

The Password is “Common Sense”: The Army’s New Policy on Senior - Subordinate Relationships

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Introduction

*The leader must be counted on to use good judgment, experience and discretion to draw the line between relationships which are “destructive” and those which are “constructive.”*¹

Since 1978, the Army has had a senior - subordinate relationship policy that focuses on the effects of such relationships, rather than on the status of the parties involved.² Given differences in service policies, today’s increased operations tempo, and the increase in deployments and joint operations, Secretary of Defense (SECDEF) William Cohen determined that all the services should prohibit certain types of relationships.³ As a result of the SECDEF memo, the Army has changed its policy.⁴ This article discusses the new Army policy on senior - subordinate relationships and contrasts it with the policy it replaced.⁵

Background

With the disbanding of the Women’s Army Corps in 1978, the Army implemented a policy governing the relationships between soldiers of different ranks.⁶ Although the policy came about as a result of an influx of women into a predominantly male organization, both the old Army policy and the new Army policy are gender-neutral.⁷

The Old Army Policy

The old Army policy covered all relationships between seniors and subordinates: officer-officer, enlisted-enlisted, officer-enlisted, male-male, female-female, and male-female. It asked whether the relationship caused an adverse effect on the unit mission, either actual or apparent. If not, the Army did not prohibit relationships between seniors and subordinates. As a result, the old Army policy did not prohibit dating between officers and enlisted soldiers, absent an adverse effect from the relationship.⁸

1. U.S. DEP’T OF ARMY, PAM 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANK, preface (7 Dec. 1993) [hereinafter DA PAM 600-35].

2. *Id.*; U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-14 (30 Mar. 1988) [hereinafter AR 600-20].

3. “[T]he Services defined, regulated, and responded to relationships between service members differently. Such differences in treatment are antithetical to good order and discipline, and are corrosive to morale, particularly so as we move towards an increasingly joint environment.” Memorandum, Secretary of Defense, subject: Good Order and Discipline (29 July 98) [hereinafter SECDEF Memo]. According to Rudy de Leon, Under Secretary of Defense for Personnel and Readiness:

The Services define, regulate, and respond to unprofessional relationships between service members differently. Given the fact that the members of different services now frequently serve side by side in joint operations, some of the differences in Service policy create confusion, are corrosive to morale. The action being directed today addresses those inconsistencies.

Rudy de Leon, Under Secretary of Defense for Personnel and Readiness, Remarks to the Press regarding the Secretary of Defense’s Policy on Good Order and Discipline (29 July 1998) available at <www.defenselink.mil>.

4. The Army’s new policy became effective on 2 March 1999. Message, 020804Z Mar 99, Headquarters, Dep’t of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999) [hereinafter DA Message].

5. Further official guidance is pending, in the form of a new DA Pam 600-35. A draft of the new DA Pam 600-35 is available now. Draft U.S. DEP’T OF ARMY, PAM 600-XX, available at <www.odcsper.army.mil> [hereinafter Draft DA PAM 600-XX]. It is, however, a draft, which is subject to change prior to the final publication. The Office of the Deputy Chief of Staff, Personnel (ODCSPER) has published briefing slides to assist commanders on training their units on the new policy by 1 October 1999. Those slides can be found at the ODCSPER website, www.odcsper.army.mil/dape/hr. Message, 031706Z Mar 99, Headquarters, Dep’t of Army, DAPE-HR-L, subject: Revised Army Policy on Fraternization (Good Order and Discipline)(3 Mar. 1999).

6. DA PAM 600-35, *supra* note 1, para. 1-4.

7. *Id.* para 2-2c; AR 600-20, *supra* note 2, para. 4-14e. The military policy on fraternization (the criminal form of improper senior-subordinate relationships) had its beginning in the male-male friendships from World War II, when the traditional military rank structure had to adapt to the influx of officers and enlisted soldiers from all walks of life. DA PAM 600-35, *supra* note 1, preface.

Other Services⁹

The other armed services focus their policies (at least as they relate to officer-enlisted relationships) on the status of the parties involved, rather than the effect of the relationship. The Air Force policy prohibits gambling between officers and enlisted soldiers and prohibits an officer from borrowing money from, or otherwise being indebted to, an enlisted airman.¹⁰ The Air Force policy also prohibits dating or sexual relations between officers and enlisted soldiers.¹¹ Similarly, the Navy and the Marine Corps have policies that prohibit relationships between officers and enlisted that are “unduly familiar and that do not respect differences in grade or rank.” The prohibitions include: dating, cohabitation, intimate or sexual relations, and private business partnerships.¹² Likewise, the Coast Guard prohibits “romantic” relationships between officers and enlisted members.¹³

The New Army Policy

The new Army policy is essentially the old Army policy with the specific prohibitions (discussed below) required by Secretary Cohen grafted to it. These prohibitions add a first

step to the analysis: (1) does the relationship fall into one of the “strictly prohibited” categories directed by Secretary Cohen; (2) if not, does the relationship cause any adverse effects? If both of these questions are answered in the negative, the Army does not prohibit the relationship.

The “Strictly Prohibited” Categories

Officer-Enlisted Business Relationships. Ongoing business relationships between officer and enlisted personnel, such as borrowing or lending money, commercial solicitation, or any other type of ongoing financial or business relationship, are prohibited.¹⁴

The above prohibition exempts landlord - tenant relationships, or one-time transactions, such as the sale of a house or a car.¹⁵ Army National Guard and U.S. Army Reserve soldiers are also exempt from this prohibition to the extent that the otherwise-prohibited business relationship arises from their civilian occupation or employment.¹⁶ Finally, existing business relationships that would be prohibited under the new policy, but were permitted under the old policy, can continue until 1 March 2000.¹⁷

8. AR 600-20, *supra* note 2, para. 1-5e.

9. Although the Coast Guard is not part of the Department of Defense and was not covered by SECDEF’s July 1998 directive, the Coast Guard policy is generally consistent with the SECDEF’s memo. SECDEF Memo, *supra* note 3.

10. U.S. DEP’T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909 (1 May 1996), para. 5. In addition to the strict prohibitions on officer / enlisted relationships in paragraph 5, the Air Force also has a general, effects-based provision that covers non-paragraph 5 situations (unprofessional relationships). *Id.* paras. 2, 3. The Air Force policy considers relationships between officers, between enlisted, between officers and enlisted, and between military members and civilian employees as “unprofessional” when they (1) detract from the authority of superiors (2) result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests.” *Id.* Unprofessional relationships can include sharing of living accommodations, vacations, transportation, and off-duty interests on a frequent or recurring basis. *Id.*

11. *Id.*

12. See CHIEF OF NAVAL OPERATIONS INSTR. 5370.2A, paras. 5, 6 (14 March 1994) [hereinafter OPNAVINST 5370.2A]; MARINE CORPS MANUAL, para. 1100.4 (C3, 13 May 1996). Like the Air Force, both the Navy and the Marine Corps have a general, effects-based provision to cover situations other than those strictly prohibited by paragraph 1100.4. That general provision prohibits relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in rank or grade, when those relationships are prejudicial or of a nature to bring discredit upon the service. Examples include relationships that “(1) call into question a senior’s objectivity, (2) result in actual or apparent preferential treatment, (3) undermine the authority of a senior, or (4) compromise the chain of command.” OPNAVINST 5370.2A, *supra*, para. 5b. Note that relationships between officers and enlisted that are unduly familiar and that do not respect differences in grade or rank are *presumed* to be prejudicial. (Because of the special status accorded senior enlisted (E-7 and above) in the Navy, the “unduly familiar” relationships (when with junior enlisted within the same command) are “typically” prejudicial. OPNAVINST 5370.2A, *supra*, para 6d.

13. U.S. COAST GUARD PERSONNEL MANUAL, ch. 8.H.2.g (C26, 3 Feb. 1997). The Coast Guard policy defines “romantic” relationships as “[c]ross-gender sexual or amorous relationship[s].” *Id.* para 8.H.2.d.3.b. The Coast Guard policy “accepts [other] personal relationships between officer and enlisted personnel, regardless of gender, if they do not” “either in actuality or appearance: (1) Jeopardize the members’ impartiality, (2) Undermine the respect for authority inherent in a member’s rank or position, (3) Result in members improperly using the relationship for personal gain or favor, or (4) Violate a punitive article of the UCMJ.” *Id.*, at para. 8.H.4.b. and 8.H.2.c. The Coast Guard is within the Department of Transportation, not to the Department of Defense. Accordingly, the Coast Guard was not required to change their policy in response to the SECDEF memo. While the Secretary of Transportation did not issue a similar directive to the Coast Guard, the Coast Guard’s position is that their policy is consistent with what Secretary Cohen required of the other armed services. Electronic Interview with Lieutenant Commander Brian F. Binney, Assistant Chief, Office of General Law, Headquarters, Commandant, U.S. Coast Guard (11 Mar. 1999).

14. DA Message, *supra* note 4, para 3c(1).

15. *Id.*

16. *Id.*

17. *Id.*

Although the new prohibition on business relationships between officers and enlisted does not have an exception for married officer-enlisted couples, the intent of the Army policy is not to prohibit “normal joint financial transactions that a husband and wife might enter into.”¹⁸ As a result, a married officer-enlisted couple can take out a joint loan for the purchase of a home¹⁹ or operate a business together in their off-duty time.

Officer-Enlisted Personal Relationships. Personal relationships between officers and enlisted members, such as dating, sharing living accommodations (except as required by operational necessity), and intimate or sexual relationships, are prohibited. This prohibition, however, is not designed to infringe on marriages that existed before 2 March 1999 (the effective date of the new Army policy) or are entered into before 1 March 2000. In addition, this prohibition does not prohibit relationships that fall out of compliance with the policy solely because of the promotion or change in status of one party. For example, if two enlisted soldiers get married after 1 March 2000, then one becomes commissioned as a warrant officer, the relationship does not violate the prohibition on personal relationships. On the other hand, this exception is not designed to allow two enlisted soldiers to continue a dating relationship after one becomes a commissioned officer.²⁰

Finally, “the intent of the Army policy is not to disrupt existing family relationships.”²¹ Although a strict reading of the policy might seem to prohibit personal relationships between officers and enlisted who are related (such as parent and child, or siblings), the policy is not intended to prevent an officer from having dinner or going to the movies with his brother, who happens to be an enlisted soldier. Nevertheless, both the officer and the enlisted soldier must maintain proper decorum while in uniform and in public.²²

What remains unclear is the effect of marriages between officers and enlisted soldiers after 1 March 2000. The new Army policy does not prohibit such marriages. Marriages between an officer and an enlisted soldier after 1 March 2000, however, raise questions in two areas.²³

First, what effect does such a marriage have on any *prior* prohibited conduct between the now-married parties?²⁴ While the Navy, the Marine Corps, the Air Force, and the Coast Guard all address this issue in their policy (and take the position that marriage does *not* insulate the parties from the consequences of prior prohibited conduct), the Army did not address the issue in the new policy.

Second, what effect does such a marriage have on any *subsequent* prohibited conduct between the married parties? The new Army policy does not specifically address this issue. The old Army policy did not strictly prohibit personal relationships (including marriages) between officers and enlisted soldiers.²⁵ If such relationships (under the old Army policy), however, caused one of the three adverse effects listed in *Army Regulation (AR) 600-20*, paragraph 4-14a, the soldiers would be subject to corrective action from their commanders.²⁶ If the parties to an officer-enlisted marriage could be subject to corrective action for their conduct under the old, more expansive, Army policy, it follows that the parties to such a marriage could be subject to similar action under the new Army policy, if the relationship caused one of the five adverse effects listed in paragraph 3b of the DA Message.²⁷

Officer-Enlisted Gambling. Under the new policy, officer-enlisted gambling is prohibited, without exception. As there is no specific exception for gambling between spouses, the Army policy could be read to prohibit a married officer-enlisted couple from gambling together. Again, the Army policy is not intended to “disrupt typical family activities.”²⁸ Accordingly, a

18. Draft DA PAM 600-XX, *supra* note 5, para. 2-19.

19. *Id.*

20. *Id.* para. 2-25b.

21. *Id.* para. 2-8.

22. *Id.*

23. The Army’s senior leadership is currently working through how the new Army policy will apply to marriages between officers and enlisted soldiers that take place after 1 March 2000. The Army will publish further guidance on this issue.

24. Remember that the new Army policy exempts officer-enlisted personal relationships that existed prior to 2 March 1999, until 1 March 2000, provided the relationship was proper under the old Army policy. The new Army policy contains no exemption for officer-enlisted personal relationships that begin after 2 March 1999, or continue past 1 March 2000 (regardless of the date it began).

25. AR 600-20, *supra* note 2, para. 4-14e(2); DA PAM 600-35, *supra* note 4, paras. 1-5b, 1-5e.

26. *Id.*

27. DA Message, *supra* note 4, para. 3b.

28. Draft DA Pam 600-XX, para. 2-22b.

married officer-enlisted couple could, for example, share raffle or lottery tickets, gamble together during a vacation to Las Vegas, and participate in their church's bingo games on Thursday nights.²⁹

Recruiter / Recruit Relationships and Permanent Party / IET Trainee Relationships. In both of these areas, the bottom line rule is that if the recruiting mission or the training mission does not require the relationship, the relationship is prohibited. Again, commanders need to apply the policy pragmatically. Although the policy would seem to prohibit all contact between family members (to include spouses) if one is a permanent party soldier and the other an IET trainee, the "intent of the [new Army] policy is not to disrupt existing family relationships."³⁰ Certainly a Lieutenant Colonel mother can visit with her son who is an IET trainee,³¹ and a Master Sergeant assigned to a Miami recruiting office can have his daughter, a member of the Delayed Entry Program, home for the holidays.³² All parties must remember, however, that while either is on duty or they are in public, they are expected to "maintain the traditional respect and decorum attending the military relationship between them"³³

Don't Jettison Common Sense

As can be seen from the discussion of the "strictly prohibited" categories above, common sense plays a major part in interpreting the new Army policy. Even though the new Army policy prohibits certain relationships between officers and enlisted soldiers, the policy is not designed to create a strict caste system in the military, with no contact between officers and enlisted soldiers. In addition to the specific exceptions for each prohibition, the new Army policy contains a general exception as follows:

These prohibitions [for officer-enlisted business relationships, officer-enlisted personal relationships and officer-enlisted gambling] are not intended to preclude normal team building associations which occur in the con-

text of activities such as community organizations, religious activities, family gatherings, unit-based social functions, or athletic teams or events.³⁴

The purpose of this exception is to remind commanders that the new policy is not designed to prohibit team-building activities that are vital to the effectiveness of a military unit. The policy would not prohibit unit picnics on family day, or unit softball teams in the post league. Likewise, the new policy would not require separate officer and enlisted dining-ins. "Right arm" nights are not prohibited because officers and enlisted soldiers may socialize during the event.³⁵

This exception also reminds commanders that the Army family benefits from soldiers (both officers and enlisted) participating in community activities. Therefore, an enlisted soldier would not be required to turn down a position as a cubmaster because an officer has one of the dens in the pack.³⁶ An officer would not be required to worship at another church because an enlisted soldier is an elder. An enlisted soldier would not be required to forego the family reunion because his aunt, a commissioned officer, will also attend.

Commanders should use their common sense and good judgment in determining whether a relationship between an officer and an enlisted soldier falls within this exception. Even though officers and enlisted soldiers may interact in situations that fall within this broad exception, they must "be aware of and continue to observe proper military customs and courtesies."³⁷

Other Changes

For those involved in military justice, one of the biggest differences between the new Army policy and the former Army policy is the punitive nature of the new policy. Violations of the new policy may be prosecuted as violations of Article 92, Uniform Code of Military Justice.

29. Provided, of course, that the bingo nights are not otherwise in violation of local gaming laws. *Id.*

30. *Id.* para. 2-8b.

31. *Id.*

32. *Id.*

33. *Id.*

34. DA Message, *supra* note 4, para. 3d.

35. Draft DA PAM 600-XX, *supra* note 5, para. 2-11.

36. *Id.* para. 2-12b.

37. *Id.*

What Has Not Changed

Although the new Army policy has the strict prohibitions listed above, what if the questioned situation does not fall into one of the “strictly prohibited” categories? For those situations, the analysis under the old Army policy and under the new Army policy is essentially unchanged.

The old Army policy prohibited relationships that involved (or gave the appearance of involving): (1) “partiality or preferential treatment,”³⁸ (2) “improper use of rank or position for personal gain,”³⁹ or that created (3) “an actual or clearly predictable adverse impact on discipline, authority or morale.”⁴⁰ The new Army policy has essentially the same effects-focused prohibition.

Paragraph 4-14b of *AR 600-20* (as revised by the DA Message) now includes two additional prohibited relationships beyond the three from the old Army policy. The new Army policy also prohibits relationships that “[c]ompromise or appear to compromise, the integrity of supervisory authority or the chain of command.”⁴¹ A platoon sergeant’s personal relationship with the company commander may run afoul of this provision to the extent that the relationship allows the platoon sergeant to make an “end run” around the first sergeant.

The second new prohibition is against relationships that “are, or are perceived to be, exploitative or coercive in

nature.”⁴² The senior party in an otherwise proper relationship should be wary of the perception that he is taking advantage of the junior party, solely by virtue of his rank.

Conclusion

The Army’s policy on improper senior-subordinate relationships has undergone a major change. This change was designed to address the potential disparity in treatment, for certain relationships, between the armed services in the Department of Defense. Although for certain categories of relationships (generally officer-enlisted relationships), the Army now looks at the status of the parties rather than the effect of the relationship, the new policy leaves much of the Army’s former policy effectively unchanged, with the focus on the effects of relationships, rather than on the status of the parties.

As with any new policy, growing pains are inevitable. Many nuances of the policy remain to be uncovered by those in the field. While the Army has a new policy at the direction of our civilian leadership, those who implement that policy should not forego applying common sense in place of a strict application. The comment from the old version of *AR 600-20*, paragraph 1-14e remains true: “[T]his policy is based on the principle of good judgment.”⁴³

38. *AR 600-20*, *supra* note 2, para. 4-14.

39. *Id.* para. 4-14a.

40. *Id.*

41. DA Message, *supra* note 4, para 3b. This provision is nearly verbatim from the prohibitions contained in the Navy and the Marine Corps policies.

42. *Id.* The permanent party-IET trainee prohibition notwithstanding, this now-punitive provision would seem to address the Army Court of Criminal Appeals position that Article 93, UCMJ position does not apply to wholly consensual sexual activity between a supervisor and a subordinate. *See United States v. Johnson*, 45 M.J. 543 (Army Ct. Crim. App. 1995). *But see United States v. Goddard*, 47 M.J. 581 (N.M. Ct. Crim. App. 1997) (holding that Article 93 does apply to make wholly consensual sexual activity between a superior and a subordinate criminal).

43. *AR 600-20*, *supra* note 2, para. 1-14e.