Attachment 7

striving for Justice

With Temperance Prudence and Fortitude

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 it's 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 of 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.

Contacts and references

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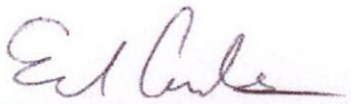

Eugene Columbus, President
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EUGENE COLUMBUS
President

DONALD COFFIN
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JAMES KELLY
Secretary

TAMARA BARTEL
Treasurer

January 15th 2013

NEVADA BOARD OF PRISON COMMISSIONERS

RE: Custody staffing of Nevada's Prisons

Dear Commissioners,

During recent board meetings, there have been officers speaking out about the staffing levels of the Institutions. The Nevada Corrections Association has received many queries regarding this subject from officers and supervisors. The concerns that have been expressed by the vast majority of these individuals is not about staffing of the Department as a whole, but that of staffing each Institution, and more precisely, the staffing of each shift. The concern is that on a shift by shift basis, each time there is a shift change, the dynamics of the Institution changes, sometimes in a dramatic way. This is also true of the inmate population and the level of custody and control we may have. For this reason, some of our members have expressed, in a passionate way at times, their concern for their safety, and the safety of all of our colleagues. In an effort to better understand the staffing issues that we face, Director Cox recently contracted the Federal Institute of Corrections to conduct a study of the levels and effectiveness of the staffing for the Department of Corrections. The NCA believes that this is not cost effective and is unnecessary because there has been a study conducted in 2006 which was done at a time when staffing circumstances were similar to our current circumstances.

Although the Administration may be concerned about the staffing levels of the Department as a whole, there is still a gap between the Administrations opinion of what a safe staffing level is for each shift, and that of the individuals who are working on the Institutions on a daily basis. Because of this gap, some of our officers have expressed their concerns and their frustrations based on their own safety and that of their colleagues, in somewhat ardent terms. These are individuals who are, in most cases, the primary provider for their family. They have spouses, children and other family members who rely on them, and expect that they will go to work and come home safely, regardless of the potential dangers they may encounter. For this reason, the NCA finds it necessary to address our members concerns, and try to spell out the specific needs that

will help to assure that our officers and co-workers have a much better chance to end the work day as secure as they arrived.

Because our prisons are somewhat a microcosm of a small town, we have many of the problems that any town would have. When it comes to the safety and security of all persons within the fences, it is the custody staff who are the primary defender of this. It is the custody staff who are the police force that is called upon when emergencies are broadcast. In essence, they are the 9-1-1 responders. Just like society, Prisons have many confrontational situations such as; domestic disputes, assaults, fights, weapons use, arguments, rapes, suicides. The list goes on and on. Unlike our counterparts in society who have strong back up, a multitude of weapons at their disposal, top of the line equipment and strong incentives for retention; correctional staff have none of this to speak of. This is where the frustration is rooted. When a distress call is put out, we have only our fellow officers to respond and rely on. This gives us individuals who, like the calling officer, are only part of a group of unarmed officers who rely solely on their numbers and their wits. The number of officers depends on the staffing level of the shift on duty at the time, and the wits that we rely on is the result of years of experience that is handed down throughout the years, and the minimal training that is now available through the Department.

The number of officer for each shift is dependant on a number of variables. There are several different types of leave available to all state employees that are used daily. These different leave types effect our shift staffing, and are unpredictable in most cases. Because of this, there is an absolute need for the supervisors to be able to hire overtime. The overtime issue can never be fully eliminated because of the unpredictable nature of the staffing dynamic. For instance, if we had nine officers on the shift designated as Sick and annual officers, we could have 10 people call off sick for the shift, leaving the shift one position short. This illustrates that there can never be a set amount of additional staff on the permanent schedule to guarantee that the shifts will be invulnerable to falling short of staff. For this reason***, there must be an overtime budget available to cover positions if need be.***

The other aspect of our basic needs when responding to a distress call is wits. Our wits are what we gain through our experiences working in a prison environment every day. We learn from doing and seeing it done. There are years of experience that we draw from, and we are given valuable guidance from those who have been in similar situations many times before. Individuals who have years of experience are probably the most valuable commodity in our setting. For this reason the NCA believes that ***officer retention should be a high priority*** when determining the Departmental budget. We cannot afford to continue with the current "brain drain" which is caused by our low pay and the constant assault on our incentives. There are currently officers and staff who have not received any sort of pay increase for about the last four years, despite the fact that these officers have gained valuable experience in this profession. ***This, we feel, needs to be remedied immediately.*** Law enforcement has always been a profession that is unique because of the core needs of a society. We must be protected by competent individuals willing to take on a job that is considered vital, but is at the same time considered undesirable to many.

These two essential elements are the foundation for a strong and reliable correctional work force. It would be challenging to say the least to find individuals who would work for the pay despite the conditions or to find others who would work in a prison environment despite the low pay. For this reason, we must be willing to find those who are willing to work and train in this profession and pass this knowledge on the future officers.

As always, thank you for your time in considering our concerns, and we would welcome a meeting with you to expand on these ideas.

Sincerely,

Gene Columbus
President
Nevada Corrections Association

Cc: Interim Finance Committee

GC/jk

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TAMARA BARTEL
Treasurer

March 13th 2013

NEVADA BOARD OF PRISON COMMISSIONERS

Re: Staff assault at Ely State Prison on February 25th 2013

Dear Commissioners,

During the NCA's biannual board meeting on March 9th 2013, it was brought to our attention that on February 25th 2013 there was an incident in the lock down unit of Ely State Prison, where an inmate had slipped out of his handcuffs and battered two individuals, causing great bodily injury. One of the individuals suffered major head trauma, while the other sustained lacerations to his head area requiring 30 stitches, along with other damage. It is clear to the Association that this inmate had committed the crime of attempted murder on a peace officer. Had he not been stopped, we would probably be discussing the actual murder of these two individuals.

Because of this incident, *which should have never occurred for reasons that will be explained,* one officer has resigned, and the other individual will have permanent scarring on his head; and both individuals will have mental scarring for the rest of their lives.

One of the persons was a Correctional Officer Trainee with a mere 7 months on the job. Two of these months were spent in the Department P.O.S.T. training academy in a classroom setting. During his P.O.S.T. training, he received approximately 8 hours on restraint training in a controlled environment. The other staff member was a NON-PEACE OFFICER who was hired to become a peace officer, but had not yet attended a P.O.S.T. academy. When the Department hires individuals who are awaiting the next P.O.S.T. training session, they are supposed to be put on the Institutions as a shadow only. They are only to follow and observe other officers to gain practical experience through observation only. Because they are not yet a sworn peace officer, they are not to ever have physical contact with inmates. Supervisors should be aware that there is no

exception to this. However, in this case, and in many other cases, these non-peace officer staff members are being used to fill mandatory positions in order to avert hiring overtime, and are forced into positions where they *do* have physical contact with inmates. This incident can accurately be described as the phenomenon known as MISSION CREEP.

> **Mission creep** is the expansion of a project or mission beyond its original goals often after initial successes. Mission creep is usually considered undesirable due to the dangerous path of each success breeding more ambitious attempts, only stopping when a final, often catastrophic, failure occurs.

The NCA believes that this mission creep derived from policies, which on the surface may have been well intended but, in the end have had consequences that were anticipated by our Association; yet, our warnings were ignored. Although we could not have predicted exactly what would happen if our concerns were not addressed, this incident can clearly be seen as the "end" which resulted from the Departments "means".

We would like to bring to your attention a letter the NCA had sent to you in the middle of January, which addressed both the "brain drain", and the short staffing levels, which the NDOC has been suffering from in recent years. The incident at Ely State Prison highlights the consequences of ignoring these issues in the name of budget concerns. The NCA has been advocating the prioritizing of safety concerns over budget concerns for some time, and it has now been shown that our concerns were warranted.

The staffing of the unit and the circumstances leading to this assault were as follows:

> On February 25th 2013 in unit 5 of Ely State Prison an inmate on staff assault occurred leaving a training officer with severe head trauma and another staff member with lacerations requiring about 30 stitches. The incident occurred at about 6:55 pm. The training officer and the other staff member, (who was hired as a peace officer, but had not gone through the post training, and therefore not a peace officer) had applied wrist restraints on two inmates in order to escort them to the recreational yard. It is alleged that both individuals had applied the wrist restraints, and the trainee was showing the non-peace officer how to apply the restraints. While walking across the unit, one of the inmates had "slipped his handcuffs" and severely assaulted one staff member, and then the other, using the wrist restraints, which were secured on only one wrist, as a striking weapon. The second inmate also participated in the assault, but his restraints were still secured on both wrists.

The NCA has several major concerns with the systemic failures that have been brought to light by this incident. First, allowing non-peace officers to shadow peace officers. This practice, if done properly and safely, would be mildly acceptable to the NCA. Obviously, in the manner it was conducted above, this is unacceptable to us in every respect. We believe that this "mission creep" was caused by any or all of the following:

There was much pressure on the shift supervisors to not hire overtime. They use non-peace officers in positions that are considered vital for minimum staffing levels. They were filling positions which are considered vital for the safety of staff and inmates, and ultimately, the public. According to NRS 209.131, these peace officer positions must be filled ONLY by State certified peace officers; WITHOUT EXCEPTION.

The fact that a Correctional Officer Trainee was allowed to train a non-peace officer was due to the severe lack of formal training, and the absence of qualified officers to conduct any on-the-job training.

The more experienced officer was working in the control bubble, while the trainee was working on the floor of a high security unit. Supervisors should know that officers can be reassigned for the security needs of the Institutions. There is an argument to be made for having a more experienced officer controlling the cell doors. However, in a situation where inmates are in contact with an officer, it is more desirable to have an experienced officer conducting the hands on procedure, where incidents are more apt to occur without warning. While in the control bubble, an officer is able to hold off on opening a door until it is clear that the actions about to be taken are correct.

The trainee was instructing the non-peace officer in techniques that are used during hands on situations with inmates. Formal training on these techniques is to begin in the peace officer certification process, and then conducted in the field by officers who have practical application experience in the use of these techniques. A trainee should NEVER be allowed to train others on critical techniques.

The NCA would strongly iterate that this incident and the issues which led to it are not new to the Department. Human error is inevitable when working in a highly volatile environment such as this. But when budget concerns take a higher priority than the safety and security of the staff, inmates and the public, we are violating the very mission statement which gives us a far better chance of going home safe and healthy, and allows the public to be assured that they too are safe.

We would like to once again offer our extensive experience in these matters by requesting that a meeting with your staff occur so that concerns other than the budget can be considered when regulations and procedures are being slated for change.

We hope that this letter finds you well, and we look forward to meeting with you in the future.

Sincerely,

Gene Columbus
President, NCA

Donald Coffin
Vice President, NCA

GC/jk

Cc: Select members of the Nevada State Legislature

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President

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Remarks to the Nevada Board of Prison Commissioners

March 19th 2013

Thank you Mr. Chairman, Commissioners: I am here today representing the Nevada Corrections Association in matters which are of great concern to our membership and many others.

The NCA has recently sent letters to each of your offices, and that of the Director, which brought to light a serious incident where an inmate had assaulted two staff members. I won't go into details of the incident at this time other than to say that the NCA believes that the severe reductions of training, the constant shifting of minimum staffing levels and deterioration of our pay and benefits have all contributed in some way to this incident.

To address the training issues, we would like to point out that we are now to the point where officers are receiving a bulk of their mandatory training through the internet. By not having "in class" refresher training for our officers on vital security functions, we eliminate the interaction among officers which lead to new ideas, group discussions, questions and answers and a team building opportunity, all for the sake of budget savings, at the expense of safety and security.

The minimum staffing levels at the institutions have been a point of contention for some time. Even though the amount of inmates and the activities on the yards do not change in any appreciable way, the minimum staffing levels seem to change as if these variables do indeed fluctuate. We believe that the PREA rule force us to commit to a minimum staffing level that is both safe and consistent.

As far as pay and benefits are concerned, we do see that the Director is doing what he can to reinstate what we have lost. We would however like to emphasize that law enforcement is a necessary evil in our society in which mistakes often end in disaster. For this reason, when the state takes the time and money to train individuals, and

determine that they are trustworthy, we should go above and beyond normal methods to retain these individuals so that their practical experience can be passed on to others.

The Administrations low priority of training and retention were probably the main contributor that led to this incident at Ely. The individuals who were working in this High Risk Unit of the state's Maximum security Institution were not of the caliber which is essential for safe operations. Practical, intense hands on training, which was lacking in this incident, are essential for all who maintain close proximity with inmates. The Institution put a trainee, and another who was not trained, and was not a P.O.S.T. certified peace officer in direct contact with some of the most dangerous inmates in our system.

This incident is very similar to one that occurred not too long ago at Warm Springs Correctional Center. One of our officers was blocked in a cell by inmates, where he was assaulted by other inmates. In this case, the officer was able to fight his way out of the cell, and had an officer in the control bubble that was able to stop the assault with his firearm, and call for back up. Had the second officer not been there, this incident would have been much more devastating.

I would like to tie up all of these comments into one theme: The Administration seems to have shifted away from our mission of security and protection, to that of lowering the budget and saving money.

The NCA understands the budget concerns with today's economy. We would however like to emphasize that the safety and security of the citizens of Nevada must take priority over all else. This is the core of our mission. With recent budget decisions and the implementation of unnecessary policies, our ability to effectively work inside the wire on a daily basis is being deteriorated. If this trend continues, we will see more incidents such as that of Ely and Warm Springs, with perhaps even more tragic outcomes. To send men and women into a potentially volatile situation is one thing. We all know the danger. But to send them in with inadequate training, improper tools, and with no backup is just unconscionable.

I know that you will be addressing the PREA Federal rule in today's meeting. The NCA would just like to mention that we have conducted an analysis of the staffing portion of this rule. We have included a copy of our analysis of this rule in the packet I have here for each of you. Along with the analysis I have also included a copy of our letter addressing our staffing concerns, and another copy of the letter I mentioned earlier. I would also like to submit a copy of all these letters for the record.

Thank you for having this timely meeting to inform the public on these issues, and for allowing me to testify.

James Kelly
Secretary, NCA

EUGENE COLUMBUS
President

DONALD COFFIN
Vice-President

JAMES KELLY
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TAMARA BARTEL
Treasurer

March 21st 2013

NEVADA BOARD OF PRISON COMMISSIONERS

Re: Revised and expanded statements by James Kelly during the Nevada Board of Prison Commissioners meeting of March 19th 2013

Dear Commissioners,

During the prison board meeting held on March 19th 2013, I made statements while representing the NCA which I would like to extend and revise.

After talking to colleagues after the meeting, I was informed that my comments regarding the notification of changes to the AR's may have been unclear or contradicting. What I meant to say was that the Department has been doing a good job of notifying staff of their ***intent to solicit recommendations*** on future changes to the AR's. Ms. Blackwell has been sending notifications to staff which would give all staff the opportunity to suggest changes to AR's that will be presented to the board during future meetings.

I would also like to expand on comments I made regarding the dismal record of the inspector generals office.

I pointed out that the IG's office has conducted biased investigations, leading to sustained allegations which have been overturned during appeal; and that this process often leaves staff without income for several months. Because the IG's office is under direct control of the Deputy Director, Ms. Del Porto is influenced by the Department, and not by justice. She has the sole authority to decide what will be investigated and what will not be investigated. This influence could be expanded when the PREA rule takes effect, causing more investigations on those whom the Department sees as problem staff. When

more staff are put under investigation for alleged PREA violations, they may be unjustly charged with many other violations of AR 339. This is already a common practice, and will only get worse. The IG's office cannot be viewed as an irreproachable entity because of the influence the Administration can and will wield in the future, and has wielded in past investigations. This influence is also felt in Pre-disciplinary hearings where the hearing officer is also one who is under the direct supervision of the Deputy Director; and also has a history of upholding decisions which were later overturned on appeal.

I would ask that my expanded and revised statements be included in the record of the board meeting.

Thank you for your consideration.

James Kelly
Secretary, NCA

Cc: Gene Columbus, President NCA
Greg Cox, Director NDOC