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Anti-Fraternization Policies in Community Corrections: A Tool to Address Staff Sexual Misconduct in Community Correction Agencies

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A Tool to Address Staff Sexual Misconduct in Community Correction Agencies

"Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be above suspicion of violation of the very laws [they are] sworn . . . to enforce. Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings."

by Nairi M. **Simonian** and Brenda V. **Smith**

Georgia's law *specifically references community corrections agencies: Ga. Code. Ann. § 16-6-5.1(a): A probation or parole officer or other custodian or supervisor of another person referred to in this Code section commits sexual assault when he engages in sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer or who is in the custody of law or who is enrolled in a school or who is detained in or is a patient in a hospital or other institution and such actor has supervisory or disciplinary authority over such other person.*

Iowa's law *implicitly covers community corrections since community corrections is under the jurisdiction of the Iowa Department of Corrections: I.C.A. § 709.16(1): An officer, employee, contractor, vendor, volunteer or agent of the department of corrections or agent of a judicial district department of correctional services, who engages in a sex act with an individual committed to the custody of the department of corrections or a judicial district department of correctional services commits an aggravated misdemeanor.*

I. Introduction

Community corrections agencies have the difficult responsibility of regulating and sanctioning relationships that develop between persons under community corrections supervision and community corrections personnel. Individuals under supervision include ex-offenders, parolees, probationers, pre-trial defendants, and their family and friends. Supervisory personnel can include probation or parole officers, volunteers and contractors. This responsibility is particularly challenging in a community corrections setting where employees may not work within a facility; work alone in unsupervised locations away from superiors and peers; have contact with offenders in homes, jobs or other isolated settings; have random, unanticipated contact while in the community; and have difficulty determining who is under supervision since offenders once in the community may not be in a uniform or confined in a facility. These factors can make it more difficult for community corrections personnel to determine appropriate boundaries between personal and professional associations. Thus, leaders must develop policies which protect the proper functioning of community corrections agencies, but do not violate employees' constitutional right to associate with whomever they please.

With the passage of the Prison Rape Elimination Act in 2003 (PREA)[2], the importance of addressing relationships—sexual and otherwise—between corrections staff and offenders has increased. PREA specifically addresses the sexual abuse of persons in custody. While titled the *Prison* Rape Elimination Act, the Act's application is not limited to individuals incarcerated in prisons. The act applies to "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of *parole, probation, pretrial release*, or *diversionary program[s]*".[3]

Currently, all fifty states have laws that prohibit correctional staff from having sex with persons in custody.[4] Additionally, 27 states and the District of Columbia specifically reference community corrections agencies in the language of their custodial sexual misconduct laws, while in another 10, community corrections staff is covered implicitly. Community corrections will be covered implicitly under a state law if the language of the law broadly covers all employees who engage in custodial supervision of offenders or if the state's community corrections division is under their Department of Corrections and the language of the law covers the Department of Corrections. Additionally,

This article outlines the different constitutional standards that courts apply when analyzing agency restrictions on relationships between ex-offenders and community corrections staff. The article also details the various factors that courts, in particular cases, consider in determining whether correctional policies which prohibit staff/ex-offenders relationships are constitutional. Finally, the article concludes with recommendations about how agencies might develop policies in this area that both protect community corrections agencies and are constitutional.

II. Constitutional Standards for Freedom of Association Cases

The First Amendment of the U.S. Constitution states that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances". The courts have further interpreted this language to mean that every person has the right to freely associate with whomever they choose.[5] This applies to all persons, regardless of their employment. However, this right is not absolute and can be restricted under certain circumstances. In determining the constitutionality of agency restrictions on employee associations, courts first determine the appropriate constitutional

standard to apply to evaluate the prohibited conduct. The Supreme Court has laid out three standards for analyzing government conduct which restricts or prohibits rights guaranteed by the Constitution, in this case the right to intimate association. Those three standards are

- rational relation;
- intermediate scrutiny; and
- strict scrutiny.

The strict scrutiny standard is the hardest constitutional standard to satisfy. The strict scrutiny standard requires that the rule and/or prohibition be narrowly tailored to serve a ***compelling*** government interest. Usually, courts apply the strict scrutiny standard to fundamental interests, like the right to marry, conceive or to rear children in a particular way.[6] The intermediate level of scrutiny is less rigorous than strict scrutiny and balances the interests of the employee and the interests of the state when the government employee's association affects the greater public.[7] Moreover, this standard of scrutiny requires that governmental rules that restrict constitutional behavior be tailored in a reasonable manner to serve a ***substantial*** state interest. The lowest constitutional standard is the rational relation standard. To meet the rational relation standard, the agency rule must ***rationally*** relate to the government's interest. Courts use this lower standard when no fundamental interest -- like the right to marry or bear children -- is involved. When using this lower standard, courts generally uphold government conduct.

III. Factors Courts Considered When Balancing the Right to Freedom of Association Against Community Corrections Agencies' Interests

In most jurisdictions, correctional employers limit or regulate relationships between correctional staff and offenders. Moreover, many courts have held that correctional policies that prohibit these relationships and/or require employees to report them do not violate employees' constitutional right of freedom of association.[8] In the context of community corrections, however, the situation may be more complicated. A court may find that a correctional policy or code of conduct is proper, yet may also determine that the nature of the relationship is protected from government intrusion. Then prohibiting the relationship or punishing the employee because of it is unconstitutional. In these situations, the nature of the relationship – marriage, familial, sexual -- overrides the government interest in either regulating or prohibiting it.

Factors that courts consider when analyzing the constitutionality of a specific policy aimed at prohibiting staff/ex-offender relationships include, but are not limited to:

- Nature of the relationship (i.e. marriage, dating, friends);
- Nature of the government interest -- is it a very important or strong interest such as ensuring the impartiality of probation/parole officers and their treatment of probationers and parolees;
- Degree to which the regulation burdens the right to associate freely – Can the officer marry anyone else?; Can the officer buy a car from anyone else?;
- Degree to which the regulation promotes the efficiency of the government service provided -- Does the policy advance the functioning of community corrections?;
- Whether the conduct regulated would have a significant negative impact on the individual's job performance – Does it affect on-duty, job related conduct or is it primarily private? ;
- Are operations of the government agency involved potentially or actually adversely affected?;
- Is the public perception and reputation of the agency affected?

The weight that the court gives to these factors will determine whether it will uphold the agency policy.

IV. Case Law

Courts have consistently held that states may regulate the off-duty conduct of correctional personnel in custodial and non-custodial contexts. While there have been a few cases where the courts have sided with correctional staff over the agency, the facts of these cases are very distinct and do not represent a majority view.[9] The large majority of cases make clear that community corrections personnel are held to an extremely high standard of professional conduct, and personal relationships with offenders that could jeopardize the proper functioning of community corrections agencies will be prohibited.[10] While these cases have involved both institutional and community corrections settings, in this article we will solely focus on case law involving community corrections agencies.

In *Montgomery v. Stefanaik*,[11] a Seventh Circuit case,[12] a probation officer was fired after her supervisors learned that she and her fiancé had purchased a car from a dealership employing a probationer whom she supervised. Though the vehicle was not purchased from the probationer, the officer had still violated the agency's code of conduct. The agency's code of conduct forbade probation officers from transacting business with any company employing probationers under their supervision. Martina Montgomery, the probation officer, was suspended and eventually fired for violating this policy. Montgomery claimed that her termination infringed upon her right of intimate association with her fiancé, and deprived her of procedural and substantive due process. The court applied a two-part test.[13] First, does the challenged policy impose a direct and substantial burden on an intimate relationship, such as marriage. If so, the court would apply the higher **strict scrutiny** standard. However, if the policy did not impose a direct and substantial burden on an intimate relationship, the court could apply the **rational basis** review standard to the restriction.

Applying this test in *Montgomery*, the court found that the agency code of conduct prohibited purchasing a car from a probationer, and not from associating with her fiancé. The court found that Ms. Montgomery

An employee shall not live with, nor provide lodging for, an offender, except if the offender is a family member of the employee, including a spouse where the employee's marriage to the offender existed prior to the employment date or where the spouse became an offender after the employment date. In all cases where the employee lives with or provides lodging to an offender who is a family member, this must be immediately reported in writing to the employee's Warden, Regional Prison Administrator, Field Operations Administration Regional Administrator or Central Office Administrator, as applicable.

(Excerpt from Michigan Department of Corrections Rule 46)

was free to purchase a car for her fiancé from any dealership that did not employ one of her probationers and that she could associate with her fiancé in any way she chose. In short, the agency prohibition did not substantially affect the employee's intimate relationship with her fiancé and only needed to bear a rational relationship "to the agency's interest in ensuring the impartiality of its probation officers".[14] This is because "[p]robation officers have significant discretion when making sentencing recommendations and supervising probationers, and their decisions can greatly impact the liberty of convicted individuals."[15] Additionally, the court found that the agency had a legitimate interest in ensuring that probation officers conduct themselves in a professional manner.

In another case, *Akers v. McGinnis*[16], the Michigan Departments of Corrections (MDOC) had a rule on "Improper Relationships with Prisoners, Parolees or Probationers, Visitors or Families." Plaintiff, Ms. Akers, a bookkeeper at a correctional facility in Chippewa County, Michigan, befriended a male prisoner clerk. Shortly after the male prisoner's release, Ms. Akers gave him a ride in her car to a job interview. Ms. Akers was terminated by MDOC for its anti-fraternization rule. Another plaintiff in the case, Ms. Loranger, a Wayne County probation officer, was contacted by a man she had dated before becoming an MDOC employee. The man was then serving a life sentence without parole in a prison in another state. Ms. Loranger exchanged several letters with him. Ultimately, she realized that she was in violation of the MDOC rule and approached her supervisor about the matter. Four months later, MDOC also terminated her for the rule violaion.

The Sixth Circuit[17] found that MDOC had a legitimate interest in preventing fraternization between MDOC employees and offenders' families and that MDOC's rule was a rational means for advancing that interest. The court reasoned that the potential for exploitation by both MDOC employees against offenders and offenders against MDOC employees was great. The court also noted that officers were not the only employees who possessed the power to exploit the offenders. "Even clerical workers without any penal authority can by the mere manipulation of paperwork greatly affect an offender's status for better or worse, or at least be pressured into attempting to do so."[18] The court also agreed with forbidding contact between employees and offenders' visitors and families since third parties are often used to circumvent the prohibition on direct contact. Given that, the court concluded that the MDOC's termination of the two employees was permissible and constitutional. The court upheld the constitutionality of MDOC's anti-fraternization policy and granted qualified immunity to the individual management defendants, even though labor arbitrators had already set aside the discharges of both plaintiffs and instead imposed relatively brief suspensions on both women.. The Sixth circuit upheld maintaining the rule infractions on the employees' disciplinary record and refused to award monetary damage to the two plaintiffs—Akers and Loranger.

In a third case, *Clark v. Alston*,[19] Lisa Clark, an applicant for a probation officer position, filed a claim against Judge Craig Alston alleging that he violated her First Amendment right to freedom of intimate association when he withdrew an offer of employment after learning that she had resigned from the Michigan Department of Corrections and later married an inmate who she supervised while employed as a correctional officer. Ms. Clark had applied for a probation officer position with the Court Probation Department. In her application, she only listed employment from 1999-2004. During her interview with Judge Alston, Judge Timothy Kelly, the chief probation officer (CPO) and a probation officer, she was asked about her work experience prior to 1999. Ms. Clark indicated that she had been employed by the MDOC but had left on bad terms. She revealed that she resigned from her position at MDOC pending investigations of allegations that she had an improper relationship with an inmate.

Concerned about this information, the CPO confronted Plaintiff about the incidents at MDOC and asked that Plaintiff sign a waiver to allow the court to employment file from MDOC. At trial, the CPO stated that "any personal relationship with an inmate is a concern."[20], and explained, "when you are in a position of authority, whether it be a prison guard or a probation officer, you are not allowed to have any personal relationships with people that you are supervising".[21]

In upholding the withdrawal of employment, the U.S. District Court for the Eastern District

of Michigan reasoned that "the mere fact that an employer uses an individual's marital relationship in an employment decision will not always constitute an undue or impermissible intrusion into the marital relationship."[22] The court stated that a judge's concern about such a relationship which began while the plaintiff was employed at the prison is a legitimate business reason for denying employment. The court concluded that if the prospective employee's marriage to a particular individual may legitimately adversely affect the employment, the consideration of such a factor does not violate a person's constitutional rights of intimate associaton.

These cases, though factually distinct, demonstrate that a state can terminate a community corrections' officers' employment as a result of their association with an offender. Moreover, even when the prohibition restricts the community corrections employees' right of intimate associate, as was the situation in *Clark*, a court is more likely to side with the state than the employee. Finally, the court upheld all of the terminations not just because they were between a community corrections officer and an offender, but because the relationships could ultimately adversely affect the officers' employment either by compromising the impartiality of the probation officer or because the probation officer held a position of authority that could be exploited to the benefit or detriment of the employee and adversely affect the agency.[23]

V. Policy Considerations

The discussion above makes it clear that while the case law is very fact-specific, the large majority of decisions support agency prohibitions on correctional employees forming personal relationships – including romantic, sexual and business -- with probationers, parolees and ex-offenders. Moreover, in light of PREA, community corrections agencies will need to be more aware of how these issues affect community corrections staff, persons under supervision and the agency. Finally, several recurring themes appear in the case law which can serve as a helpful guide in evaluating your own policies on relationships between community corrections personnel and offenders. The following list highlights many of these themes and provides a starting point for evaluating your agency anti-fraternization policy.

1. Draft Narrow and Clear Policies:

From a policy point of view, agencies should draft narrow, clear and specific policies regarding prohibited behavior or relationships. The policies should clearly define the prohibited behavior – exchanging letters, having a business relationship, dating, and marriage.

2. Notify Employees, Volunteers and Contractors About Correctional Policies During Training:

The agency should inform employees about the anti-fraternization policy during training. The agency should also communicate to the employees that once they are aware that they have engaged in prohibited behavior, they should inform the agency. Failure to provide notice of a prohibited relationship or interaction should be a separate violation.

3. Design a Procedure Which Requires Reporting and Evaluation on a Case-by-Case Basis:

The agency should create a mechanism for employees to report a prohibited relationship or interaction. The mechanism could also provide a process for guidance or approval of the interaction. Courts are likely to analyze the nature of the relationships and the correctional policies on the relationships on a case-by-case basis. An agency should also have a procedure which requires evaluation and response to these relationships on a case-by-case basis. Some factors the agency should consider include: determining whether the:

- behavior is truly private;
- behavior is likely to affect operations of community supervision functions or the behavior of the employee; or
- behavior affects the proper reintegration of the offender back into the community.

If you would like a copy of the full-length memorandum addressing anti-fraternization in correctional settings, and for information on anti-fraternization policies in settings other than community corrections, go to www.wcl.american.edu/nic/resources.cfm and under "Corrections Publications" view:

Simonian, Nairi and Smith, Brenda V. A memo regarding Anti-Fraternization policies and case law in the Ninth Circuit. The Department of Justice/ National Institute of Corrections Project on Addressing Prison Rape. Washington, DC. January 2006.

4. Restrict Relationships which Affect Important Agency Interests:

Policies should address relationships which affect the agency's interests. These include: the employee's on-the-job performance; proper supervision of the offender; the reputation of the agency; the impact on discipline and respect for the chain of command.

5. Have a Legitimate Agency Purpose:

Any rule prohibiting staff-ex-offender relationships must have a legitimate agency purpose – meaning there must be some connection between the rule and the harm it seeks to address within the agency. Examples of the harm the rule might seek to address include safety, security, reintegration, integrity and morale of the community corrections agency. When the rule reasonably and legitimately addresses one or more of these harms, courts are likely to uphold the rule as constitutional.

6. Enforce/Apply the Policy Uniformly:

Failure to apply the rule uniformly could subject the agency to claims of discrimination, put the agency at risk for civil liability and can endanger the viability of the entire policy.

7. Monitor the Policy at a High Management Level:

Finally, effective implementation of the policy requires monitoring and consistent implementation of policies at a high management level. This requires management truly taking on a leadership role in their respective agencies.

In the final analysis, community corrections leaders need to use all the tools at their disposal to address staff sexual misconduct with persons under supervison. Agency policies on anti-fraternization are important tools, particularly given that they can be drafted to meet specific agency needs. We hope that this article provides guidance to you in your efforts to address the issue of employee/offender relationships. As always, you should consult your organization's legal advisor as you review, evaluate or modify your policies. You can also contact either Nairi Simonian, simonian@wcl.american.edu, 202-274-4386 or Brenda V. Smith, bvsmith@wcl.american.edu, 202-274-4261 for further information about this issue. ▲

Endnotes

[1] *See* Pasadena Police Officers Assoc. v. City of Pasadena, 51 Cal.3d 564, 571-572 (1990).

[2] 42 U.S.C. 15601 et seq. (2003).

[3] 42 U.S.C. 15609.

[4] U.S. Dep't of Justice, National Institute of Corrections, 50 State Survey of Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody, Developed Under Cooperative Agreement 06S20GJJ1, Washington, D.C. (2006).

[5] *See e.g.* Roberts v. United States Jaycees, 468 U.S. 609, 617-618, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984).

[6] *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

[7] *See generally* Pickering v. Board of Education of Tp. High School Dist. 205, Will County Il., 391 U.S. 563 (1968).

[8] *See generally* Keeney v. Heath, 57 F.3d 579 (1995(holding that rules which prohibit a jail "guard" from dating an inmate who is in or out of jail do not violate the Fourteenth Amendment Due Process Clause); Fleisher v. City of Signal Hill, 829 F.2d 1491 (1987)(holding that a probationary police officer's constitutional rights were not violated when he engaged in sexual conduct with a 15 year old girl prior to being hired); Wolford v. Angelone, 38 F. Supp. 2d 452 (1999)(holding that a Virginia Department of Corrections anti-fraternization policy did not completely obstruct a state prison guard's employment opportunities or impose absolute restrictions on the right to marry when she was terminated for marrying an ex-convict).

[9] *See* Via v. Taylor, 2004 U.S. Dist. LEXIS 11246 (2004)(finding that a relationship between former correction's department employee and a parolee did not affect the officer's job performance, did not have a security impact, did not adversely affect the institution, and the relationship itself resembled a family relationship which deserved heightened scrutiny); *see also* Reuter v. Skipper, 224 F.Supp. 2d 753 (D.Del. 2002)(holding that a female corrections officer's personal association with an ex-felon was protected by the First Amendment because correctional policy did not prohibit the employee's conduct at the time she began her relationship with the ex-felon, the officer did not supervise the ex-felon and reported her conduct when she learned of his status, and Oregon, unlike other states, did not have a law criminalizing sexual relations between staff and offenders at the time this case was decided).

[10] *See* supra note 8 and infra note 24.

[11] 410 F.3d 933 (2005).

[12] The Seventh Circuit includes Illinois, Indiana and Wisconsin.

[13] Montgomery *supra* note 12, at 938 (citing Zablocki v. Redhail, 434 U.S. 374, 383-387 (1978)).

[14] *Id.* at 938.

[15] *Id.*

[16] 352 F.3d 1030 (6th Cir. 2003).

[17] The sixth circuit includes Kentucky, Michigan, Ohio and Tennessee.

[18] *Id.* at 1039.

[19] 2006 U.S. Dist. LEXIS 46586.

[20] *Id.* at 19.

[21] *Id.* at 20.

[22] *Id.* at 13.

[23] *See* Weiland v. City of Arnold, 100 F. Supp. 2d 984 (2000)(holding that a city had an interest in order and efficiency that outweighed a law enforcement officer's associational and/or privacy interest in continuing his dating relationship with a felony probationer).

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