

**REVIEW PANEL ON PRISON RAPE
PUBLIC HEARINGS: APRIL 26 and 27, 2011**

**TESTIMONY OF BETSY HUTCHINGS
Managing Attorney, Prisoners' Legal Services of New York
April 22, 2011**

It is a pleasure to have the opportunity to provide the Panel with testimony pertaining to staff-on-inmate sexual misconduct at Elmira Correctional Facility.

I have been the Managing Attorney of the Ithaca Office of Prisoners' Legal Services of New York (PLS) since 2004. Between 1984 and 1998, I was a PLS staff attorney in the Ithaca Office. Between 1998 and 2004, I was associate counsel in the Criminal Appeals Bureau of the Legal Aid Society in New York City. Prior to joining the staff at PLS, I was a staff attorney in federal legal services programs in West Virginia and Kentucky (1978-1984).

Prisoners' Legal Services (PLS) is a statewide civil legal services program providing representation, administrative advocacy and legal counseling to indigent inmates in the custody of the New York State Department of Correctional Services (NYS DOCS, DOCS or the Department). PLS was created in 1976 in the aftermath of the Attica prison riot.

The Ithaca Office of PLS handles requests for assistance from the following maximum security correctional facilities: Elmira, Southport, Five Points, and Auburn. We also provide assistance to inmates in several medium and minimum security facilities.

On April 17, 2011, I was asked to provide testimony relating to the Department of Justice Report "Sexual Victimization in Prisons and Jails Reported by Inmates 2008 and 2009." I was asked to comment in particular on the report's finding that the rate of reported acts of staff sexual misconduct made by inmates at Elmira Correctional Facility (Elmira C.F.) was among the highest in the nation.

Letters are the primary means used by inmates to request legal services from PLS. Each year, PLS receives thousands of requests for assistance, many of which are related to staff misconduct. In 2010, the Ithaca Office of PLS received 17 requests for assistance relating to physical misconduct by staff from inmates at Elmira Correctional Facility. Of this number, 12 concerned excessive force and 5 were claims relating to sexual misconduct (or both sexual and non-sexual physical misconduct). None of the requests for assistance with matters involving staff-on-inmate sexual misconduct stated that the conduct occurred during pat frisks.

This review of the requests for assistance relating to staff-on-inmate sexual misconduct raises an obvious question: If, when surveyed by the Bureau of Justice Statistics, the inmates at Elmira Correctional Facility reported incidents of sexual misconduct by staff at an unusually high rate, why do so few inmates at Elmira Correctional Facility write to PLS about this issue? The answer to this question involves the interplay of a number of factors. The most fundamental (and well recognized) source of the discrepancy lies in the reluctance of inmates to report such conduct due to shame, fear of retaliation and the belief that they that their reports will be found to be untrue.¹ These factors are inherent in the prison culture and are the result of the power disparity between staff and inmates, the solidarity of the security staff, and the insularity of prison culture. In combination, these factors discourage inmates from reporting staff-on-inmate sexual misconduct out of fear of retaliation and the assumption that they will not be believed.

A second layer of disincentives to reporting is found in the use of institutional programs, such as the Inmate Disciplinary Program, to punish inmates who report staff-on-inmate sexual misconduct, the structure of the Inmate Grievance Program, the investigations conducted by the DOCS Inspector General and the threatening notice in DOCS' Directive No. 4028A, the policy statement on the prevention and intervention in staff-on-inmate sexual abuse.²

Using the DOCS Disciplinary Program to Punish Inmates Who Report Staff-on-Inmate Sexual Misconduct

Based on a recent experience where an inmate was punished for reporting an act of staff-on-inmate sexual misconduct, it appears that the DOCS policy that prohibits reprisals against inmates who report staff-on-inmate sexual misconduct – enacted in 2005 – is not yet a part of the institutional culture and that its warning that false reports will lead to discipline or criminal action, in the eyes of prison officials and inmates overrides its more benign reassurance that reprisals will not be taken for good faith reports of staff-on-inmate sexual misconduct. The following illustrates how the policy was implemented with respect to AA,³ an inmate in DOCS custody who in November 2010, reported an incident of staff-on-inmate sexual misconduct.

In November 2010, responding to a request for assistance from AA, a PLS staff attorney from the Ithaca Office interviewed AA about an excessive use of force by a guard that had occurred in May 2010. Prior to contacting PLS, AA had filed a grievance relating to the physical assault and

¹ "Investigating Sexual Assaults in Correctional Facilities," Staff Perspectives, Sexual Violence in Adult Prisons and Jails, U.S. Department of Justice, National Institute of Corrections, Volume 2, July 2007, pp. 3, 4, 15; http://www.wcl.american.edu/nic/resources/issues_investigating_sexual_assaults_in_correctional_facilities.pdf?rd=1

² The DOCS policy relating to the prevention of and intervention in staff-on-inmate sexual abuse is found in Directive 4028A, attached hereto at Exhibit 1. The PLS comment on the impact and import of the warning that reporters of staff-on-inmate sexual misconduct may be prosecuted or disciplined is found on page 6 of this testimony.

³ For reasons of confidentiality this inmate will be known as AA and all documents attached as Exhibits will be redacted to conceal the inmate's identity.

and had reported it to the Superintendent of the facility where the assault had occurred. Following the interview with the PLS attorney, AA wrote the attorney who had interviewed him that he had been sexually assaulted during the use of force, but had been afraid to report the sexual misconduct out of “personal pride” and because he thought he would not be believed and would suffer retaliation. After speaking to the PLS attorney, AA apparently felt sufficiently safe from retaliation to risk reporting the sexual misconduct to the DOCS Inspector General (IG).

The IG investigated and then instituted a disciplinary proceeding charging AA with having lied in his report of staff-on-inmate sexual misconduct. The basis of the charge was the inconsistency between AA’s original report of a physical assault – which did not mention having been sexually assaulted – and AA’s subsequent report stating that he had been sexually assaulted during the incident.⁴

At least as disturbing as the fact that the charges were filed, is that they were filed by an investigator in the Inspector General’s office – the office presumably given the responsibility by Directive 4028B, “Sexual Abuse Reporting and Investigation,”⁵ for investigating reports of staff-on-inmate sexual misconduct – and that the charges were not dismissed by the facility review officer – a facility staff member of the rank of lieutenant or above whose job it is to determine whether a misbehavior report should be referred for hearing or dismissed.⁶ In this case, instead of dismissing the misbehavior report and counseling its author, the review officer classified the offense as serious and approved it for a Tier III hearing.

At the hearing, the IG investigator testified that the bases for the charge were 1) the conflict between the grievance initially filed by AA which did not mention having been sexually assaulted and AA’s subsequent report to the IG that he had been sexually assaulted during the incident, and 2) the investigator’s interpretation of AA’s medical records.⁷ During the hearing, AA explained that he had initially not reported the sexual abuse out of fear of retaliation and fear that he would not be believed, and asked that a clinician from the Office of Mental Health testify as to why sexual assault victims frequently delay reporting. He referred the hearing officer – a lawyer – to the provision in Directive 4028A which prohibits reprisals for reports of staff-on-inmate sexual misconduct. The hearing officer found AA guilty and imposed a penalty of 9 months of isolated confinement.

⁴ See Misbehavior report, redacted to remove identifying information, attached hereto as Exhibit 2.

⁵ This Directive is not available to Prisoners’ Legal Services.

⁶ See 7 N.Y.C.R.R. §§251-2.1 and 251-2.2, attached hereto as Exhibit 3.

⁷ In a supplemental appeal of this hearing, PLS disputed the IG’s conclusions, noting that the IG’s conclusion that AA’s medical records did not confirm that he had been sexually assaulted was not based on consultation with medical personnel and referencing our conversation with one of the doctors who had examined AA in which the doctor said that the examination did not rule out a sexual assault. See Supplemental Appeal, attached hereto as Exhibit 4.

AA appealed the hearing. His appeal expressly states that he was disciplined for a report that he made to the IG in violation of Directive 4028A and that the charges were retaliation for filing the report.⁸ In his appeal, AA stated:

At issue is I wrote to the Inspector general (state government) complaining that I was sexually assaulted and wanted to press charges as I have every right to do.

I was given a misbehavior report because Inspector General believed me to be lying.

Inspector General clearly showed disregard to the laws and rules of NYS as well as DOCS, which prohibits me from being given Misbehavior Report for seeking government redress. [] Hameed v. Pundt, 964 F.Supp 836 SDNY 1997 states “prisoner has no general constitutional right to be free from being falsely accused in misbehavior report unless report is filed in response to undertaking constitutionally protected activity.

It is clear that I was punished for seeking government redress, and that I was denied due process of law and my first amendment right which says I have a right to seek government redress. [With one exception where brackets were used to show a deletion, spelling, punctuation and grammar are as in the original].⁹

AA also highlighted that late reporting of sexual assaults is not unusual and that he had not initially reported the sexual assault because of fear of retaliation.¹⁰

In spite of AA’s clear presentation of the issues, the Director of Inmate Disciplinary Programs affirmed the determination of guilt.

Following the denial of his appeal, AA filed a grievance alleging that the IG investigator had violated his First Amendment right and had retaliated against him for filing a grievance.¹¹ He expressly stated, “This is not a challenge to a misbehavior report [which cannot be grieved].¹² The Inmate Grievance Supervisor at Elmira C.F. dismissed the grievance, ruling that AA was “seeking to appeal a decision otherwise attainable through the established procedure for Disciplinary.”¹³

⁸ See AA’s Appeal, redacted to remove identifying information, pp. 1-2, 7, 9, 10, 12 attached as Exhibit 5.

⁹ Id. at 11.

¹⁰ Id. at 5, 8.

¹¹ See AA’s Grievance dated November 25, 2010, attached hereto as Exhibit 6.

¹² Id. at 1.

¹³ See Response to Inmate Grievance dated November 29, 2010, attached hereto as Exhibit 7.

At this point, PLS contacted the Commissioner of the Department on AA's behalf, made similar arguments to those made by AA, and the hearing was reversed. By that time, AA had been confined to the Special Housing Unit for four months.

My point in giving so much detail on this case is to demonstrate:

1) that a lawyer, an IG investigator and higher level security and civilian staff – including the Director of Inmate Disciplinary Programs, an Officer of at least the rank of lieutenant and the Facility Grievance Program Supervisor, all of whom should be familiar with DOCS policy of not taking reprisals against inmates for reporting staff-on-inmate sexual misconduct, failed to protect AA from disciplinary action for reporting staff-on-inmate sexual misconduct.

2) that the personnel responsible for the failure were assigned to the very programs and in the very positions that are charged with the responsibility for preventing the taking of reprisals against inmates who report staff-on-inmate sexual misconduct: the Inmate Grievance Program, the Office of the Inspector General and the Inmate Disciplinary Program.

3) that AA's fear that he would experience retaliation and not be believed if he reported that he had been sexually assaulted by an officer were validated and that his experience will be viewed as confirmation by other inmates that reporting incidents of staff-on-inmate sexual misconduct will lead to retaliation and findings that the reports are not credible.

Due to of the intractability of prison culture demonstrated by AA's recent experience, achieving the PREA goals would be accomplished more efficiently and effectively by transferring the responsibility for receiving reports of staff-on-inmate sexual misconduct and investigating those reports rests to an agency outside of the Department of Correctional Services.

The Deficiencies of DOCS Directive 4028A

DOCS Directive 4028A sets forth the procedure for handling inmate reports of staff-on-inmate sexual misconduct.¹⁴ While the policy prohibits reprisals from being taken against inmates who report such conduct, immediately following the "no reprisals" provision is a "Note" warning that all allegations of staff-on-inmate sexual misconduct will be reported to law enforcement officials and that "a person is guilty of falsely reporting an incident [of staff-on-inmate sexual misconduct] if it is proven beyond a reasonable doubt that, knowing the information reported, conveyed or circulated to be false or baseless, he or she reports to . . . an agency the alleged

¹⁴ Exhibit 1.

occurrence of an offense or incident that did not in fact occur (Penal Law 250.50).” The policy reassures potential reporters that a report made in good faith based upon a reasonable belief that the alleged conduct did occur does not constitute falsely reporting an incident or lying for the purpose of disciplinary action.

Given the cultural context of prison life, the subtext of the policy is embedded in this warning –if inmates report staff-on-inmate sexual misconduct, they expose themselves to discipline or criminal charges. For inmates – who already believe that reporting staff-on-inmate sexual misconduct will lead to retaliation and that their reports will not be believed – the substance of the Notice *is* the Department’s policy.

Certain Requirements and Procedures of the Inmate Grievance Program and the Inspector General’s Investigatory Process Discourage Reporting of Staff-on-Inmate Sexual Misconduct

It is widely recognized that inmate victims of staff-on-inmate sexual misconduct are leery about reporting their experience due to fear of retaliation, fear that they won’t be believed and embarrassment and shame. For such individuals, some of the requirements of the Inmate Grievance Program are problematic.¹⁵ First, there is 21 day deadline for submitting a grievance, which upon a showing of good cause, can be extended to 45 days. Inmates who are the victims of staff-on-inmate sexual misconduct are frequently apprehensive about reporting and may not overcome their fear of reporting for significant periods of time. To maximize the likelihood of achieving the PREA goals, the deadlines should be eliminated for grievances relating to staff-on-inmate sexual misconduct.¹⁶

Second, in my experience the vast majority of inmate grievances reporting staff misconduct are investigated by security staff at the facility where the incident took place and where the reporting inmate usually continues to be housed.¹⁷ One of the first steps in the investigation is getting the

¹⁵ DOCS Directive 4040, attached hereto as Exhibit 8.

¹⁶ An additional factor to consider is that in order to seek redress in federal court for staff-on-inmate sexual misconduct, an inmate must first exhaust his administrative remedies. Prison Litigation Reform Act, 42 U.S.C. §1997(e)(a). In New York State, in most situations, the Inmate Grievance Program provides the administrative remedy that an inmate must exhaust prior to filing a §1983 suit. Wilkinson v. Banks, 2007 WL 2693636, *4-5 (W.D.N.Y. Sept. 10, 2007). This means that in many situations, including those where an inmate is alleging staff-on-inmate sexual misconduct, an inmate must submit a timely grievance and available him/herself of all available administrative appeals before he or she can file a lawsuit alleging a his assailant violated his constitutional rights. As the Inmate Grievance Program requirements are presently configured, many victims of staff-on-inmate sexual misconduct will not be able to take advantage of the legal right to sue their assailants because they are too frightened of retaliation to file timely grievances.

¹⁷ Grievances involving staff misconduct are known as Harassment grievances. Directive 4040 §701.2(e). Harassment grievances must be forwarded to the Superintendent the day that they are filed. Directive 4040 §701.8. When he receives a harassment grievance, the Superintendent must decide whether to initiate an in house investigation or a Central Office Inspector General investigation, or in the case of possible criminal activity, request a state police investigation. Directive 4040 §701.8(d). The Superintendent has 25 days to respond to the grievance. Directive 4040 §701.8(f). If the Superintendent denies the grievance or does not respond within 25 days, the inmate can submit an appeal to the Central Office Review Committee. Directive 4040 §701.8(g) and (h).

alleged assailant's version of the incident that the inmate reported. All but the newest inmates know that any complaint they make will be related to their assailant and that the investigation will be conducted by a colleague of the assailant. Hence, an inmate's fear that he is likely to experience retaliation and is unlikely to be believed are reality based, as is demonstrated by AA's case.

This impediment to reporting must be eliminated if NYS DOCS is to achieve the PREA goals. Reports of staff-on-inmate sexual misconduct should be reported to and investigated by an agency outside of the Department of Correctional Services.

The Need for Confidential Communication Between Inmate Victims of Staff-on-Inmate Sexual Misconduct and Victim Advocates

Another barrier to reporting staff-on-inmate sexual misconduct that I learned about in preparing my testimony for this hearing is the inability of victim advocates in the local hospitals to conduct confidential interviews with inmate victims of staff-on-inmate sexual misconduct.¹⁸ The victim advocate in Tompkins County¹⁹ told me that in 2010 she twice went to the local hospital to offer to advocate for inmate victims of sexual assault. In both situations, DOCS security staff was in the room with her while she spoke to the inmate victims. The chilling effect that the presence of DOCS security staff would have on an inmate victim of staff-on-inmate sexual misconduct in these circumstances is self evident.

To the extent that the civilian victim advocates offer inmates the opportunity to get support from a non-DOCS source, the presence of DOCS security staff in the interview room deprives inmate of a the opportunity to report the assault to a person who has no incentive to retaliate and no ability to do so.

Staff-on-inmate Sexual Misconduct During Pat Frisks

The notion that inmate reports of staff-on-inmate sexual misconduct during pat frisks is based on the inmates' misunderstanding of invasiveness of a properly conducted pat frisk is misguided. A pat frisk that is otherwise proper is improper if it is accompanied by verbal taunts of a sexual

¹⁸ In preparing to write this testimony, I contacted the victim advocates in Chemung and Tompkins County. I knew from prior contacts with the victim advocate in Tompkins County that when inmate victims of staff-on-inmate sexual misconduct or inmate-on-inmate sexual assault from Five Points Correctional Facility are brought to Cayuga Medical Center, they are offered that assistance of a victim advocate from the Tompkins County Advocacy Center. Based on this knowledge, I contacted the victim advocate for Chemung County to find out how many occasions in the last year she had been asked to provide services to inmate victims from Elmira Correctional Facility. Confirming that inmate victims at Elmira Correctional Facility are reluctant to report staff-on-inmate sexual misconduct, she told me that she had not been asked to provide services to any inmates from Elmira C.F. Both victim advocates with whom I spoke were ready to provide services to inmates from state correctional facilities and were sensitive to the issues that they face as male victims living in an environment where generally people do not reveal that they have been victimized.

¹⁹ The victim advocate for Tompkins County with whom I spoke about this issue is employed by The Advocacy Center, 607 277 5000, P.O. Box 164, Ithaca, NY 14851

nature. An otherwise proper pat frisk is improper when the officer is unduly rough or when it involves unnecessary touching.

To achieve the PREA goals, Departments of Correctional Services must adopt effective deterrents to pat frisks that are accompanied by taunts and/or unduly rough or unnecessary touching.

Recommendations

1. Disciplinary proceedings accusing inmates of filing false reports of staff on inmate sexual abuse have a chilling effect on a population that is already fearful of filing such reports. We recommend that DOCS prohibit such disciplinary proceedings and provide training to employees on the policy and the reasons for the policy. We also recommend the elimination of the provision in Directive 4028A(3)(NOTE) warning of the possibility of criminal prosecution and administrative disciplinary actions for false reports of staff-on-inmate sexual abuse.
2. In-house responsibility for receiving and investigating reports of staff-on-inmate sexual misconduct results in investigations that are conducted by members of the security staff. A significant percentage of these investigations are initiated as a result of grievances and are conducted by security staff at the facility where the incident occurred and the inmate and his assailant, respectively, live and work. Others are conducted by investigators from the Inspector General's Office who are a part of the institutional culture. To encourage inmates to report incidents of staff-on-inmate sexual misconduct, we recommend transferring the responsibility for receiving and investigating reports of staff-on-inmate sexual misconduct to an agency outside of the Department of Correctional Services.
3. We recommend that Directive 4040 be revised so that grievances pertaining to staff-on-inmate sexual misconduct are submitted to and investigated by an outside agency and that the deadlines for submitting grievances pertaining to staff-on-inmate sexual misconduct be eliminated.
4. Requiring victims of staff-on-inmate sexual misconduct to meet with civilian victim advocates in the presence or within earshot of security staff has an obvious chilling effect on the victim's exercise of his option to speak with a victim advocate. We recommend that meetings between civilian victim advocates victims of staff-on-inmate sexual misconduct be confidential and that they be conducted out of the earshot of security staff and that no staff alleged to have been involved in the misconduct be involved in escorting the victim to these meeting or be present during the meetings.

5. We recommend that the Department videotape all pat frisks so that they can be reviewed when inmates report that there were inappropriate comments and/or touching during a pat frisk and on a random basis to ensure that the frisks do not constitute staff-on-inmate sexual misconduct.

Thank you again for inviting me to comment on the Department of Justice Report "Sexual Victimization in Prisons and Jails Reported by Inmates 2008 and 2009 and for the opportunity to submit recommendations regard the prevention and investigation of staff-on-inmate sexual misconduct.

Betsy Hutchings, being duly sworn, deposes and says that the preceding testimony is true and accurate except as to those statements which were provided to me by others. Where I reference statements made by others, the source of that statement is provided in the testimony.

Betsy Hutchings
Betsy Hutchings

Sworn to before me this 22nd day of April, 2011.

William A. Lesman
Notary Public
William A. Lesman
No. 02 LE 6163195
Qualified in Tompkins County
Commission Expires March 19, 2015