

# Addressing Sexual Abuse of Youth in Custody



## Module 16: HUMAN RESOURCES ISSUES

Developed by the NIC/WCL Project under NIC CA  
#06S20GJJ1



# Proactive vs. Reactive Thinking

## Proactive: What is Ideal

-  Designing policies
-  Screening at hiring stage

## Reactive: Dealing with the here and now

-  Investigations
-  Discipline and termination of employees



# Employment Context

■ Different legal considerations apply depending on whether you are:

■ Public or private

- Public (government) employer
- or private facility or private sub-contractor



■ Union or nonunion

- Union environments lessen employer flexibility, but there are ways to work *with* unions on these issues



# Key Issues for Public Employees

## Proactive

-  Off duty conduct rules
-  Employee surveillance

## Reactive

-  Employee surveillance in investigation context
-  Due Process Rights in discipline and termination




# Some Key Issues For All Employers

## Proactive

-  Reference checks and defamation issues


## Reactive/Proactive

-  Sex/race discrimination charges (Title VII) in the context of discipline and termination actions





# Key Issues in the Union Context

## Proactive

-  Dealing with the Union in making policy changes and collective bargaining agreement modifications

## Reactive

-  Dealing with the Union in investigations
-  Dealing with the Union in grievance and arbitration proceedings concerning employee discipline/termination



# Public Employer Issues

■ Provisions of federal and state Constitution apply

■ 1<sup>st</sup> Amendment - freedom of association

■ 4<sup>th</sup> Amendment – privacy, surveillance

■ 5<sup>th</sup>, 14<sup>th</sup> Amendment – due process, equal protection

■ Balancing test – courts will weigh intrusion on employee's constitutional rights against weight of employer's interest



# Employer Interests that Can Support Off-Duty Conduct Rules

- Interests in on-the-job performance
- Interests in off-the-job conduct that implicates officer's fitness for duty
- Interests in public reputation of correctional institution

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# Litigation Results

## ■ Off Duty Conduct Rules Generally

■ Many court cases involving police and corrections officers uphold policies regulating off-duty conduct

■ E.g., disorderly conduct, association with criminal activities, places or persons, etc.



# Litigation Results

- Rules regulating corrections officers' off-duty contacts with former or current clients or others with involvement in criminal justice system
- Somewhat more mixed results, but generally no-contact policies are also upheld by reviewing courts



# Litigation Results for no contact policies

- Courts of appeals have tended to uphold policies that prohibit corrections officers from contact with current or former clients in light of the security interests involved
- There are a few contrary trial court decisions with specific facts
- This is an evolving area of the law
- Good, sound, well thought out-policies are best protection
  - Think through the connection between rules and policies and the goals or interests being enforced



# Employee Surveillance

■ Key issues under balancing test is “reasonableness”:

- Notice
- Methods
- Random vs. targeted
- Objective cause
- Balance between intrusiveness and employer need



# Privacy

- “Reasonable expectation of privacy”
- Depends heavily on work context
  - Corrections officers working in secured areas have low expectations of privacy
  - Probation officers and others working in the community may have higher expectations of privacy
- E.g., Personal or apparently “personal” cars



# Proactive Steps: Employee Surveillance

- Provide general notice about employee surveillance methods
- Restrict surveillance methods to those reasonably necessary
- Use even-handed procedures for selecting surveillance targets



# Investigations and Discipline

- Think through whether the case will be handled as a criminal or administrative matter
  - Garrity* issues – cannot use information obtained through threat of job action in subsequent criminal proceeding
- Due process rights will apply, but this does not necessarily prevent administrative suspension pending resolution of investigation in appropriate circumstances



# Reference Checks

- Area in which employment lawyers are very (too?) wary because of potential defamation concerns
- Use of waiver forms in which job applicant agrees to waive all legal rights based on reference given; applicant must present this to former employer





# Reference Checks

- Nonofficial, back channel communications preferred but these cannot be written down or invoked later in explaining why an applicant did not get the job, which raises its own set of problems
- Negligent Hiring – must check available public records for problems before hiring and must attempt to check former references



# Sex/Race Discrimination Charges

- Plaintiff must show that employer treated him or her differently than others similarly situated but of a different sex, race, national origin, or religious category
- This is hard to do; most discrimination cases are lost and most lawyers hesitate to file beyond administrative level without very strong evidence
- Pretext: is the employer's stated reason the REAL reason?



# To Protect Against Successful Discrimination Cases

- Maintain consistency in treatment across cases, incidents, and employees, and review cases for consistency
  - Individual discretion by varying supervisors can be problematic
  - Unstated rules – e.g., credit for longstanding clean record – can also be problematic; either make the rule an explicit one or don't use it
- Contemporaneous and clear articulation of reasons for employment actions



# To Protect Against Successful Discrimination Cases

- Maintenance of detailed personnel files that include contemporaneous documentation of problems, even relatively minor ones
- These files should be treated as confidential (secured access) with access rights limited to those with real reason to need them



# Consistency Makes Good Policy Proactively

- Training supervisors
- Minimizing managerial discretion
- Treat like cases alike
- Consistently enforce disciplinary rules



# Consistency Makes Good Policy Proactively

- Maintain up-to-date personnel files
- Keep contemporaneous documentation of all infractions, even minor ones
- Protect employment information from general discussion



# Union Issues

- Contractual obligations created through collective bargaining agreements (CBAs)
- Proactive: review CBAs for inconsistent provisions and work to reconcile



# Modifying Inconsistent CBA Provisions



- Best option: Rely on Management Rights clauses
- If new or expanded policy is presented to union reps and they don't object, good argument exists that the policy change was within the scope of management rights






# Modifying Inconsistent CBA Provisions

## Second best options

-  Request mid term modification
-  Bargain for changes at contract renewal

 Both are less ideal options because they require trading



# Investigations

- Union representation – Weingarten rights
- Employee has right to have union rep. present during interview
- Role of the union rep. is to facilitate the process and help the employee understand what is going on



# Investigations

- ❏ Union rep. may not obstruct proceedings and may be asked to leave if he or she is doing so
- ❏ Good, well trained union rep. can facilitate the process; it is worth investing energy in developing good relationships with union reps.



# Arbitration

- Both sides have the right to legal representation and to present evidence
- Employer may not interfere with right of employees to testify at arbitration hearing
- Arbitrator is not required to follow finding of misconduct in another forum, even a criminal court



# Union Duty of Fair Representation

- Unions are legally required to represent all of their members fairly (even if they think the member is guilty of misconduct, and even if they think the misconduct is reprehensible)
- Unions have an interest in eliminating “bad apples” from their midst, just as management does
- Vigorous union advocacy on behalf of an accused employee does not mean the union believes the employee does not deserve discipline or termination



# Proactive Steps in Union Context

- Run training sessions, which include clear statement of disciplinary rules
- Give union policy statements on disciplinary procedures for staff sexual misconduct
- Review collective bargaining agreement for inconsistent terms; request modifications if necessary
- Assume and expect professionalism by union reps.; understand their constraints and duties

