



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

August 8, 1996

Via Express Mail

US v. State of Arizona



PC-AZ-002-001

The Honorable J. Fife Symington
Governor, State of Arizona
1700 West Washington
Phoenix, Arizona 85007

Re: CRIPA Investigation of Arizona Women's Prisons

Dear Governor Symington:

On February 8, 1995, we notified you of our intention to investigate allegations of sexual abuse and violations of privacy rights of female inmates confined in Arizona Department of Corrections ("ADOC") facilities, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. §§ 1997 et seq. The purpose of this letter is to advise you of our findings, supporting facts, and recommended remedial measures, pursuant to 42 U.S.C. § 1997b(a)(1).

As a result of our investigation, we have concluded that there exists at ADOC women's facilities an unconstitutional pattern or practice of sexual misconduct and constitutionally unacceptable invasions of privacy rights, and that ADOC officials have not addressed these problems adequately. These conclusions, and the more specific findings and recommendations set out below, must be read in the context of ADOC's refusal to cooperate with our investigation. Although ADOC has provided some relevant data, our requests for other information have been denied or gone unanswered. Most importantly, ADOC officials have refused to grant us access to female inmates, correctional staff, or ADOC women's facilities. Both the legislative history of CRIPA and federal case law make it clear that the Attorney General may consider state officials' failure to cooperate with an investigation in her decision to bring suit under the Act. United States v. Michigan, 868 F. Supp. 890, 896 (W.D. Mich. 1994).

Nevertheless, we offer our findings and recommendations in a cooperative spirit. We hope that ADOC will be willing to discuss these matters with us promptly and in appropriate detail, rather

than continuing its adversarial posture.

Our findings and recommended remedial measures are offered in the context of the current state of the law regarding the unconstitutionality of sexual misconduct against female inmates and the analytical framework for assessing the constitutionality of invasions of privacy rights of female inmates.

I. FINDINGS AND SUPPORTING FACTS

A. Physical Sexual Misconduct.

We have received significant evidence, some of it confirmed by ADOC records, that during the past few years at least 14 female inmates have been subjected to sexual assaults and other non-consensual sexual behavior by guards, including rape, sodomy, touching and fondling, masturbation, urination, removal of clothing, nude dancing, indecent exposure, and offensive sexual comments.

We also have received significant evidence, some of it confirmed by ADOC records, that during the past few years a number of female inmates have engaged in supposedly "consensual" sexual behavior with ADOC staff, sometimes in return for special privileges not available to other inmates. In the context of a prison environment, in which inmates necessarily surrender virtually all self-control over every aspect of their lives and are at the mercy of staff for their basic needs, there cannot be any "consensual" sexual behavior between staff and inmates. Moreover, a prison environment which fosters or tolerates "consensual" sexual behavior between staff and inmates significantly increases the probability of nonconsensual sexual misconduct by staff.

In two letters dated September 22, 1995, and December 6, 1995, copies of which are attached, we provided Arizona state officials with detailed information on sexual misconduct in ADOC women's facilities. We received some of this information in the form of 13 sworn "Jane Doe" affidavits of inmates whose identities were confidential. In addition, detailed information on some of the sexual misconduct summarized above is contained in a document provided to us by ADOC (referred to by ADOC as the "Matrix"), a copy of which is also attached.^{1/} ADOC officials have conceded that ADOC settled one case in which a CSO was accused of raping a female inmate; and we have received information that contract employees have requested sexual favors from female inmates in exchange for better job assignments.

^{1/} ADOC has provided us with self-selected documents relating to the incidents covered by the Matrix.

The evidence outlined above, considered in light of the fact that ADOC officials have refused to permit us to interview female inmates, indicates that sexual misconduct is occurring in ADOC women's facilities with constitutionally unacceptable frequency. The sexual misconduct cases included in ADOC's own Matrix reflect only those incidents that ADOC chose to investigate through its Inspections and Investigations ("I & I") unit after the incidents happened to come to ADOC's attention. ADOC has raised the possibility that other complaints regarding sexual misconduct were not investigated by I & I, but to date ADOC has not responded to our request for information concerning that possibility. The common-sense inference that the sexual misconduct cases included in the ADOC Matrix constitute only a portion of the actual number of such cases is supported by the fact that our investigation uncovered numerous additional allegations of sexual misconduct -- about which ADOC apparently was not aware -- notwithstanding ADOC's refusal to permit us to interview female inmates. We note also that a number of the Jane Doe affidavits suggest that female inmates fear retaliation if they report sexual misconduct to ADOC officials.^{2/}

B. Constitutionally Unacceptable Invasions of Privacy.

We have received significant information -- including five of the Jane Doe affidavits and Case #22 in the ADOC Matrix -- that female inmates' privacy rights are violated by male correctional officers who, without good reason, engage in frequent, prolonged, close-up and prurient viewing of female inmates showering and using toilet facilities.

Arizona's refusal to cooperate in our lawful federal investigation of allegations of civil rights violations in ADOC women's facilities allows us to draw adverse inferences from the self-selected evidence that we have obtained from ADOC and from the evidence derived from non-ADOC sources. That evidence, and the adverse inferences derived from that evidence, indicate the presence of constitutionally unacceptable invasions of privacy in ADOC women's facilities.

C. ADOC Responses Regarding Sexual Misconduct and Unlawful Violations of Privacy Rights.

Our investigation indicates that ADOC has responded to the related problems of sexual misconduct and unlawful invasions of privacy in a manner that has some positive aspects, but which is not constitutionally adequate.

^{2/} The Task Force Survey results also indicate that a substantial number of female inmates are reluctant to report problems to ADOC staff.

1. Screening of potential employees. At least on paper, ADOC's system for evaluating and screening potential employees in terms of their propensity for sexual misconduct appears to be appropriate in substantial measure. However:

- a. We do not have sufficient information to evaluate how well the screening process works in practice -- although in at least one instance, involving ADOC Matrix Case #36, it appears that ADOC ignored significant evidence that the employee may have had psychological problems relating to sex.
- b. ADOC's policy of checking with criminal justice agencies in jurisdictions where an applicant has lived for the past five years (IMP 103.1.15.6.1.1) is insufficient; we would suggest that the check should cover at least the past ten years.
- c. ADOC policy provides for checking with each applicant's references (IMP 103.1.15.6.1.4); we do not know what other efforts, if any, are made to identify and contact past employers.
- d. We have no evidence that contract employees who work in ADOC facilities are subject to ADOC's pre-employment screening.

We note also that pre-employment screening by itself is unlikely to weed out all candidates who might be tempted to engage in sexual misconduct.

2. Training. On paper, ADOC's training program with respect to issues relating to sexual misconduct appears to be adequate. However, it is unclear how much of that training focuses on the supervision and searching of female inmates, and we cannot confirm the adequacy of that training program without speaking to correctional staff. Nor do we know whether contract employees receive the same training as ADOC employees.

3. Initiation of investigations. We regard it as positive that ADOC has initiated investigations in response to several different sources, including inmate and staff allegations, rumors, and anonymous written statements. However, as noted previously, ADOC has not responded to our requests for information on the frequency with which inmate grievances regarding sexual misconduct have not been referred to I & I for investigation.

4. Thoroughness of investigations. Several of ADOC's investigations into allegations of sexual misconduct were timely, thorough, and well documented. However, other investigations were not adequate (e.g., the investigation in ADOC Matrix Case

36). Moreover, the routine use of male investigators to interview female victims is likely to impede the thoroughness and accuracy of investigations of alleged sexual misconduct.

5. Sanctions. In some cases in which ADOC employees were found to have engaged in sexual misconduct with female inmates, ADOC has imposed adequate sanctions (i.e., dismissal).^{3/} In other cases, however, employees have received little or no discipline despite substantial evidence that they engaged in such misconduct (see Matrix Cases 7, 15, 32, and 36). It is problematic that ADOC policies (IMP 103.1.8) permit lenient sanctions for sexual misconduct (even for second offenses). We also are concerned that ADOC policy (IMP 206.7.6.7) permits the rehiring or reinstatement of an employee who resigns in lieu of dismissal after only two years; an employee who resigns in lieu of dismissal after being accused of sexual misconduct should be permanently disqualified from future employment with ADOC.

6. Efforts to determine the nature and extent of sexual misconduct and unlawful invasions of privacy. At least until very recently, ADOC simply had reacted to allegations of sexual misconduct that came to its attention, with no affirmative effort to determine the extent to which sexual abuse and harassment were occurring in female facilities. In this regard, former Director Lewis's recent appointment of a Task Force appeared to be a potentially positive step. However, the information that Mr. Lewis provided with his letter of December 4, 1995, to Attorney General Reno indicates that the manner in which the Task Force proceeded was seriously flawed in terms of investigating the extent of sexual misconduct at ADOC women's facilities. Most obviously, administering the inmate and staff surveys on a non-confidential, face-to-face basis, apparently using ADOC staff as interviewers, created inherent barriers to the communication of information regarding sexual misconduct by ADOC employees.^{4/} Given the sensitive nature of the inquiry and the likelihood that female inmates will be fearful about the consequences of reporting sexual misconduct by ADOC employees, an affirmative investigation by an outside entity -- such as the Department of Justice -- is necessary.

^{3/} We note with favor that ADOC has referred some sexual abuse incidents to prosecutorial authorities.

^{4/} Notwithstanding the problems in the Task Force surveys, those surveys did disclose additional information regarding such matters as the inadequacy of staff training, female prisoners' reluctance to report sexual misconduct, and the concerns of a portion of the inmate population with unlawful invasions of privacy by male staff members.

7. Failure to implement State's own policies. The information that ADOC officials have provided to us does not indicate that ADOC has made an adequate effort to reduce opportunities for its employees to engage in sexual misconduct with or unlawfully invade the legitimate privacy interests of female inmates.

II. RECOMMENDATIONS

We wish to make two preliminary points about the recommendations that follow. First, some of the recommendations are necessarily general because the relevant details depend on information that ADOC has refused to provide. Second, the recommendations are not non-negotiable demands. As indicated earlier, we hope that ADOC will be willing to discuss the recommendations with us with the goal of avoiding litigation.

A. Overall Goals.

We recognize that as a practical matter, no measures can completely eliminate the possibility that some ADOC employees will engage in sexual misconduct with, or unlawfully invade the privacy of, female inmates. However, the complete elimination of such conduct should be ADOC's goal, and ADOC should take all necessary and prudent measures to minimize sexual misconduct and unlawful invasions of privacy in its women's facilities.

B. Screening of Employees.

ADOC should:

1. Ensure that evaluation and screening of prospective employees at least comply with existing ADOC policies.
2. Check with criminal justice agencies in all jurisdictions in which each applicant has resided for at least the preceding ten years.
3. Include all former employers in the routine background check.
4. Develop procedures to ensure that ADOC responds appropriately to evidence that a prospective or current employee may have psychological problems relating to sexual conduct. (This would be a suitable responsibility for the Women's Facilities Administrator, discussed in Section II(H), below.)
5. Require that contract employees undergo the same background check as regular employees.

C. Training.

At minimum, ADOC should:

1. Ensure that all employees who are assigned to female facilities actually receive proper training on staff-inmate relationships as well as the supervision and searching of female inmates.
2. Ensure that contract employees who are assigned to work in female facilities receive proper training on inmate-staff relationships as regular employees.

D. Investigations of Allegations of Sexual Misconduct and Unlawful Invasion of Privacy.

With respect to complaints or other allegations of sexual misconduct or unlawful invasions of privacy:

1. ADOC should initiate investigations in response to allegations in any form, and from any source.
2. ADOC should ensure that all investigations are prompt, thorough, and well documented. All potential witnesses, including inmates, should be identified and interviewed.
3. Investigations should be conducted by outside investigators, or by ADOC personnel who are not under the command of facility administrators.
4. Female investigators should be available to interview alleged female victims and any other female witnesses who may be reluctant to discuss intimate details with male investigators.
5. In each facility, one official should be designated to review all allegations and investigations of sexual misconduct and unlawful invasion of privacy. All such allegations and investigations also should be reviewed by the Women's Facilities Administrator (see Section II(H), below).

E. Sanctions for Sexual Misconduct and Unlawful Invasions of Privacy: Referrals to Prosecutorial Authorities.

1. There should be a single sanction for employees engaging in rape, sodomy, touching and fondling, masturbation, urination, removal of clothing, nude dancing, and indecent exposure: termination from employment. The current system of sanctions permits punishments that are too lax to deter future offenses.

2. ADOC should refer to prosecutorial authorities all cases in which there is any credible evidence to support the filing of criminal charges, even when ADOC has concluded that, on balance, the evidence does not prove the charge. Prosecutors, rather than ADOC employees, should decide whether the evidence developed by ADOC justifies the filing of criminal charges or further criminal investigation.
3. An employee who resigns in lieu of dismissal after being accused of sexual misconduct should be permanently disqualified from future employment with ADOC.

F. Efforts to Determine the Nature and Extent of Sexual Misconduct and Unlawful Invasions of Privacy.

Given the problems inherent in any attempt by ADOC personnel to determine the nature and extent of sexual misconduct and unlawful invasions of privacy in ADOC's own women's facilities, ADOC should arrange for an investigation of these issues by an independent outside agency or expert.

G. Necessary Proactive Steps to Address Sexual Misconduct and Unlawful Invasions of Privacy.

There are a number of steps that ADOC should take to minimize the opportunities for sexual misconduct and unlawful invasions of privacy, including the following:

1. ADOC should devise measures to minimize the possibility of sexual misconduct in situations in which a single employee (male or female) is alone with one or two female inmates in locations where sexual misconduct could go undetected. Those measures should include the assignment of CSOs and other staff who have received proper training in staff-inmate relationships and the supervision and searching of female inmates, and might include the use of surveillance cameras in selected areas.
2. ADOC should increase the presence of supervisory staff in living and work areas; and the supervisory staff should actively engage inmates and lower level staff in conversation about conditions of confinement, including sexual misconduct. A more active role for supervisory staff would send the message that inmate-staff relations are being monitored closely, and it would provide more meaningful opportunities for inmates and lower level staff to approach supervisors with comments or complaints.

3. Because inmates housed in mental health units are most vulnerable to sexual misconduct, ADOC should assign to those units CSOs and other staff who have received proper training regarding staff-inmate relationships and the supervision and searching of mentally ill female inmates. ADOC also should take special care in mental health units to avoid staffing patterns and procedures that place staff in one-on-one situations with female inmates.
4. ADOC should promulgate and enforce rules that require female inmates to wear appropriate clothing at all times. Such rules would reduce both the opportunities for male staff to engage in voyeurism and the inadvertent or intentional incitement of sexual responses.
5. ADOC should take appropriate steps to protect female inmates from unlawful invasions of their privacy rights. Such steps should include the assignment of CSOs and other staff who have received proper training in staff-inmate relationships and the supervision and searching of female inmates, and might include the installation of visual barriers in showering and toilet areas that protect privacy without unduly interfering with legitimate security interests.

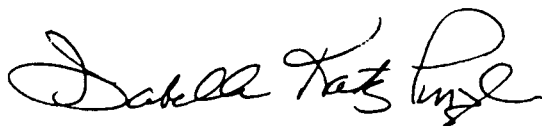
H. Women's Facilities Administrator.

ADOC's female facilities are adjuncts to predominantly male prisons, and there are no wardens for female units (only deputy wardens). Moreover, all of the ADOC wardens except one (Meg Savage) are male; and Ms. Savage's experience is with male facilities. Thus, the unique issues raised by incarcerated females are likely to be underappreciated and dealt with on a facility-by-facility, rather than system-wide, basis. We note that one respondent to the Task Force Survey indicated that ADOC training was characterized by a negative attitude toward working with females.

One way to mitigate these problems without restructuring the entire Department would be to create a new position in ADOC's Central Office, the "Women's Facilities Administrator," whose sole responsibility would be to serve as a liaison between the women's facilities and ADOC's Director and Deputy Director. This addition to ADOC's organizational structure -- which preferably should be filled by someone with experience at male and female correctional facilities -- would add "organizational sensitivity" with regard to issues concerning female inmates, and it would provide a basis for instituting appropriate policy changes throughout the system.

Pursuant to CRIPA, the Attorney General may institute a lawsuit to correct deficiencies of the sort identified in this letter 49 days after the appropriate state officials have been notified of those deficiencies. 42 U.S.C. § 1997b(a)(1). We continue to hope, however, that litigation will not be necessary. We therefore urge ADOC officials promptly to provide us with access to persons, facilities, and information that so far has been withheld, and to discuss with us the issues raised in this letter.

Sincerely,



Dr Deval L. Patrick
Assistant Attorney General
Civil Rights Division

Enclosures

cc: The Honorable Grant Woods
Attorney General
State of Arizona

Mr. Terry L. Stewart
Director
Arizona Department of Corrections

Mr. Hal Cardin, Warden
Ms. Denise Andre, Deputy Warden
Arizona Center for Women

Mr. Dale Copeland, Warden
Ms. Judy Drigo, Deputy Warden
ASPC-Perryville

Mr. Sam Sublett, Warden
Ms. Mary Vermeer, Deputy Warden
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Mr. Hal Cardin, Warden
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