

Investigating Allegations of Staff Sexual Misconduct With Inmates: Myths and Realities

By Susan W. McCampbell and Elizabeth P. Layman

Sheriffs and jail administrators faced with allegations of staff sexual misconduct with inmates often find themselves in a minefield. Trying to prove or disprove allegations, responding to public and media scrutiny, and dealing with the impact of these allegations on agency morale can challenge the most seasoned administrator.

Staff sexual misconduct is defined as a range of behaviors from inappropriate language to rape. An agency's policies can precisely spell out prohibited behavior, or the policy can be as vague as directing staff to avoid undue familiarity with inmates.¹ Regardless of how specific or vague the definitions, staff sexual misconduct is the symptom of a breach of professional boundaries. Initial breaches of these boundaries may have been seemingly minor issues that appear to have little or no consequence for the jail. But small breaches of professionalism compound over time to create a work environment where the boundaries are blurred on all issues, including sex.

An agency that has experienced staff sexual misconduct is often able to gaze backwards and see what red flags were missed. Red flags relate to both an individual's behavior as well as the degree to which a work environment is sexualized. Although not limited to jails, a sexualized work environment sanctions, either formally or informally, such things as sexual harassment, jokes with sexual innuendos, inappropriate workplace relationships among and between staff, use of unprofessional language or street slang and off-duty conduct that spills over into the work site. When professionalism is compromised, the boundaries between staff and inmates can become distorted.

There are a number of myths about staff sexual misconduct in a jail setting. When any of these myths is the basis for decisions about how to address staff sexual misconduct, an agency misses the mark in effective management of a dangerous situation.²

Myths of Staff Sexual Misconduct

Myth: *My agency has had no allegations of staff sexual misconduct, so I can't see why this should be a concern to me.*

Reality: Virtually no public or private institution has escaped sexual misconduct, be it the church, schools, mental health facilities and government. An agency with no allegations would be wise to review its policies and procedures. Are policies specific in terms of prohibited behaviors? Do procedures mandate reporting and thoroughly address the reporting process—for staff and inmates—to ensure that any reports are not squashed? What is the general work climate—does the staff work with and trust the administration?

Myth: *Sexual misconduct is the result, at least in part, of cross-gender supervision.*

Reality: While it is true today that there are both more females in the jail workforce, and more female inmates, sexual misconduct is not the result of cross-gender supervision. Analyses of incidents in several states have shown that women staff are involved as often as

male staff. Staff sexual misconduct is not limited to male staff/female inmates or female staff/male inmates. Incidents of same-sex misconduct have also been reported and litigated. In an attempt to prevent misconduct, some jails have banned the supervision of female inmates by male corrections staff. Unfortunately, such policies infrequently prevent misconduct, and, in some cases, risk violation of provisions of Title VII of the 1964 Civil Rights Act. Effective policies regarding the supervision and searches of inmates, along with prompt and effective investigation of allegations, do more to prevent misconduct than a ban on cross-gender supervision.

Myth: *If the inmate consents to the sexual relationship with staff, the allegation is difficult to sustain.*

Reality: The federal courts have been quite clear that there is no such thing as consensual sex in a jail or prison environment.³ Most state statutes have eliminated consent as a defense. Any belief that consensual sex exists in jails leaves agencies open to litigation, compromises security and establishes a workplace that is hostile for both staff and inmates.

Myth: *"The code of silence" prevents us from getting reports, so investigating these allegations is pointless.*

Reality: The code of silence is unfortunately part of the culture in many agencies,⁴ and it impacts the agency's professionalism in every way. The code of silence is most prevalent when administrators are investigating potentially serious allegations, such as use of force or sexual misconduct. If the code of silence inhibits a sheriff or jail administrator from conducting effective investigations, then the source of the mistrust must be identified and a plan adopted for improving the situation. But, the code of silence does not relieve the sheriff of the responsibility of conducting as effective an investigation as possible. The agency needs to have clear procedures for reporting misconduct, and it must address how it will protect those who report misconduct, both staff and inmates.

Myth: *Raising this issue with staff and inmates will only exacerbate the matter, creating problems where none exists.*

Reality: On the contrary, the problem is exacerbated and permitted to thrive when the issue is NOT raised. Most state prison systems are aggressively addressing staff sexual misconduct by implementing policies that identify prohibited conduct, educate staff and require mandatory reporting.⁵ Staff training, clearly defined policies prohibiting specific behaviors, inmate orientation, and effective reporting and investigative protocols are critical in establishing zero tolerance. While controversial to some, orienting inmates to the agency's zero-tolerance policy along with providing an appropriate reporting procedure is one way to ensure the policy's integrity. Without raising the issue of staff sexual misconduct to the same status as use of force, the matter will not be sufficiently addressed. And the issue WON'T go away on its own.

Myth: *Orienting inmates will only produce false allegations against staff whom an inmate dislikes or wants to get even with.*

Reality: Agencies that institute mandatory reporting for staff and inmates may find an initial increase in allegations. Most allegations

are determined to be unfounded. However, few have been found to be maliciously false. As part of their policies, many agencies include procedures that deal with maliciously false reports. When inmates see that allegations are investigated both fairly and thoroughly, the spike in reports drops. The other option is to not orient inmates at all, with the intention of avoiding malicious reporting or over-reporting. But for the sheriff and jail administrator, ignorance of what is really happening in the jail may be even more hazardous and eventually prove lethal to even the most stellar career.

Myth: We get so many new employees, some of whom are not prepared for this job's demands, that it is almost inevitable that misconduct will occur.

Reality: While some rookie officers have been involved with misconduct, a disturbing observation is that many officers involved in sexual misconduct are those with many years on the job and who hold rank in the organization.⁶ These veteran officers have access to keys, know the isolated parts of the facility, can move unquestioned around the facility, and their conduct is generally unchallenged by their peers or supervisors. The loss of trust in and pending criminal charges against an individual who might have been a leader in the agency are yet another way that sexual misconduct allegations can be so damaging.

Myth: Streetwise inmates con the staff into compromising situations, victimizing staff.

Reality: Many inmates will certainly try to manipulate staff in attempts to improve or gain control over their environment. But the agency—meaning administrators and supervisors—has an obligation to prepare and supervise staff so that they do not become involved in misconduct. Inmate profiles clearly detail their troubled backgrounds; this information is critical to effective inmate management. For example, approximately 60 percent of female inmates have been the victims of physical or sexual abuse before they arrive in jail. Sixteen percent of male inmates report prior abuse histories, most likely an underreported number.⁷ The inmates' view of reality and how to get what they want is different from the world of most staff. The agency must arm staff with the information and skills they need for working with this unique population. The courts have made it clear that they do not consider staff the victim in any incidence of staff sexual misconduct.

Myth: There is hardly ever any physical evidence with these allegations, and witnesses infrequently cooperate.

Reality: It is often the case that jail administrators receive reports of misconduct weeks or months after the alleged event. Physical evi-

dence, if it existed, may be unusable or tainted. In a jail setting, witnesses may have been released from custody or moved to prison. But if the agency has a credible and fair internal investigation process, staff and inmates are more likely to cooperate. If staff fear the internal investigation process, or perceive it as unfair with the outcomes predetermined, then there will be little cooperation.

Myth: *The department's investigators from the criminal investigation division routinely review all sexual misconduct allegations from the jail. Many top-notch investigators are ineffective in the jail environment.*

Reality: The jail is not the real world. Investigators skilled at free-world sex crime investigations are often lost, frustrated and stymied in the maze of the jail's culture. Jurisdictions that have worked to ensure effective investigations have taken knowledgeable and skilled corrections staff and trained them as investigators, or taken good free-world sex crime investigators and immersed them in the reality of the jail culture. The challenge for the sheriff is to figure out how best to use the resources available to conduct a credible and effective investigation, knowing the limits and challenges of the jail environment.

Myth: *If I had any problems in the jail with sexual misconduct, I'm sure I would have heard about it from my medical or mental health service-providers.*

Reality: Maybe and maybe not. Medical and mental health providers may see a confidentiality issue in providing information, or don't know what is important to report. The best way to clarify this matter is to review the contractor's operating procedures and reach a mutually agreed upon notification plan. It is recommended that a jail's medical staff not gather forensic evidence in a sexual assault case. Using the local sexual assault treatment center would be a wiser alternative.

Myth: *Even if we investigate and sustain criminal law violations, the prosecutor won't take the case. These cases are just not a priority for them.*

Reality: Many jail administrators voice this frustration. The prosecutor might say that the grand jury won't indict, or a jury won't convict. In truth, the issue may be that the quality of the investigation makes successful prosecution difficult. Investigations often start out as administrative, and statements given by staff during administrative investigations cannot then be used against them in criminal cases.⁸ Further, evidence protection, witness statements and corroboration often don't meet the standards for prosecution. The sheriff and jail administrator should make sure the prosecutor is aware that prosecution of cases helps to maintain a professional jail workplace. They should also invite the prosecutor's help in establishing investigation standards. Even after working with the prosecutor, cases still might not be accepted for criminal prosecution. But this does not relieve the sheriff of the responsibility of conducting a credible investigation and forwarding it to the prosecutor.

Myth: *Arrestees aren't in jail long enough for sexual misconduct to occur. The prison environment, where inmates and staff have years to get to know each other, is the place where this misconduct will happen.*

Reality: Since sexual misconduct is less about sex and more about power, every institutional setting is vulnerable. Although most arrestees are "frequent flyers," some will not understand or be prepared for the jail culture and therefore are potential victims for unprofessional staff. These arrestees are frightened, intimidated and

willing to do what is necessary to get out of jail. Once out, most want to forget the experience, or they think that whatever they went through was just routine. In addition, some staff may see the short stays as an even safer opportunity for prohibited behavior. The frequent turnover of inmate population may reduce the risk of discovery since suspicious activity may go unnoticed by new arrivals, and those inmates with short stays may choose to not report such activity for fear of retaliatory acts that could affect their court appearances and the outcome of pending cases.

Effective Investigations

Given the difficulty of investigating allegations of staff sexual misconduct with inmates, how can sheriffs ensure that allegations are appropriately handled? The first few hours after an allegation is received are critical to the ultimate investigative outcome. Decisions about what evidence to impound, which witnesses to interview and when, what surveillance to initiate, and whether or not to move the involved staff or inmate are all crucial to the investigation. Investigative protocols need to be in place addressing:

Collection and preservation of evidence. The agency must identify who will collect evidence and train those individuals; define how evidence will be packaged, stored and preserved; and ensure the chain of evidence.

Production of evidence by inmates and/or staff. Every possible piece of evidence (i.e., logbooks, inmate movement records, inmate commissary transactions, telephone logs and tapes, etc.) is important. The agency's policies should also address the production of evidence for DNA analysis for both staff and inmates.

Interviewing techniques for vulnerable victims. Investigators must be aware and understand the complexities of victims in a jail setting, how they respond to different situations, and how their past histories can affect current events. For example, the appearance of posttraumatic stress disorder (PTSD) in an interview situation requires skilled investigators who will get information without further traumatizing the victim.

Use of polygraphs. Investigators need to know agency policy, state statute and the language of collective bargaining contracts when deciding if and when to use polygraphs. The role polygraphs play in the investigative process should be spelled out in the protocol.

Referrals to sexual assault treatment centers. The process and criteria for when to make referrals should be spelled out. This should also apply to referrals for health and mental health services.

Initiation of covert activities (video surveillance, wiretaps, etc.). These should be considered if such investigative techniques may quickly provide information that will support or disprove allegations. However, if a situation demands immediate action to safeguard staff or inmates, covert activities may not be feasible.

Interviewing staff. Establish consistent guidelines for interviewing staff, and make sure investigators have experience interrogating witnesses.

Referrals to the employee-assistance program (EAP). The EAP can provide needed support to staff members who have reported misconduct, are witnesses, or are even the subject of the investigation. Ideally, the EAP provider should be informed of staff sexual miscon-

duct allegations and investigations, given their sensitive and volatile nature.

In addition to support for individual staff involved, the entire shift on which an incident has been reported, or even the entire jail staff, may well need extra support in the form of trained peer debriefers or other mental health interventions. During the course of investigations, which by nature are kept confidential, rumors fly, some staff members might have been suspended, and facts are scarce. The staff's trust in a fair internal investigation process will go far during the unsettling period when an investigation is underway and peers are going through tough times.

Use of other investigatory resources. The agency's protocols should address who will complete investigations into allegations or who might assist. If other agencies will do the investigation, be sure that your agency has a well-established working relationship with them so that each knows what to expect.

Coordination with the prosecutor. One of the most critical relationships when handling allegations of sexual misconduct is with the local prosecutor. Before an allegation arises, build a relationship with the prosecutor to determine what procedures will be followed in the event that criminal allegations result.

Management of the investigation. Who keeps the investigation within professional parameters, preserves confidentiality, makes decisions about the process, and maintains the records is crucial. At the conclusion of the investigation, whether the allegation is founded or unfounded, the investigative information should be used by the jail administrator to improve or enhance operations with an eye toward prevention.

Demystifying the internal investigative process. Mention internal affairs to most jail line staff, and few will have positive comments. For a variety of reasons, the IA process is suspect in most agencies. Often this may be because the staff doesn't understand why IA does what it does. Agencies who have succeeded in improving staff morale and dealing with the code of silence report that demystifying the internal investigation is a major factor in that success. If staff and inmates know how the process works and what to expect, they are more likely to cooperate and report suspicious activities or violations of policy. They must

also see that investigations are completed fairly, consistently, discreetly and thoroughly by competent, trained investigators.

Effective investigations of staff sexual misconduct allegations are essential. The facility's security, the safety and health of inmates, and the professionalism of the organization are all at risk. With effective and definitive policies and procedures, a role-modeled zero tolerance for such conduct, mandatory reporting, support and training for staff working in this difficult environment, inmate orientation and a credible and

effective investigative process, the sheriff can work to produce a healthy and safe work environment. ©

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Endnotes

¹ Forty-six states now have specific statutes criminalizing staff sexual misconduct with inmates.

² See also Susan W. McCampbell and Elizabeth P. Layman, Training Curriculum for Investigating Allegations of Staff Sexual Misconduct with Inmates, National Institute of Corrections, October 2000. This curriculum is available from the NIC Information Center at (800) 877-1461, or you may e-mail the Information Center at asknicic@nicic.org.

³ From Carrigan vs. Delaware, U.S. District Court for the District of Delaware, September 28, 1999: "The court concluded, as a matter of law, that an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment."

⁴ Neal E. Trautman, Ph.D., "The Code of Silence Now We Know the Truth," Sheriff, March 2001, page 16.

⁵ See, United States v. Michigan, Civil Action 97-CVB-71514-BDT, and Cason vs. Seckinger, S. Middle District Court for the Middle District of Georgia, Civil Action 84-313-1-MAC.

⁶ As one example, see "Officials Prison Sex Charges," Bucks County [Pa.] Times, June 1, 2001: "Charged yesterday, institutional sexual assault were [name] 4 captain of the prison guard and 23-year employee, [name], 33, a prison counselor [name], 38, a sergeant guard who had worked the jail 10 years, and prison guard [name], 42-year employee."

⁷ U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Selected Findings: Prior Abuse Reported by Inmates and Probationers, April 1999, NCJ 172879.

⁸ Garrity v. New Jersey 385 U.S. 493 (1967) provides that statements taken from employees during administrative investigations as a condition of continued employment cannot be used in the employee's subsequent criminal indictment or trial. ©