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August 29, 2012

REVIEW AND ANALYSIS OF THE FEDERAL REGISTER
VOLUME 77 NO. 119 AS IS PERTAINS TO
28 CFR PART 115

*National Standards to Prevent, Detect, and Respond to Prison
Rape; Final Rule*

Docket No. OAG-131

Reviewed and analysis published by:
Nevada Corrections Association

Scope

Although the report covers several areas concerning prison rape and the prevention thereof, this analysis was conducted on the staffing requirements only, and the rules and recommendations of the Department of Justice as required by PREA. “The Prison Rape Elimination Act (PREA) of 2003, 42 U.S.C. 15601 *et seq.*, requires the Attorney General to promulgate regulations that adopt national standards for the detection, prevention, reduction, and punishment of prison rape. The final rule on this issue was formulated from a comment session that was solicited from agencies responsible for incarcerating individuals on all scales, as well as advocacy groups of all kinds”.

All quoted material that is to follow is from this particular Federal Register. Commentary and review is focused only on the staffing aspect of the final rule.

Purpose

To determine if the Nevada Department of Corrections is currently in compliance with the recommended staffing levels as laid out in this report. Although this final rule is flexible in its recommendations, the staffing levels that are recommended will not only effect the NDOC’s compliance with the final rule, but will have a greater impact on the overall safety and security of staff and inmates in general, and should be considered for immediate enforcement.

Analysis

One of the conclusions in the *executive summary* is that prison rape has a stigma in the general public that this is a joke, and/or the inmates deserve this type of punishment if they are incarcerated. This misconception is true in our state in that the public does not seem to understand the impact of incarceration as well as they should. It seems that the public has an, “out of sight out of mind”, mentality when it comes to prisons in general. That is, the public wants to see justice served with harsher sentences, and once they are, “put away”, they don’t want to hear about the intricate details on the day to day activities that take place in order to care for these individuals as human beings. Because of this mentality, funding for prisons seems to be an up hill battle to maintain safety and security among many other requirements. It seems as though when push comes to shove to get portions of the budget, safety and security loses every time. This issue and many other issues dealing with not only the safety and security of inmates, but that of staff and the well being of the grounds on which we all live and work, seems to be of low priority when it comes to funding by the state. However, this final rule does try and address these issues, even if it is limited to this one specific issue. The safety issues that the final rule addresses will go far in overlapping into other safety issues that concern all involved.

“A State whose Governor does not certify full compliance with the standards is subject to the loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the Governor submits an assurance that such five percent will be used only for the purpose of enabling the State to achieve and certify full compliance with the standards in future years. 42 U.S.C. 15607 (c).”

Under the *summary of major provisions* section of the executive summary, it addresses the *supervision and monitoring* aspect of this rule. It requires each Institution to develop and document an

individual staffing plan that provides for adequate staffing levels. It also requires that Departments use their best efforts to achieve this. The final rule also warns Departments that the “best effort” language should not be used to set the bar “artificially low” in order to avoid non-compliance. The rule states, “...if the facility’s plan is plainly deficient on its face, the facility is not in compliance with this standard even if it adheres to its plan”. This seems to say that if the Department under staffs the Institution for any reason, yet this is the plan that they feel is adequate, they are still in non-compliance with the standard. This is also part of the definition of *full compliance* under *general definitions*. The final rule seems to understand that there may be unforeseeable acts that prevent the Department from being in full compliance at every moment, but does maintain that the Department will be in full compliance as long as they, “...then act promptly to remedy the violation”.

The changes in the final rule under the *supervision and monitoring* section says that when determining the staffing levels, Institutions must consider the following factors:

1. Generally accepted detention and correctional practices.
2. Any judicial findings of inadequacy
3. Any findings of inadequacy from Federal investigative agencies
4. Any findings of inadequacy from internal or external oversight bodies
5. All components of the facility’s physical plant
6. The composition of the inmate population
7. The number and placement of supervisory staff
8. Institution programs occurring on a particular shift
9. Any applicable State or Local laws, regulations or standards
10. The prevalence of substantiated and unsubstantiated incidents of sexual abuse
11. Any other relevant factors. Prisons...must use “best efforts to comply with the staffing plan on a regular basis”

and are required to document and justify deviations from the staffing plan.

“The final standard also adds a requirement that the annual assessment examine the resources the facility has available to commit to ensure adequate staffing levels.”

“With regard to the cost of staffing, the (DOJ) notes that the Constitution requires that correctional facilities provide inmates with reasonable safety and security from violence, *see Farmer V. Brennan, 511 U.S. 825, 832 (1994)*.

This last passage would also include the Stickney case in which we are obligated to staff certain units with a certain amount of officers, depending on the population. This standard should also apply to like dormitory style units such as units 4, 10A and 10B with one officer watching up to 180 inmates on NNCC. Leaving one officer to watch both 10A and 10B with 120 inmates on each side of a solid wall seems to be a grossly negligent act in that if the officer is on one side, there are no eyes on the other side.

An annual assessment is also required by the standard to reassess, determine and document whether adjustments are needed to resources that the facility receives.

“The Department reiterates, however, that this standard, like all the standards, is not intended to serve as a constitutional safe harbor. A facility that makes its best effort to comply with the staffing plan is not necessarily in compliance with constitutional requirements, even if the staffing shortfall is due to budgetary factors beyond its control.”

There are Federal resources to assist with developing a staffing plan. The NDOC should take advantage of these resources.

A comment was made that the direct supervision of inmates would have major cost implications. The DOJ answered by saying that

this is a misinterpretation. The final standard does not require direct supervision of inmates. This passage would argue against a recent memo sent to NNCC via the AWO that says every unit must tour the unit at least three times an hour. This is just a knee jerk reaction to recent events. Just as we will not be able to completely eliminate rape, we will never eliminate suicide. The inmate in this incident had not shown any suicidal ideations or exterior signs. There is no need to implement this latest unattainable directive because it is not possible to do this when there is only one officer working a unit, and the fact that the officer has many other duties to attain during any given shift. Tours are vital to the safe operations of a unit, but as the standard points out, it is not necessary to *directly* supervise inmates.

“The Department recognizes that adequate staffing levels alone are not sufficient to combat sexual abuse in a corrections setting. However, adequate staffing is essential to providing sufficient supervision to protect inmates from abuse.”

“A facilities inability to perform required functions and operate in accordance with the institutional schedule without significant periods of lockdown may have a direct bearing on the adequacy of staffing. However, deviations from the schedule and performance deficiencies may signal deeper problems unrelated to the number of staff. In addition, the ability to stay on schedule and perform routine functions does not necessarily indicate a safe or adequately staffed facility. While this information may be relevant to an auditor, review of the facility’s staffing plan, it cannot be the sole determinant of staffing adequacy.”

If the Department receives a “Does not meet standard” with regard to PREA, it will have 180 days to correct the deficiency. The auditor will work with the Department to make sure it is in compliance with all standards of PREA.

The final rule also says that it is generally meant when the word “staff” is referred to, staff is defined as having exclusive or

primary duties that are of supervising inmates. This would exclude administrative staff, medical staff, and I also believe caseworkers who see staff on an irregular basis.

The DOJ also looks at surveillance cameras as a supplement to staffing, not a replacement.

Conclusion

The Department of Justice realizes that prison rape will not be eliminated. However, it has set certain guidelines and standards to greatly reduce this act. The Nevada Department of Corrections is currently grossly out of compliance with these standards which took effect on August 20th of 2012. It would behoove Department Administrators to rethink the policy of no overtime, leaving vacant positions unfilled and shorting staff on the Institution. There are a number of tools and advice at their disposal to come into compliance. And although the standards do not address staff safety because of their focus on PREA alone, compliance with these standards will greatly enhance staff safety as well as the intended subject. In that regard, it is just short sightedness that the AWO of NNCC would send a memo, insisting that officers tour a unit 3 times an hour. If an officer is alone in a dorm style unit such as 4, 10A and 10B, or a mental health unit like unit 6, it is an obvious security issue for both staff and inmates. A second officer in each of these units a necessary for safety of staff, and it would greatly increase the opportunity to tour units and prevent inmate injuries. Not only does the court case quoted by this standard apply, the Stickney ruling should also apply to any like unit such as those mentioned.

The standards set by the DOJ as far as staffing to meet PREA requirements would help in more than this one aspect of overall safety and security of all Institutions.

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