

MEMORANDUM

TO: Chairman/Commissioner Croce

FROM: Brian M. Callahan

RE: Constant Supervision of Inmates

DATE: April 20, 2005

County Law section 652(2) originally provided that a male correction officer could not supervise a female inmate detained in the jail, unless a matron or female correction officer was present. Section 652(2), amended in 1994, now permits but does not mandate cross-sex supervision of inmates, as follows:

A female correction officer or female deputy sheriff who is authorized to perform correctional duties and has completed training, as mandated by the State Commission of Correction, shall be in attendance in a correctional facility when females are confined in the correctional facility and shall, when deemed necessary by the Sheriff or keeper of the jail to maintain the order and security of the facility, be in attendance in any housing unit where females are confined. A male correction officer or male deputy sheriff who is authorized to perform correctional duties and has completed training, as mandated by the State Commission of Correction, shall be in attendance in a correctional facility when males are confined in the correctional facility and shall, when deemed necessary by the Sheriff or keeper of the jail to maintain the order and security of the facility, be in attendance in any housing unit where males are confined.

This means that, while a female officer must be in attendance somewhere at the facility when female inmates are housed at the jail and a male officer must be in attendance somewhere at the facility when male inmates are housed at the jail, it is within the Sheriff or

jail administrator's discretion where to assign the officers. Male officers no longer need be accompanied by a female officer to supervise female inmates.

Notwithstanding the foregoing statutes permitting the assignment of male and female officers to supervise opposite sex inmates, correctional facilities have been ordered to take appropriate precautions to protect certain privacy interests of inmates while providing equal employment opportunities for male and female correction officers. See Forts v. Ward, 471 F.Supp. 1095 (S.D.N.Y. 1978), vacated and remanded on other grounds, 621 F.2d 1210 (2d Cir. 1980). In Forts, the Second Circuit Court of Appeals ruled that female inmates retain certain minimal privacy rights, such as not being viewed by male officers while using the toilet, showering, and dressing, absent exigent circumstances.

Similarly, in Wolfish v. Levi, 439 F.Supp. 114, 160 (S.D.N.Y. 1977), the District Court required suitable regulations by the Metropolitan Correctional Center to forbid entry into rooms or bathroom facilities by officers of the opposite sex unless there has been sufficient warning or an emergent necessity justifies an exception. As far as male inmates are concerned, a Federal District Court in Maryland, following the holding in Forts v. Ward, held that a male inmate's privacy rights were violated by the assignment of female guards to posts where they could view him while completely unclothed [See Hudson v. Goodlander, 494 F.Supp. 890, 894 (D.Md. 1980)].

Title 9 NYCRR §7003.2(d) requires the "uninterrupted personal visual observation" and the "continuous clear view" of prisoners under constant supervision. It is the opinion of Counsel's Office that an officer cannot maintain a continuous clear view of an inmate of the other gender while simultaneously providing the same inmate the privacy rights required pursuant to Forts. As such, it is the Commission's position that the constant supervision of an inmate must be performed by an officer of the same gender.

However, in an emergency, courts have considered it eminently reasonable that the nearest officers should be able to render assistance, regardless of sex, and any temporary violation of inmate privacy that might occur would be justified by the overriding necessity to protect the safety of both inmates and officers [see Hudson v. Goodlander, *supra*; Wolfish v. Levi, *supra*].