SOME SEX BY CONSENTING OFFICERS OKAY BY THE NINTH CIRCUIT COURT OF APPEALS

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The U.S. Court of Appeals for the Ninth Circuit decided in *Perez v. City of Roseville, et al.,* D.C. No. 2:13-cv-02150 GEB-DAD, that the termination of Officer Perez for engaging in off-duty sexual conduct with another officer was against her constitutional guarantee of privacy and free association. The Court acknowledged that this decision was contrary to those of the Fifth and Tenth Circuits. It's important, however, to look closer at this case as it can give guidance for any policy development, investigation and discipline determinations.

The Court makes a distinction that this conduct might have been impermissible had the police agency been able to show that it "negatively affected on-the-job performance or violates a constitutionally permissible, narrowly tailored regulation."

Officer Perez had been employed by the Roseville Police Department for seven months and was still on probation. She and a fellow officer became engaged in a romantic relationship. Both officers had children, but were separated from their respective spouses at the time. The incident came to the attention of the agency when the wife of the other officer filed a complaint alleging the affair and that the officers were engaging in sexual conduct while on duty. The subsequent investigation did not establish any on duty sexual conduct.

But as Paul Harvey used to say, "And then rest of the story."

This case really fell on the failures of the agency and its administrative investigation process. The Court acknowledged that the agency had to investigate the initial complaint because it alleged a potential on duty violation. All that was found occurring on duty was that the two officers engaged in some limited text messaging and phone calls. Both officers received written reprimands for "Unsatisfactory Work Performance" and "Conduct Unbecoming." When Officer Perez appealed her reprimand to the Chief she was then told that she was being released from probation or fired.

Several issues arose after her termination that really resulted in this litigation. The agency subsequently alleged other work performance problems, however none of these were documented or investigated. The Chief and command staff acknowledged that her termination was based "in part" because of her sexual relationship with the other officer. Two command officers directly involved in the investigation or in the approval chain stated in depositions that they found Officer Perez' relationship presented an "ethical dilemma" and was "morally wrong." The Court concluded that these command officers were "biased."

The Court concluded that the subsequent employment issues amounted to a "pretext" and that a jury could find her termination was based, to some degree, upon the sexual relationship. The Court also concluded "there is circumstantial evidence that each of the Department's proffered reasons is independently 'unworthy of credence.'"

"In sum, given the investigation of charges based upon allegations related to her affair with another officer, the evidence of the investigators' moral disapproval of her affair, and the Department's constantly shifting justifications for her termination, as well as the independent reasons for doubting the legitimacy of each shifting justification, we conclude that a genuine issue of material fact exists to whether Perez was fired at least in part because of her extramarital affair."

This decision really is not much different than several others in past years. A public agency must be able to show how the off-duty conduct of an employee has the potential to adversely affect his/her job performance or ability to perform or how it has the potential to adversely affect the operation, morale and efficiency of the agency.

Courts have been critical of police agencies that rely on vague policies regarding "conduct unbecoming" and "immoral behavior." One large agency identifies sexual misconduct as "idling and loafing." Surprisingly, few police agencies have adopted policies specific to sexual misconduct and continue to rely on these vague forms of written policy. Both LLRMI and the IACP have model policies on sexual misconduct.

But the issue in the *Perez* case goes further. The agency failed to articulate a "rational reasoning" for its employment action. It failed to spend the time to provide the necessary "administrative insight" into why this conduct, by this employee had the potential to adversely affect her performance or ability to perform or had the potential to adversely affect the morale, operation or efficiency of the police department.

When articulating this rationale reasoning and administrative insight it is paramount that agency personnel leave their personal beliefs in check. Disciplinary decisions must be impartial and reasonable. When you wade into personal beliefs and moral positions you become biased.

The agency's conduct after her appeal smacks of retaliatory conduct. It would be difficult to support her discipline, let alone termination, on charges that were not documented and investigated. Of course, one of the judges noted that the agency could have terminated her based solely on her probationary status without qualification to the reasons.

Action steps:

1. Develop an articulable, narrow policy delineating off-duty and sexual misconduct.
2. Train employees with specific examples what the agency expects of them in off-duty conduct and what would constitute impermissible sexual conduct.
3. Spend the required time to specifically and fully delineate your rationale reasoning for the specific act of misconduct and the accused employee.
4. Document employee performance, both positive and negative.