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Abstract

Sexual violence in adult correctional facilities led to the enactment of the 2003 Prison Rape Elimination Act as one approach to reducing this form of institutional violence. The current study examined collective bargaining agreements governing correctional agencies to identify impediments that may impact administrators' responses to sexual violence, specifically in instances of allegations of staff–inmate sexual misconduct. In addition, structured interviews and focus groups with correctional administrators and labor representatives were used to develop policy recommendations. Contract language and interview participants demonstrated that a myriad of cultural and structural characteristics of prisons as well as pragmatic considerations may serve to inhibit the implementation of some policy changes. Interview participants identified several insights about contemporary prison settings and modifications that may aid in reducing some forms of institutional violence.

Keywords

correctional staff, correctional policy, inmate assaults, prison rape

Introduction

Prior to the 1990s, sexual violence in correctional institutions failed to attract attention from either the public or the media; however, researchers have been keenly aware of this ongoing concern finding wide-ranging reports of the prevalence of inmate sexual victimization and numerous methodological challenges in studying this phenomena. In 1968, Davis investigated some of the earliest allegations of sexual violence in the Philadelphia jail system concluding that sexual assaults were “epidemic” in the system emphasizing the “raw, ugly, and chilling” nature of the assaults that were occur- ring (Davis, 1968). Many of his conclusions, however, were based on his extrapolations from interviews beyond the officially documented 2.9% prevalence rate of sexual victimization in the jail population. Based on his investigative efforts, Davis estimated the rate was substantially higher but that inmates failed to cooperate in his investigation or report incidents because they feared retaliation or other repercussions.

In the 40 years following Davis’s (1968) study, numerous scholars have attempted to determine accurate rates of sexual victimization in prisons. Studies have documented prevalence rates ranging from 2.4% to 27% or higher of inmates who experienced sexual victimization including sexual threats and forced sexual acts (Blackburn, Mullings, & Marquart, 2008; Fuller & Orsagh, 1977; Hensley, Koscheski, & Tewksbury, 2003, 2005; Gaes & Goldberg, 2004; Hensley & Tewksbury, 2005; Struckman-Johnson & Struckman-Johnson, 2002; Tewksbury, 1989). According to Gaes and Goldberg (2004), the significant variation in rates of reported sexual violence between these studies can be attributed in part to the definition of sexual violence employed, small sample sizes, and variation in research methodology. Moreover, most of the previous literature on the topic of sexual victimization is limited to a particular jurisdiction, rather than a larger stratified sample of inmates throughout the United States. In addition to the weaknesses in the literature summarized by Gaes and Goldberg, it is notable that much of the prior literature focuses on that sexual violence committed by other inmates and ignores correctional staff as a potential source of unwanted and inappropriate sexual contact.

The focus on sexual violence in prisons expanded significantly when the issue of sexual misconduct by correctional staff came to the forefront in the 1990s. Stemming

from the development of inmate lawsuits alleging sexual misconduct, an increase in state laws prohibiting sexual relations between staff and inmates, and numerous studies conducted by academic researchers, the federal government and human rights organizations, the interest and concern of policymakers was acquired. In response to the increased awareness and in an effort to define prison rape as a social issue, in 2003 President Bush signed into law the Prison Rape Elimination Act (PREA). PREA specified a zero-tolerance policy for rape and sexual assault in prison, bringing to the forefront one of the most sensitive issues in the correctional environment. The Act applies to all federal, state, and local prisons, jails, police lock-ups, private facilities, and community settings such as residential facilities and is the first federal law ever to acknowledge prison rape. The swift and nearly uncontested passage of the Act indicated that prison rape was recognized as a pressing issue for correctional administrators, their employees, and lawmakers. As a result of this action, prison rape, which according to the courts is a form of “cruel and unusual punishment,” was redefined as a civil rights violation for inmates and juvenile wards.

The broad purposes of PREA include making the eradication of prison rape a top correctional priority; developing and instituting national standards to prevent, detect, and reduce sexual violence in prisons; and increasing the accountability of correctional officials who fail to detect, prevent, reduce, and punish prison rape. In addition to PREA, many correctional agencies are governed by labor contracts, which influence key areas affecting correctional operations. These contracts often cover areas such as staffing, health and safety, education and training, investigations and discipline, grievance procedures, and job classifications. Thus, while correctional administrators agree that preventing and reducing sexual violence, whether inmate–inmate or staff–inmate is a top priority, they are mandated by PREA yet must function within the purview of the labor contracts. Contractual provisions can be of potential help or a hindrance to correctional administrators who are responsible for responding to allegations of sexual violence in their facilities.

To date, researchers and policymakers alike have failed to consider whether com- mon provisions in labor contracts serve as facilitators or impediments in responding to allegations of staff perpetrated sexual violence. The current study involves a

documents analysis of all state and federal labor contracts to quantify the extent of impediments (if any) administrators face when responding to allegations of sexual misconduct occurring between correctional staff and inmates that stem specifically from these governing agreements. Results of this analysis are contextualized through focus groups and semistructured interviews with correctional professionals resulting in pol- icy recommendations pursuant to efficient and effective contractual processes regarding staff sexual misconduct in prisons.

Staff Sexual Misconduct Prior to PREA

In 1996, the National Institute of Corrections (NIC) sponsored a survey of correctional agencies nationwide including Canada and concluded that few departments had "looked closely at whether and to what extent their policies and practices offer clear guidance to staff and inmates on the issue of sexual misconduct" (LIS, Inc., 1996, p. 2). Yet, it was quickly becoming apparent that staff–inmate sexual misconduct can and does occur in correctional facilities, especially facilities housing female inmates. A 1999 U.S. General Accounting Office report (GAO, 1999) examined data from four jurisdictions including Texas, California, the Federal Bureau of Prisons, and the District of Columbia between 1995 and 1998 finding 506 allegations of sexual mis- conduct by staff on inmates, of which 92 incidents (18%) were substantiated. Nonprofit organizations further supported this information with reports describing female inmates' mistreatment and substantiated allegations of sexual misconduct by staff (Amnesty International, 1999).

Researchers quickly followed up in with studies pertaining to this issue. Struckman- Johnson, Struckman-Johnson, Bumby, and Donaldson (1996) conducted a study of male and female inmates in a Midwestern prison system finding that "20% had been pressured or forced at least once to have sexual contact against their will while incarcerated. Persons working in the prison were involved in 18% of the incidents" (pp. 74-75). In a separate 1998 study of male inmates in seven Midwestern prisons for men (in four different states), Struckman-Johnson and Struckman-Johnson (2000) found that "21% of the inmates had experienced at least one episode of pressured or forced sexual contact since incarceration" (p. 383). They argued that their study suggested that "a substantial portion of sexual coercion incidents involved prison staff

perpetrators" (p. 389). Similar results were found in their study focusing on female inmates in three Midwestern prisons. Specifically, Struckman-Johnson and Struckman-Johnson (2002) found that "nearly one half of the incidents of sexual coercion were carried out by female inmates . . . and almost half of the incidents reported by female targets were perpetrated by staff" (pp. 25-26) including staff perpetrators who were male and female. While many of these studies are limited by those factors outlined by Gaes and Goldberg (2004), the assumption that staff–inmate sexual contact is nonexistent was clearly not supported.

Impact of the PREA

Responding effectively and efficiently to allegations of staff sexual misconduct requires a uniform, streamlined process that ensures allegations will be addressed in a timely manner. This process is in the interests of both inmates and staff. Moreover, regular, systemic assessment of the prevalence of sexual misconduct in prisons is a first step to understanding and responding to such inappropriate behavior. The PREA provided for this gathering of data through its direction of the Bureau of Justice Statistics (BJS) to carry out a comprehensive annual statistical review and analysis of the incidence and effects of prison rape. PREA also established within the U.S. Department of Justice a Review Panel on Prison Rape that carried out public hearings concerning the operation of the three facilities with the highest incidence of prison rape and the two facilities with the lowest incidence in each category of facilities identified. Finally, it charged the National Institute of Corrections with providing training and technical assistance to the field, developing a clearinghouse and authoring an annual status report to Congress and directed the Attorney General to develop grants to assist states in ensuring that budgetary circumstance do not compromise efforts to protect inmates and safeguard the communities to which they return.

The passing of PREA also created the National Prison Rape Elimination Commission (NPREC), with a charge to conduct a comprehensive legal and factual study of the impacts of prison rape, submit a report on the study, and to develop recommended national standards. To accomplish these responsibilities, NPREC held public hearings throughout the United States. The research and evaluation of best

practices is currently in progress and the NPREC has established expert committees to guide the development of draft standards. The standards that are in development will apply to all agencies and populations under the law.

Following the PREA directive outlined for a comprehensive analysis to be conducted by BJS, Beck and Hughes (2005) conducted the first national study of administrative records on sexual violence of adult and juvenile correctional facilities. Their findings indicated that in 2004 inmates and wards reported 3.15 allegations of sexual violence per 1,000 inmates, with a total of 8,210 allegations reported nationwide. Allegations involving staff sexual misconduct (42%) were higher than inmate–inmate nonconsensual sexual acts (37%) but not to a statistically significant degree. An additional 11% of incidents consisted of staff sexual harassment of inmates. Beck and Hughes also reported that in state prisons, most victims of staff sexual misconduct were male, while most of the perpetrators were female. By contrast, in local jails most victims of staff sexual misconduct were female, while most of the perpetrators were male.

In the most recent BJS study on sexual victimization in adult prisons, Guerino and Beck (2011) found 7,444 allegations of sexual victimization occurred in prisons and jails during 2008, an increase from 6,241 allegations of sexual victimization in 2005. Of the 7,444 allegations, 931 incidents (13%) were found to be substantiated. Substantiated incidents involving staff sexual misconduct (46%) were slightly less than inmate-on-inmate nonconsensual sexual acts (54%). Consistent with prior data, male inmates were more likely to be the victims in prisons whereas female inmates were more likely to be the victims in jails with perpetrators most commonly of the opposite gender.

In 2007, the BJS released its first report based on the newly established National Inmate Survey (NIS) conducted between April and August 2007. The NIS collected reports of sexual victimization experiences during the previous 12 months from a ranom sample of 23,398 inmates from within 146 state and federal adult prisons. Results indicated that 1,109 inmates reported one or more allegations of sexual victimization. Taking into account weights for sampling facilities and inmates within facilities, the estimated number of state and federal inmates experiencing one or more incidents of sexual violence involving another inmate or staff nationwide totaled an estimated 60,500

(or 4.5% of the nation's prisoners; Beck & Harrison, 2007). Of this 4.5% nationwide, an estimated 2.1% of inmates experienced an incident involving another inmate and an estimated 2.9% experienced an incident involving staff.

Some inmates (an estimated 0.5% nationally) stated that they had been sexually victimized by *both* other inmates and staff. A majority of victims of staff misconduct reported activity beyond simple touching in a sexual way. An estimated 0.3% of inmates nationwide reported being injured as a result of the sexual victimization by staff. Survey items related to staff sexual misconduct asked if inmates willingly had sex or sexual contact with staff, or if they were pressured or made to feel they had to have sex or sexual contact. Results showed that among inmates reporting experiences of sexual misconduct by staff, the number that reported they had sex or sexual contact willingly (n = 22,700) was nearly identical to those who reported contact as a result of physical force, pressure, or offers of special favors or privileges (n = 22,600). Taking into account weights for sampling facilities and inmates within facilities, the estimate number of incidents nationwide totaled 109,300 incidents of willing sexual contact with staff, while 114,100 incidents involved unwilling sexual contact with staff. Expressed as a rate, nationwide an estimated 82 incidents of willing sexual contact with staff per 1,000 inmates held in state and federal prisons were reported by inmates, whereas a total of 85 such incidents of staff sexual misconduct per 1,000 inmates were reported as unwilling.

In addition to official BJS reports, independent studies conducted since the passage of PREA have continued to produce valuable data on the prevalence of sexual misconduct in correctional facilities but they have retained a primary focus on inmate–inmate sexual victimization (Austin, Fabelo, Gunter, & McGinnis, 2006). Insightful into the dynamics associated with sexual contact in correctional facilities research that has sought an explanation for the wide variation in reported rates of sexual victimization. In extensive interviews conducted by Fleisher and Krienert (2006a), results contextualized variation in sexual assault rates as well as clarified the divergence between the typical suspicion that "prison rape" is a common occurrence and the relatively low rates of reported incidents. In interviews with 564 inmates in both male and female high security prisons and female medium security prisons (30 prisons in 10 states), they found conflict existed between common public perceptions about prison sexuality and inmates

themselves. According to Fleisher and Krienert (2006b), “there is no equivalent in inmate sexual culture that’s equivalent to our perception of rape. In prison lexicon, rape is another way of ‘getting ripped-off’—no different from having a radio stolen from a cell” (p. 1). Furthermore, during their interviews researchers found that inmates stated that rape as Fleisher and Krienert defined it did not frequently occur and rapists were not welcome in the regular inmate society. Interestingly, inmates who were interviewed agreed that inmates issue false allegations against staff pertaining to sexual misconduct. In follow-up questions that considered only staff sexual misconduct, female inmates noted that personal relationships or mutual sexual relationships with male or female staff were common.

Although correctional staff–inmate sexual contact has been long established as a criminal offense or, at minimum, unethical in jurisdictions across the country, many of the studies completed prior to the establishment of PREA suggested some level of inappropriate correctional staff–inmate contact existed in correctional institutions. Post-PREA research, specifically the study by Fleisher and Krienert and also govern- mental reports, suggests that staff sexual misconduct persists despite PREA’s zero- tolerance standard for prison rape, which made prison rape a top correctional priority, and increased the accountability of correctional officials who fail to detect, prevent, reduce, and punish prison rape. The question that becomes apparent is what inhibits the detection, investigation, and prevention of staff–inmate sexual misconduct in correctional facilities?

Without doubt, correctional administrators and labor groups support the tenets of PREA and admonish any unethical behavior of correctional staff that would be deemed as anything less than professional. Furthermore, both correctional administrators and labor groups would vehemently argue that inappropriate contact between correctional staff and inmates posed a significant safety and security hazard not only to those directly involved in these activities but to the larger group as well. The challenge that is associated with staff sexual misconduct and more specifically the PREA mandate is responding effectively and efficiently to allegations through implementation of a uniform, streamlined process that ensures allegations will be addressed in a timely manner. Such a process is in the interests of both inmates and staff regardless of the merit of an

allegation. Associated with this process are both potential barriers that hinder the process and conditions that act to facilitate such a process.

Current Study

This study focused on a document analysis of federal and state-level collective bar- gaining agreements to identify common barriers or facilitators administrators face when responding to allegations of sexual misconduct occurring between correctional staff and inmates. In addition, results from this analysis were contextualized through focus groups and semistructured interviews with correctional administrators and union leaders in an attempt to develop suggestions for decision making pertaining to collective bargaining agreements and allegations of staff–inmate sexual violence.

Methodology

Executive directors of the state-level correctional system in all 50 of the United States as well as the Federal Bureau of Prisons were contacted to determine whether their jurisdiction engaged in collective bargaining. Where applicable, a follow-up request for an electronic or paper copy of applicable labor contracts was made. Responses were received from 90% of the states and the Federal Bureau of Prisons (hereafter referred to as “jurisdictions”). A significant portion of correctional administrators and correctional officers were found to be affected by collective bargaining agreements. A total of 30 states and the Federal Bureau of Prisons operate under these agreements with their correctional officers (n □ 31). Agreements were available from 24 states and the Federal Bureau of Prisons (n □ 25) at the time of the analysis. Some of these contracts were under negotiation at the time of the analysis. Forty percent of the jurisdictions (10 of 25) had multiple contracts (i.e., distinct contracts for support staff such as teachers, nurses, laborers, and medical staff). This analysis focused only on those contracts (or parts of contracts) that directly pertained to correctional officers/line staff.

Researchers developed evaluation protocol and coding schema based on existing literature and in consultation with correctional and labor union experts. The focus of the documents analysis included examining provisions for responding to

allegations of staff sexual misconduct and/or violence, limits on disciplinary procedures and sanctions for involved staff, and the ability of correctional agencies/facilities to balance the fairness of labor practices and the protection of inmates. Based on an initial review of a subset of collective bargaining agreements, a rubric was developed and then tested on a subset of contracts. This rubric was then revised before being fully implemented in an analysis of the full set of collective bargaining agreements. Extending beyond a descriptive approach, researchers critically analyzed the content, strengths, and weaknesses of each contract as it pertained to practical application and how it may or may not serve as a barrier or facilitator in responding to staff sexual misconduct. In the analysis, researchers focused on identifying similar content patterns that existed within various jurisdictions' contracts. Identifiable content patterns were organized into a taxonomy that inventoried concepts and themes to demonstrate associations and, where applicable, factors related to repeating ideas.

Focus Groups and Structured Interviews

To place the contents of labor agreements into a practical context, subsequent to the completion of the document analysis the research team held a series of focused inter- view sessions with 20 correctional professionals from states with active collective bargaining agreements in place. To insure that both administrative and union perspectives would be examined, participants included several correctional officer union representatives from across the nation who held offices at the Executive Director level and above. Participants also included correctional administrators with a significant level of combined practical and administrative experience and held executive level positions such as Deputy Commissioner, Deputy Director, and Associate Director. Ten respondents participated in a focus group held at a national professional meeting, while the balance of the participants engaged in telephone conferences with individuals from states that were unrepresented at the aforementioned focus group time.

In all of the interview sessions, the respondents were first informed of the general nature of the project and advised that the primary task at hand was to learn as much as possible from them about how (or if) collective bargaining contracts influence efforts being made by correctional professionals to effectively and efficiently deal with

allegations of inappropriate sexual conduct between prison workers and inmates. Purposefully, a broader question was stated to encourage the onset of discussion. In this article, we primarily focused on those comments and aspect of the discussion that directly coincide with our review of contract language.[1] Respondents were encouraged to reflect on their own personal experiences, as well as experiences they may be familiar with through their interactions with other correctional professionals and/or union representatives throughout the nation.[2]

Results From Collective Bargaining Agreement Document Analysis

Collective bargaining agreements varied to a significant extent in terms of length, recency, complexity, formality, structure, and content. The analysis resulted in a rubric of several areas clearly related to role of collective bargaining agreements in correctional staff–inmate sexual misconduct. The results that follow align with the areas that emerged from the analytical rubric. An important point to note in terms of interpretation of the results discussed here is that while some collective bargaining agreements may not include clauses, articles, or language related to a given topic, this should not be taken as evidence that alternative institutional-level policies (either formal or informal) do not exist on that topic. Recall that the focus of this research project was specifically on those negotiated terms that exist in formalized collective bargaining agreements.

General Focus and Application of the Agreements

The majority of jurisdictions have a *probationary period* for correctional staff that typically spans 6 months. During the probationary period, these correctional employees have limited rights and protections normally afforded by collective bargaining agreements to correctional employees. This limitation was specifically evident, and potentially important, with respect to the grievance process wherein a probationary employee generally did not have any grievance rights with the exception of protections from sexual harassment.

Most contracts (17 of 25, 68%) specifically noted a probationary period for their staff. When documented in the contract, the probationary period ranged from 4 to 12

months, but most commonly was reported as 6 months. It was specifically noted in 52% of contracts (but implied in others) that staff with probationary status had limited rights with respect to the grievance process and discipline. Within the 52% of con- tracts (*n* = 12) that addressed this issues, specific language existed such that: (a) probationary employees were not eligible for the grievance process in 8 of 12 contracts (67%); (b) in 3 of the 12 contracts (25%), probationary employees could file grievances but not against disciplinary action; (c) it was explicitly reiterated within the grievance process section of the contract that probationary employees do not have any right to the arbitration process (1 of 12 contracts, 8%). The balance of the 12 contracts only addressed this issue once in a separate "arbitration" section of the collective bar- gaining agreement.

Implication for staff sexual misconduct and PREA-related issues. The rights of correctional employees who are under probationary status to utilize a grievance process for the purposes of grievances associated with disciplinary action or dismissal is nonexistent. It would follow that should an allegation of staff sexual misconduct be alleged against a probationary employee, any administrative decision regarding the employee's dismissal would also be ineligible for grievance action through the individual's collective bargaining unit. This lack of protection within the correctional system for a probationary employee does not preclude an individual from seeking legal action through other means outside of the correctional system for unlawful dismissal as a result of discrimination. As noted by the United Electrical, Radio and Machine Workers of America (2012) "Probationary employees also have rights under the same laws that protect other employees. Thus, a probationary employee cannot be subject to racial, sexual or age discrimination by the employer. Nor can they be made to work in unsafe conditions." These same circumstances extend to correctional employees.

The denial of access to the grievance process for probationary employees is sup- ported by a substantial body of legal decisions. As discussed in a 1993 hearing in a related manner before the Federal Labor Relations Authority (see http://www.flra.gov/decisions/v46/46-127-4.html for a full text of the decision) presided over by Chairman McKee, the decision cites precedent that stated the probationary period "is part of the process by which management determines whether a newly-hired employee should be

retained permanently. It provides the Agency with an opportunity to make such judgment prior to affording employees procedural protections established under Agency regulations or collective bargaining agreements in the event of termination for unacceptable work performance or conduct." Furthermore, the decision notes that the Federal Labor Relations Authority relied upon an earlier ruling (see *U.S. Department of Justice, Immigration and Naturalization Service v. FLRA*, 1983) in which it was stated that procedural protections for probationary employees cannot be established through collective bargaining under the federal statute.

Administrative Issues. The handling of *personnel files* and their contents are addressed in 80% of the contracts. All of these contracts included language that allowed employees access to their personnel files. Clauses within this section of collective bargaining agreements generally addressed issues such as placement of documents (i.e., reprimands, copies of notices), access to, as well as the point at which items may be purged from the personnel files. In all contracts that addressed these files, personnel were guaranteed access through their collective bargaining agreements. There were 16% of the contracts (4 of 25) that required employees to initial all documents placed in files to indicate their awareness of the documents. When specified, contracts generally addressed documents including documented oral reprimands, letters of caution, written warnings, and suspensions. With the exception of one state, no contracts specifically addressed inmate complaints against staff.

A lack of consistency with respect to the purging of documents from an employee's personnel file existed. This "purge period" ranged from oral reprimands that were never included in personnel files, to retention of files related to suspensions for 5 years. The most common range was 12 to 24 months for more serious disciplinary actions. In some instances, document retention was contingent upon factors such as no further disciplinary action occurring within a given time frame; employees must formally request removal of a document; and documents related to "abuse" of inmates (n = 2) that resulted in longer retention period from 24 to 48 months.

Implication for staff sexual misconduct and PREA-related issues. Only an extremely small number of collective bargaining agreements distinguished documentation related to staff misconduct that was related to inmates (noted as "abuse"

of inmates). This notation, however, was broad enough that it could have included other types of non-PREA—related incidents. Most contracts did not distinguish retention of documentation that might be considered precursors to staff sexual misconduct and potentially relevant to subsequent investigation processes. Open access to personnel files, while generally guaranteed, also did not specifically refer to materials and documents of an investigatory nature, or a time frame that was required for an employee's initials on personnel file documents.

As we address further in the latter half of this report, many of the collective bargaining agreements that we reviewed did not contain *any* language that was specific to staff sexual misconduct. In part, the reason for this lack of specificity is that the current contracts in some instances predated any PREA legislation. In addition, both administrators and labor representatives in some states renewed their contracts through agreeing upon an article that simply extended the current contracts rather than renegotiating the entire collective bargaining agreement itself.

The lack of specificity of language that identifies documents that are specific to sexual misconduct allegations, investigations, or related matters is problematic. As we will reiterate in a subsequent section of this report, interviews with correctional adminstrators and labor leaders both felt it was a necessity to include more specific language in the collective bargaining agreements, and extend this specificity to all other written policies and procedures.

Of greatest concern to correctional administrators and labor representatives (though for different reasons) was the open access to all documents placed in an employee's file. As a result of the lack of specificity in existing collective bargaining agreements, this open access clause allows for employees to access all investigatory related materials in a more expeditious manner than often anticipated or desired by the administration. While labor leaders felt that it was important to maintain this timely access, correctional administrators expressed concern. Labor leaders emphasized the need for both the union and the employee to begin their own investigation to the extent possible and further develop their cases especially with regard to false allegations made against the employee. Interestingly, some labor representatives emphasized the need for union supported investigation so that they also were able to determine the level of

support they wished to provide the employee (beyond basic contractual requirements) including informal advice regarding eminent dismissal and encouragement to submit resignations.

In comparison, correctional administrators reported concern with open access policies within existing collective bargaining agreements because they were then forced into a position of hesitancy in developing formal documentation of an investigation. In instances that administrators were not confident that sufficient evidence existed to meet just cause requirements, yet felt that staff misconduct existed, they felt their "hands were tied" if they alerted the employee to their suspicions by creating documentation that would then be subject to inclusion in an employee's file. While both positions have some concrete rationale associated with it, additional language that addresses the staff sexual misconduct issue is needed in collective bargaining agreements to clarify the parameters of access to personnel records.

Legal Issues Related to Termination. Just cause for terminations clauses are specified in 80% of collective bargaining agreements. These clauses aim to protect against arbitrary or unfair termination thereby ensuring job security. They further aim to require administrators to provide sufficient evidence or to have the burden of proof in the case of an employee's termination. Just cause is primarily a legally based term that many of our participants found difficult to describe in lay terms. One approach to understanding just cause as it relates to termination is that it would require the consideration of tests such as *Daugherty's Seven Tests for Just Cause* (1966) when terminations are made. This test includes the following questions: (a) was the employee forewarned of the consequences of his or her actions; (b) are the employer's rules reasonably related to business efficiency and performance the employer might reasonably expect from the employee; (c) was an effort made before discharge to determine whether the employee was guilty as charged; (d) was the investigation conducted fairly and objectively; (e) did the employer obtain substantial evidence of the employ- ee's guilt; (6) were the rules applied fairly and without discrimination; and (f) was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?

Implication for staff sexual misconduct and PREA-related issues. A just cause

clause while relatively common, attempts to further emphasize the level of evidence necessary to dismiss an employee. This clause plays an especially important role with respect to staff sexual misconduct given the oftentimes indirect knowledge, limited credibility of accusers, difficulty substantiating claims, and limited or outright lack of evidence in staff sexual misconduct allegations.

During investigations of staff sexual misconduct correctional administrators all too often find that "nobody saw anything or heard of anything . . ." and the biggest hurdle they face is obtaining any reliable evidence that substantiates an allegation and instead are forced to pit inmates against staff based on their word alone. When considering the ramifications of a just cause clause, insight from our follow up discussions with correctional administrators and labor representatives led one participant to suggest that such a clause may

> Potentially [be] an inhibitor because if you jump stages and/or move too quickly you may miss important due process issues you may end up not being able to sustain any actions that are taken against the staff in subsequent arbitration. DQ

From the labor perspective, the just cause clause immediately opens a door to an examination of the process and level of evidence that exists when dismissal does occur as a result of staff sexual misconduct. As one representative noted:

> Where there's a termination we take a look at the process. If the person is terminated and not prosecuted, I think then we need to take a look at the case to decide if the case is arbitrateable [*sic*] enough to get the guy's job back. If the person is simply being terminated, we need to know how much evidence is available against the person. If the prosecutor takes the case, 99% time we'll back away from that. CR

The majority of correctional administrators noted that the just cause clause itself is not necessarily a barrier, but it does make them ensure that they have "dotted their i's and crossed their t's." More specifically, one participant noted:

> Does anything in the [collective bargaining agreement of the state] prevent me from going forward? No? Do I have a lot more structure that I have to follow than I would if I were not in a collective bargaining state, yes. Here, there are a lot more formal steps that are defined and need to be followed. Does it interfere with or hinder the process? No. CR

Another participant noted:

> Having a union forces you to be more careful and smarter in terms of how you go about investigations. DQ

Undoubtedly, the mere existence of an additional layer of checks and balances presented by collective bargaining agreements could affect a correctional administrator's initial decision-making process on whether they will initiate action through some response—especially those administrators who are less experienced with these matters. For example, during follow up interviews we asked "Can the process be so com- plex that it's un-daunting; maybe causing some prison managers to say 'I'm not gonna deal with it unless I've got it on film'?" To which one participant responded:

> For less seasoned wardens, yes, and that's been the demise of some wardens who didn't want to deal with these things. Usually the associate wardens and other staff can help you work through the process and work through your impatience with the process. More seasoned wardens are going to be able to negotiate these kinds of things without undue burden. CR

Complaints, Grievance and Appeal Process, and Legal Issues. All collective bargaining agreements that were reviewed for this study explicitly stated the employees' right to contest corrective or adverse action through some type of grievance process. There were 48% of jurisdictions that included a resolution of mutual agreement to work together to reach a resolution at the lowest level possible when a negative employee–employer situation arises. During instances in which an informal agreement cannot be made, a more formalized grievance process may be necessary. It should be noted that more than half of the contracts contained language that specifically excluded probationary employees and/or managerial staff from utilizing this process.

Regarding discipline hearings or meetings, agencies may engage employees in a number of settings in addition to their regularly scheduled shift including mandatory meetings, scheduled meetings, and/or call-outs. Most contracts do not clearly define these various meetings, although these terms are relatively common practitioner knowledge. Out of all contracts, two contracts defined "scheduled meeting," one con- tract defined "mandatory meeting," and two contracts defined a "call out." Most agencies

(56%) attempted to handle disciplinary meetings during work time or to consider these meetings work time. The balance of the collective bargaining agreements did not specify this aspect in their agreements.

The grievance process outlined in collective bargaining agreements may be used by an employee to initiate a complaint about a workplace situation, respond to a complaint against an employee, or respond to disciplinary action initiated by management against an employee. In the majority of contracts, the grievance process was relatively similar regardless of the reason for initiating the process. The number of grievance stages prior to arbitration ranged from two to four with 48% (12 jurisdictions) specifying their encouragement of situational resolution at the lowest level. This "lowest level" clause included documented encouragement of informal resolution as a first step in 60% of the contracts (15 jurisdictions).

A common grievance process. The grievance process is the only process described in collective bargaining agreements that has a direct relationship with correctional administrator action taken in response to staff sexual misconduct. A typical process regarding an incident involving staff sexual misconduct would begin with a complaint lodged against a staff member from some source that is in turn investigated through a variety of means including an investigatory team. If support for the allegations is found, the correctional administrator would take action to reprimand the employee that may include termination. The action of the correctional administrator is the specific action that is subject to being challenged through the grievance process outlined in the collective bargaining agreement.

Typically, three or four layers or levels existed within the grievance processes examined, although four jurisdictions had five levels. Some contracts considered arbitration as a "level," however, most agreements treated arbitration as distinct from the description of the grievance process. When an employee aims to proceed with filing a formal grievance or complaint, 64% (16 of the 25 contracts) indicated specific content requirements for the grievance or complaint. Only one contract specified the use of a required form, however, it is possible in practice that forms for this purpose are provided by the union.

All contracts that detailed their grievance processes included a time dependency

element or “deadlines” for action. The chronologically first deadline noted was the maximum allowable length of time that could have elapsed between the employee’s awareness of the act, event, or occurrence (or when awareness *should have been gained*) and the deadline to file complaint or grievance regarding this incident, usually 15 working days. The time frame for pursuing the second step of the grievance process typically began once the formal decision from management is received by the employee. The employee once again has a set timeframe within which they may choose to pursue additional grievance actions, usually between 5 and 15 days. Failure to pursue additional actions within this time period was then equated to an employee’s lack of interest in further pursuing the action. The time frame between receipt of the grievance decision and pursuit of a third step in the grievance process ranged between 10 and 15 days.

Implication for staff sexual misconduct and PREA-related issues. This section of the collective bargaining agreements was most directly related to administrative actions regarding staff sexual misconduct despite its lack of specificity in language. A limiting factor for effective correctional administrator response to staff sexual misconduct may stem from limitations placed on the timeline for initiating a complaint based on contractual language. While sexual misconduct may be pursued criminally, precursive behavior may not. That is, the time frame for initiating a complaint based on a fellow employee’s behavior may protect that individual’s rights to a fair investigation; however, it may negatively impact pursuit of PREA-related complaints. Certainly, this language is meant to protect employees against unsubstantiated complaints and/or an unnecessarily lengthy delay in administrator responses.

A second issue related to the time frame is “noticing” which is the time period between which correctional administrators are made aware of a complaint against a staff member and when they must inform the employee of the complaint. In general, the language of the collective bargaining agreements was vague and usually event related. For example, some contracts noted that employees are notified of an allegation once an investigation began. In other instances, the employee would be notified upon receiving a complaint from an inmate or once a complaint was substantiated. The rationale for a short noticing period parallels the earlier concern noted by a labor representative that

the more quickly that noticing occurs the more expeditious an “independent” investigation can be initiated by the union of the same complaint. When labor representatives were asked when staff should be given “notice,” one participant stated:

> During the bargaining process sometimes there has to be some give and take. We would rather have it sooner rather than later because it puts the person on notice and puts us on notice. It gets the investigation on target and gets things moving so things can be done and investigated and gets people pursuing things that may not be available to pursue at a later time. CR

From the perspective of the correctional administrator, the jeopardy of their investigation and an ability to gain eyewitness reports without undue influence by the employee on potential witnesses are at stake. Another administrator highlighted that the effect of noticing is situation dependent. In their words the notification requirement and how it influences their position:

> depends on circumstances of the event, but the employee must be notified if/ when investigation will take place depending on what is going to happen. If a stealth investigation is going to take place by the criminal authorities, we let them go forward without noticing the staff. If the collective bargaining agreement requires that X be noticed within a set time period, it may “inhibit” some investigations but it’s not likely to be so in the case of full scale PREA event. But “pre-cursor” investigations may be inhibited if such a notification requirement were in place. CR

Arbitration. If employees were not satisfied with the decision at the final stage in the grievance process, all but one contract that had a grievance process specified also included an arbitration clause which the employee must initiate anywhere from 10 days to 9 months after the formal decision is made. The arbitrator or composition of an arbitration panel was usually mutually agreed upon with processes written into the contract should disagreement on the arbitrator/panel exist including such remedies as the alternative striking of names from an existing list of arbitrators.

Implication for staff sexual misconduct and PREA related issues. The existence of arbitration agreements, which are not generally available to probationary employees as per the collective bargaining agreements, has undoubtedly resulted in reversal of

correctional administrator dismissal decisions that have unfortunate events surrounding the arbitration decisions. As an example, one administrator related a story of an incident involving a case where a maintenance worker was alleged to have sexually assaulted a female inmate in an institution with a strong collective bargaining unit in place. On the contrary, support for the arbitration process exists from the labor representatives based on the following rationale:

> Arbitration is good in that it helps protect employee's due process rights and having more arbitrators in cases involving PREA type cases would be helpful. DQ

Protections from Sexual Harassment. Four collective bargaining agreements contained a separate sexual harassment policy. One agreement specified that the grievance process outlined elsewhere in the contract shall not be used to file a complaint of sexual harassment, while another pointed to the grievance process as the appropriate channel for initiating action. The general tone of the language in this section is meant for sexual harassment by a colleague rather than inmate–staff relations.

Implication for staff sexual misconduct and PREA-related issues. When sexual harassment clauses do exist in a contract, they fail to address protections from sexual harassment or advancements of correctional staff from inmates. For administrators and labor leaders to fully underscore the categorical inappropriateness of any sexual innuendos within the correctional environment, or reiterate PREA, this may be an appropriate article for expansion in future collective bargaining agreements.

What the "Experts" are Thinking: Policy Recommendations From Focus Groups and Interviews With Key Informants

Participants in the focused interviews were asked to reflect on was "What would you want to see excluded from or included in collective bargaining agreements or memos of understanding that would help strengthen the ability for prison officials to respond to PREA related incidents?" Both prison officials and union representatives responded to this question and a listing of their responses follows. Some include statements from respondents explaining the reason the item is something to exclude/include.

There are a number of aspects participants suggested should be *excluded* from collective bargaining agreements. First, provisions in language should be excluded that allow staff access to evidence from inmates (inmate statements) early in the investigation process (i.e., 24-hr "notification" rule). The second aspect to exclude are constraints on the length of time between the incident and ability to proceed with charges leading to administrative review (especially as it relates to typical precursors of staff sexual misconduct such as letter writing, etc.). As some participants noted:

> Some contracts place time constraints on the investigation that are bounded by when the incident is alleged to have happened NOT when it was brought to the attention of officials. Some have 9 mos. from time of incident to close the case even if they only learn about the incident seven months after it is alleged to occur. That leaves them only 2 mos. to go through the administrative process but criminal allegations can still proceed. DQ

> There is language that requires us to be creative in the naming of the incident because if it "could" have been pursued as a crime we are not bound by the 9 mos. rule. DQ

> I would prefer that the language require that administrative actions be completed within 12 mos. after the investigation begins NOT after the incident itself. DQ

The third aspect to exclude would be language limiting the management's ability to move or reassign staff members who are the subject of an allegation. As one participant stated:

> Some language is "loose" in that it simply states that management can't move staff "for disciplinary reasons" without formal procedures being followed so sometimes we use our legal interpretation of that to say we're removing you pending the outcome of the investigation not for disciplinary reasons. Contests are likely to arise about this. DQ

While participants noted things that should be excluded, they also listed many things that should be included in collective bargaining agreements such as specific language emphasizing the seriousness of violations of sexual harassment or sexual misconduct policies and language that allows management control over who can be

involved in one-on-one supervision:

> Designation of what is essentially a BFOQ [bona fide occupational qualification] needs to be clarified. For example we cannot say that we want only female staff transporting female offenders or that we want more than one staff member to be involved in transporting one offender. Being able to include language that would allow these kinds of things would help. CR

Other participants noted the inclusion of some sort of "truth standard" in contract articles focusing on code of conduct and/or employee ethics:

> Employees caught lying during any investigation should be able to result in termination and the statute of limitations on investigations should re-start if an employee is caught lying. DQ

Specific reference was also made to a "disciplinary matrix" that ensured every discipline violation falls into a designated category on the matrix and contractual articles that insuring discipline could be administered outside of the hiring unit. Participants felt it was important that collective bargaining agreements include a direct reference to what happens to inmates who make a false serious allegation:

> In one state it's a misdemeanor (60 days loss of behavioral credit . . . never taken an inmate to court on it). Accordingly, the legal division that represents inmates is very reluctant to take such action against an inmate because it could have a serious chilling effect. Concerns about "standard of proof" issues also complicate this issue because the investigation may not be able to prove the incident happened but also not be able to conclude that it didn't. CR

> A possible compromise would be to establish language in the inmate code of conduct allowing chronic or repeated incidents of false allegation to be responded to more aggressively. CR

Participants stated the ability to terminate employment at local level for certain acts (e.g., conviction of a felony) is also key:

> Most operational misconduct must go through some sort of negotiated administrative procedures. If you have permanent status (beyond probationary term) you have access

> to all of the administrative protections and grievance procedures. This shouldn't be required if the misconduct results in a felony conviction.CR

Finally, participants argued that contracts should specifically refer to the institution's rule book as the guiding policy/procedure manual:

> There was no consensus among respondents about whether or not language that specifically relates to PREA and/or sexual conduct should be located in the collective bargaining agreement itself or is more likely (and rightly) to be in the policy/procedure manuals defining responses to specific PREA type activities rather than the more general "abuse of inmates" or "use of force" type of issues? DQ

In addition to the specific recommendations listed above, participants in the focused interviews identified two issues concerning the range of different positions represented by collective bargaining units. The first related to whether uniformed (custodial) and nonuniformed (supportive) staff should be represented as a single bargaining unit or with separate collective bargaining agreements. As it relates to PREA issues, the consensus among those participants who discussed this issue was that the most important aspect of all collective bargaining agreements, regardless of the range of their membership, is that procedures for reviewing and responding to alleged incidents of employee misconduct adhere to full due process standards and that these standards should not vary across employment groups. The second was associated with the span of positions represented by collective bargaining units. For example, having a collective bargaining unit that represents line-officers as well as supervisory or management staff, could result in the union representation of both the line-officer and a supervisory officer who has initiated disciplinary procedures against the officer and/or filed for termination of the line-officer due to the incident. This situation would place the union in a position that could involve a conflict of interest from the perspective of one (or perhaps both) parties involved.

Throughout all of our interviews there was a consistent message that echoed from one interview session to the next. The essence of that message is that the culture of the prison must shift away from the notion that inmate–staff sexual misconduct is an interpersonal and/or sexually driven issue. Everyone agrees that such behavior is

inappropriate and needs to be stopped, it is important, however, that the reasons for stopping it be focused on the issues of safety and security for the institution at large. Perhaps a “monolithic mindset” with safety and security at its forefront is exactly what the prison culture needs in order to move more effectively toward the prevention of staff–inmate sexual misconduct.

Policy Recommendations

A general consensus exists among prison administrators and union representatives that there is nothing inherent in collective bargaining agreements that *should* impede effective implementation of initiatives that aim to reduce or prevent incidents of staff– inmate sexual misconduct. It is concurrently believed that some aspects of collective bargaining agreements *may* impede the implementation of *some* PREA-related policies as compared to jurisdictions where collective bargaining agreements do not exist. The potential “inhibitors” involve contract language that appears to restrict prison managers’ options when considering how to respond to allegations of staff–inmate sexual misconduct including administration discretion regarding reassignment, notification of allegations, length of time between the alleged occurrence of an incident and the ability to file a formal complaint are three primary areas governed by specific clauses in labor contracts. Constraints such as these may inhibit a supervisor or man- ager’s ability to protect inmates from continued exposure to the officer alleged to be involved in inappropriate behavior and may force management to give formal notification of the allegation to the staff member prior to the initiation and/or completion of a sound investigation relating to the matter. In some instances, the structure of a contract may leave prison investigators with little time to complete an exhaustive review of complaints filed due to restrictions on the contractually defined limits to conclude disciplinary hearings.

Even more constraining is the widespread existence of arbitration clauses in almost all of the contracts we reviewed. Arbitration is a fundamental aspect of labor contracts that allow employees who have been disciplined and/or dismissed from their positions to challenge the supervisor’s actions before an arbitrator (or in some instances a panel of arbitrators) who has (have) the authority to override any decisions made by

the prison managers. Reports were provided regarding situations where employees who had been terminated after admitting their involvement in inappropriate sexual conduct with inmates were reinstated and returned to the same unit their victim was housed in after an arbitration settlement had been reached. Certainly the existence of due process protections need to be respected in the management and discipline of all employees and it is acknowledged that most labor contracts include a "*just cause*" clause enabling the termination and/or discipline of employees engaged in any form of misconduct.

Recognizing these contractual limiters, it is recommended that jurisdictions that provide correctional staff access to complaints or allegations lodged against them could consider the provision of a complaint or allegation summary rather than original copies thereby reducing fears of immediate reprisals for the complainant. Second, well written personnel manuals, or policy and procedure manuals, should supplant many of the concerns surrounding contractual language. To this end, we strongly encourage jurisdictions to utilize the available resources for strengthening these documents with respect to PREA-related issues including information sharing information with other jurisdictions on vetted policy. Specific language regarding sexual misconduct definitions and sexual misconduct precursor behaviors must be clearly delineated.

Certainly training is a natural recommendation in this arena for both line staff and upper-level administrators. Continuing the existing training and making improvements where ever possible to include peer education and interaction as knowledge on this topic grows will be important. Finally, defining staff sexual misconduct as a safety and security risk rather than a "sex" or "gender" issue may aid in moving proactive reporting of acts that are precursors of staff sexual misconduct behaviors to the forefront.

With regard to staff sexual misconduct, it is understandable that correctional administrators and labor leaders have unique roles. Correctional administrators have the distinct responsibility to run a constitutionally sound prison facility that is safe for the correctional officers employed and for the inmates who are housed in their facilities. Labor leaders have a necessary and strong focus on supporting *just cause* standards for their membership and ensuring due process right are upheld. Despite these distinct roles, both correctional administrators and labor leaders undoubtedly and resoundingly agreed with complete consensus that staff sexual misconduct is unacceptable and has

no place in the correctional environment. Labor leaders and management are encouraged to continue to collaborate with a specific common focus: effective policies and procedural issues related to staff sexual misconduct. This time, the goal both groups have on this issue is the same—zero tolerance of sexual violence in all facilities nationwide, a diligence on issues related to sexual violence, and improvements or changes in methods to prevent and respond to incidents of sexual violence.

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Notes

1. We thank a review for suggesting this distinction in contrasting the two methods used in this study.
2. Throughout this report, some statements attributed to participants in the focused interviews will be presented as quotations from these discussion sessions. In some instances, the exact text of the respondent's statement is being presented and is indicated with the notation (DQ). In other instances, the quoted text represents a close reconstruction of the statements drawn from the recorder's notes and recollections indicated with the notation (CR).

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