

DATE: January 28, 2010
TO: Joint Committee on Legislative Post Audit
FROM: Roger Werholtz, Secretary of Corrections



I would like to take the opportunity to submit some additional written comments regarding the contents of the Post Audit report on Department of Corrections: Reviewing Allegations of Staff Misconduct. I regret that we did not include these in the initial response, but we became convinced, upon further review and analysis, that we should make these observations in writing since time to discuss everything is obviously limited.

The issues of Department of Corrections staff sexual misconduct, undue familiarity, and trafficking in contraband are not new issues to the Department of Corrections or to the Legislature. The Department has had, for many years, a rule prohibiting staff from engaging in actions of undue familiarity with inmates. In the early 1990s the Department sought legislation to criminalize sexual relationships between staff and inmates. This law was eventually enacted in 1993. In 1997 the Department requested legislation, which was enacted that same year, to increase the severity level for the crime of trafficking in contraband.

The policy regarding undue familiarity and the statutes regarding sexual misconduct and trafficking in contraband have been strictly enforced by all facilities of the Department. When allegations have been brought forward they have been investigated. When the allegations have been substantiated, sanctions have been imposed. As I noted in my response of January 21, 2010, we have not seen any credible evidence to suggest that undue familiarity or sexual misconduct is condoned or tolerated at any Kansas correctional facility, nor have we seen any credible evidence to indicate that undue familiarity or sexual misconduct is widespread among staff.

There is no denying that on occasion employees of the Department of Corrections have violated their public trust by engaging in improper and sometimes illegal conduct. The Department has discussed incidents of this nature openly with the Legislature and the media as they have occurred over the years. As a case in point, the Gallardo incident at Topeka Correctional Facility (TCF) was referred to the Topeka Police Department for investigation and was prosecuted by the Shawnee County District Attorney. The Young matter at Lansing and the Goff matter at El Dorado were also addressed in public venues. It is not possible to make all personnel records public due to statutes and regulations governing employee privacy, but those that are appealed to the Civil Service Board or are filed in court are public. The records and actions of the Department in seeking tools to assist in addressing these issues and in responding to specific incidents show that the Department has been open and active in attempting to resolve such issues with the resources available.

Because of the potential adverse impact on security resulting from even one incident involving this type of conduct, we sought assistance from the Legislature to give us these additional tools to utilize for deterrent or response purposes. We also sought assistance from the Legislature during the 2007 session with a request for funding for security enhancements at all KDOC correctional facilities. This funding, in combination with a grant provided through the Prison Rape Elimination Act, allowed us to install cameras, metal detectors, package scanners, and other security equipment that we previously lacked the resources to acquire. These enhancements have greatly improved our security posture with respect to these issues.

There is a statement on page 18 of the audit report that “conditions were ripe for staff misconduct to have occurred.” One of the reasons cited in support of that statement is that cameras are not located in various areas. At the time of the Gallardo incident in October, 2007, Topeka Correctional Facility basically had only a handful of cameras for the entire facility. Now it has approximately 250. However, given the physical layout of the facility, we were told by consultants with the Moss Group that over 1000 cameras would be needed to adequately cover all areas of the facility. This would be a significant resource issue.

Also listed as a reason in support of the statement is that supervisors “received sporadic supervision and no additional monitoring.” Work details at TCF are supervised in the same manner as work details at other correctional facilities. Supervision of detail supervisors is not ongoing on a constant basis. Staffing limitations do not allow for such intensive supervision. If constant supervision or tracking of movement is desired, additional staff will be necessary, or tracking technology will need to be acquired. We can log who went where, for what purpose, and how long they stayed, but that type of logging would not have prevented the Gallardo incident from having occurred.

Another reason cited in support of the conclusion that conditions were “ripe for misconduct” was that three male staff members had been “investigated” for improper behavior. One of the three was not an instructor with the program in question. Being investigated does not imply guilt. Until a matter can be substantiated, disciplinary action, including possible termination, cannot be taken. Considering all of the factors listed in the report, it appears that the conclusion that “conditions were ripe for staff misconduct” may be overstated.

In a number of places in the report, the auditors discuss discrepancies between data bases and reports. We do not want to leave the committee with the impression that numbers do not match up. We believe that the numbers were reconciled and the information was provided to the auditors. In one instance (pg. 2) the differences noted were the result of investigative data being kept by one set of staff while dispositional data was kept by another set of staff in a separate set of files. We agree this is not a desirable practice, but do want to make clear that complete information did, and does exist, on cases that show the sequence of events from allegation to investigation to disposition in cases at Topeka Correctional Facility.

On page 12, we find an example of what we see as a larger problem in discussing what are the appropriate responses to issues involving staff undue familiarity and those involving sexual misconduct. We believe that, too often, the terms are used interchangeably and that this blurring of distinctions leads to some conclusions about the appropriateness of the actions taken in response. We believe the report on page 4 accurately articulates the distinctions between the broader term of undue familiarity and the more specific term of sexual misconduct. We believe that the analysis done to reach some of the conclusions lumps these two categories together, when the Civil Service Board and a more complete understanding of the events would not. Our impression is that the auditors feel that TCF was not severe enough in their disciplinary actions taken in response to undue familiarity. We do not see any criticism in response to actions taken on cases of sexual misconduct. We would point out that during the five-year period of review requested by the auditors, a total of 19 cases of discipline from TCF were appealed to the Civil Service Board. Of those 19 cases, 15 were upheld by the Board. Three were modified to a less severe penalty (termination from a CO II position was reduced to placement in a “non-security” position at TCF; a three-day suspension was reduced to a one-day suspension; and a termination was reduced to a ten-day suspension). One was withdrawn in a settlement to a 30-day suspension in lieu of termination. Of the 19 cases, eight involved undue familiarity. Of the eight cases that involved undue familiarity, four were upheld by the Board, three were modified by the Board, and one was settled. In other words, all of the disciplinary cases modified by the Civil Service Board to a lesser sanction than that originally imposed by TCF involved undue familiarity.

As stated in our earlier response included with the audit report, part of the consideration when imposing a disciplinary sanction, is what sanction will the Board support if the decision is appealed? Looking at the chart prepared by Post Audit on page 27 of the report, it appears that the one piece of data that creates the impression of TCF being less severe for cases of undue familiarity is the number of suspensions as opposed to terminations or resignations when compared to Lansing and El Dorado. In looking at the actions taken by the Civil Service Board, the only cases in which a less severe penalty was imposed were those for undue familiarity. It would appear that the Board reached a conclusion opposite that of Post Audit and Board decisions clearly influence actions we will propose in subsequent cases. In some instances, the decision was made to proceed to terminate because we suspected, but could not prove, more serious misconduct (as the report suggests we should have done in some cases cited). However, our experience has been that such actions likely will not be upheld by the Board. We have conferred with the auditors and believe we are in agreement as to who the employee is in each case cited. We would be happy to discuss any of the individual cases with the committee and receive feedback on what we should have done differently in response to specific acts of misconduct.

Finally, the example cited on page 12 characterizes the relationship between an officer and a volunteer as “a subtle form of undue familiarity”. This is not the case. Undue familiarity, by definition, involves an offender and a staff member, volunteer or other

person. The example cited on page 12 is an example of a staff member failing to perform a critical security procedure for whatever reason, but it is not an example of undue familiarity.

On page 33, the Post Audit report states, “The Department’s rape allegation database and survey data the Department reports to the Department of Justice are inconsistent.” An explanation regarding this difference was provided to Post Audit. We believe the data reported to the Justice Department is accurate and that data entry issues account for the difference. The information was also available from records maintained by investigators.

Finally, we would ask the committee to consider what was known and could be proven at the time a particular decision was made as opposed to what became known later. Hindsight is always much clearer. Staff and supervisors must make many decisions each day regarding where to intervene, what to prioritize, what action is sufficient to resolve a problem, what needs further follow up, when to intervene directly to prevent misconduct and salvage an employee, or when to continue to observe and monitor to prove misconduct in order to terminate and/or prosecute an employee.

I appreciate the opportunity to present these additional observations for the committee’s consideration.