

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

-  1st Amendment - freedom of association
-  4th Amendment – privacy, surveillance
-  5th, 14th 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

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



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

