is very difficult to access a nuclear facility without coming in through the front gate as an approved guest or employee. Reportedly, anti-nuclear protestors and other protestors are aware of the danger of unapproved access and so of late have kept their activities outside the perimeter. Anyone found on the grounds is therefore more likely to be there with criminal intent. And, with today's sophisticated explosives that can be hidden or imbedded in clothing or innocuous looking objects, an innocent-looking person may actually be on a deadly mission. Considering the danger to the health and safety of the public if equipment is damaged and radiation leaked, or radiological material stolen and used in a dirty bomb, it is clearer why the bill is believed to be needed – nuclear security guards, their trainers, and their employers need the guards to function within NRC requirements without fear that in so doing, they are protecting the public but opening themselves up to undue criminal prosecution or civil liability.

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