

PREPARED STATEMENT OF

DALE DESHOTEL

**PRESIDENT
COUNCIL OF PRISON LOCALS**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE THE

HOUSE JUDICIARY COMMITTEE

ON

OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

DECEMBER 8, 2011

Mr. Chairman and Members of the Committee -

My name is Dale Deshotel. I am the President of the Council of Prison Locals, American Federation of Government Employees (AFGE), AFL-CIO. On behalf of the more than 36,000 federal correctional workers at the U.S. Department of Justice's Bureau of Prisons' (BOP) correctional institutions, I want to thank you for the opportunity to submit our prepared statement for the hearing record on three BOP issues that are critically important to the safety, security, and well-being of federal correctional workers.

Issue #1: Serious correctional worker understaffing and prison inmate overcrowding is causing a significant increase in dangerous inmate-on-worker assaults.

The BOP is continuing to experience serious correctional worker understaffing and prison inmate overcrowding problems – a situation that is resulting in a significant increase in inmate assaults upon correctional workers.

More than 217,600 prison inmates are confined in the 115 BOP correctional institutions today, up from 25,000 in 1980, 58,000 in 1990, and 145,000 in 2000. By the end of FY 2012, it is estimated there will be more than 222,000 inmates incarcerated in BOP institutions nationwide.

The number of correctional workers who work in BOP institutions, however, is failing to keep pace with this tremendous growth in the prison inmate population. At the beginning of FY 2011, the BOP system was staffed at an 89% level (35,839 of 40,279 authorized positions were filled), as contrasted with the 95% staffing percentage levels in the mid-1990s. This 89% staffing level is *below* the 90% staffing level believed to be the minimum staffing level for maintaining the safety and security of BOP institutions. In addition, the FY 2011 inmate-to-staff ratio was 4.82 inmates to 1 staffer, as contrasted with the FY 1997 inmate-to-staff ratio of 3.57 to 1.

At the same time, prison inmate overcrowding is an increasing problem at BOP institutions despite the activation of new prisons over the past few years. The BOP system today is overcrowded by about 37%, up from 31.7% in January 2000. Inmate overcrowding is of special concern at higher security institutions – with 50% overcrowding at high security prisons and 39% at medium security institutions. By the end of 2012, it is estimated the BOP system will be overcrowded by 40%.

These serious correctional worker understaffing and prison inmate overcrowding problems are resulting in a significant increase in inmate assaults against correctional workers. Illustrations of this painful reality include: (1) the savage murder of Correctional Officer Jose Rivera on June 20, 2008, by two prison inmates at the United States Penitentiary in Atwater, CA; (2) the brutal stabbing of a correctional officer on April 23, 2009, by a prison inmate at the United States Penitentiary in Terre Haute, IN; (3) the brutal stabbing of a correctional officer on November 1, 2009, by a prison inmate

at the United States Penitentiary in Lewisburg, PA; and (4) the more than 350 vicious inmate-on-staff assaults that have occurred at various BOP institutions since the murder of Correctional Officer Rivera.

The AFGE Council of Prison Locals is aware that these understaffing and overcrowding problems are the result of years of congressional underfunding of BOP. We also are aware that the Committee, an authorizing panel, is not responsible for appropriating funding for BOP or any other Department of Justice agency. However, we strongly urge the Committee to use its oversight powers to illuminate for the Congress and the American public the very real fact that BOP is an increasingly dangerous place to work because of serious correctional worker understaffing and prison inmate overcrowding.

Issue #2: BOP correctional officers should be allowed to routinely carry pepper spray in highly dangerous areas of federal prisons.

The AFGE Council of Prison Locals strongly urges the Committee to direct BOP to institute a new pepper spray policy that would allow federal correctional officers who work in highly dangerous housing units and other high security areas of BOP prisons to routinely carry pepper spray in case situations arise where they must defend themselves if physically attacked by dangerously violent inmates.

This new pepper spray policy is necessary because BOP prisons are becoming increasingly dangerous places to work. Prison conditions are significantly more violent than a few years ago because of serious correctional officer understaffing and prison inmate overcrowding – and because correctional officers are being forced to control more aggressively dangerous offenders, including more gang-affiliated inmates.

Under current BOP policy, federal correctional officers are not allowed to routinely carry pepper spray in BOP prisons. Instead, prison wardens (or designated officials) must authorize pepper spray utilization before correctional officers can use it to quell an emergency situation. Pepper spray is stored in specific locations throughout the prisons, such as in secure control rooms, watchtowers in the prisons' yards, or in the prisons' armories outside the secure perimeter.

The problem, however, is that in situations where aggressively dangerous inmates, who often have home-made lethal weapons, are physically attacking correctional officers, there is little or no time for the warden to authorize the use of pepper spray and get it to the endangered officers so they can protect themselves. The correctional officers are left to defend themselves with the two things they are authorized to carry: keys and a walkie-talkie radio.

Unfortunately, BOP management continues to refuse to allow correctional officers to carry pepper spray while on duty, relying on the following four arguments – arguments with which the AFGE Council of Prison Locals strongly disagree:

(1) Cultural argument: According to BOP officials, correctional officers do not carry pepper spray or other equipment because BOP believes in the importance of officers communicating with inmates to ensure officer safety. BOP believes that carrying pepper spray would impede officers' communication with inmates – and increase the level of prison violence - because (a) the officers would be more likely to use the pepper spray to prevent an inmate from engaging in dangerous misconduct than talk with the inmate, or (b) the inmate would perceive correctional officers carrying pepper spray as more threatening and therefore would be less willing to engage in communication with officers.

The AFGE Council of Prison Locals, however, believes this “officer-inmate communication” policy totally ignores the current reality at BOP institutions. The level of violence inside BOP institutions is already increasing – and not because correctional officers are not attempting to communicate with prison inmates. The violence level is increasing because of the serious correctional officer understaffing and prison inmate overcrowding problems – and because correctional officers are being asked to control offenders who are deliberately non-communicative, more aggressively violent, and often gang-affiliated.

In addition, the AFGE Council of Prison Locals believes this “officer-inmate communication” policy ignores the information in a BOP Executive Staff Paper, dated March 7, 2003. According to that paper, the Colorado, Illinois, and Texas State Departments of Corrections - three of the many states that allow their prison staff to routinely carry pepper spray - reported to BOP in 2003 that the ability of their staff to immediately use pepper spray decreased the need for physical restraint techniques, enhanced inmate compliance to staff warnings and commands, and resulted in an overall and significant reduction in injuries to both staff and inmates.

(2) “Used against officer” argument: BOP argues that correctional officers should not routinely carry pepper spray because it could be taken from the officer by an inmate and then used against him or her by that inmate.

The AFGE Council of Prison Locals believes this “used against officer” argument ignores one of the reasons why the BOP Executive Staff Paper (March 7, 2003) recommended providing correctional officers with pepper spray rather than expandable batons. One of the advantages of pepper spray use that was detailed in that paper was: “If an inmate gains control of the [pepper spray] and uses it on staff, there is no permanent harm to the staff member.” By contrast, “if an inmate gains control of the expandable baton and uses it on staff, there could be serious permanent physical harm to the staff member.”

(3) Regulatory argument: BOP argues that 28 CFR 552.25 - *Use of chemical agents or non-lethal weapons* is the reason why the agency cannot allow correctional officers to carry pepper spray. Here is that CFR section:

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER V--BUREAU OF PRISONS, DEPARTMENT OF JUSTICE

PART 552_CUSTODY--Table of Contents

Subpart C_Use of Force and Application of Restraints on Inmates

Sec. 552.25 Use of chemical agents or non-lethal weapons.

The Warden may authorize the use of chemical agents or non-lethal weapons only when the situation is such that the inmate:

- (a) Is armed and/or barricaded; or
 - (b) Cannot be approached without danger to self or others; and
 - (c) It is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage.
- [54 FR 21394, May 17, 1989. Redesignated and amended at 59 FR 30469, 30470, June 13, 1994] [Emphasis added]

The AFGE Council of Prison Locals contends that 28 CFR 552.25 does not support the BOP position regarding correctional officers carrying pepper spray. The important key is the word "use" in the first sentence. 28 CFR 552.25 restricts the active "use" of pepper spray - that is, the "putting into action" of pepper spray - to situations where an inmate is armed and/or barricaded or cannot be approached without danger to the correctional officer, and when a delay in restoring order would result in a major disturbance or serious property damage. In other words, this regulation's intent is to prevent correctional officers from actively spraying an inmate with pepper spray in less-than-dangerous situations - that is, in situations where the inmate is not armed or can be approached without any danger to the correctional officer, and when a delay in restoring order would not result in a major disturbance or serious property damage.

However, 28 CFR 552.25 says absolutely nothing about the passive carrying of pepper spray. Thus, contrary to BOP's position, this section does not preclude BOP from authorizing correctional officers to carry pepper spray. And it certainly does not preclude BOP from authorizing a correctional officer to carry pepper spray in highly dangerous prison areas - just in case the correctional officer must actively "use" pepper spray in situations where an armed inmate is physically attacking the correctional officer, and when a delay in restoring order would result in a major disturbance or serious property damage.

(4) Cost argument: BOP argues that the agency cannot afford the cost of supplying pepper spray to its correctional officers because the Bush administration and Congress failed for years to provide BOP with sufficient funding. As a result, BOP is experiencing

serious correctional worker understaffing, prison inmate overcrowding, and a significant increase in inmate-on-worker assaults.

The AFGE Council of Prison Locals is totally cognizant of the BOP's funding problems, and has been actively lobbying the Obama administration and the Congress to substantially increase funding for BOP. However, we think the argument that BOP cannot afford the cost of supplying pepper spray to its correctional officers is a bit overdone.

Frankly, pepper spray costs seem to be relatively minimal. A brief perusal of the Internet reveals that a two ounce pepper spray device costs from \$12.95 to \$17.95, and a four ounce pepper spray device costs from \$15.95 to \$20.95. Thus, the cost of providing pepper spray to each and every one of its approximately 16,000 correctional officers would be in the range of only \$207,200 to \$335,200. In addition, the total number of pepper spray devices that must be purchased – and the attendant costs - would be greatly reduced by the number of such devices already stored today in BOP prisons' armories.

Issue #3: BOP management should be directed to fully implement the five recommendations of the U.S. Equal Employment Opportunity Commission's "Final Program Evaluation Report for the Federal Bureau of Prisons."

In November 2010, the U.S. Equal Employment Opportunity Commission (EEOC) released its "Final Program Evaluation Report on the Federal Bureau of Prisons."

EEOC conducted this program evaluation after determining that BOP had an unusually high level of EEO complaints alleging management retaliation during fiscal years 2003-2006. An average 61 percent of BOP's EEO complaints contained retaliation allegations, compared to an average 40 percent government-wide.

The goal of this program evaluation was to assess whether fear of retaliation was a genuine issue at BOP and, if so, to offer recommendations to the agency that will enable it to eliminate that fear and enhance employee faith in the integrity of the agency's EEO program and in the agency's commitment to equal employment.

Findings

This important EEOC report revealed: (1) that BOP employees have an unusually heightened fear that management will retaliate if they participate in the EEO process or oppose a discriminatory employment practice, and (2) that BOP's EEO program has several deficiencies that adversely affect its employees' perception of – and participation in – the EEO process.

Based upon the data, analysis, and interviews, the EEOC found the following:

Finding #1 *There is widespread fear of retaliation among BOP employees.* – The vast majority of BOP non-supervisory employees interviewed reported an atmosphere of overall retaliation by management. Multiple employees stated that employees who engage in the EEO process or report discrimination are viewed as troublemakers who are insubordinate or have problems with authority. This fear of retaliation was immediately apparent during the EEOC interviews - with employees stating that eventually everyone would know who participated in the interviews and that the participants would suffer retaliation.

The retaliatory punishment meted out to BOP employees who engage in the EEO process or report employment discrimination included: (1) denial of promotions; (2) becoming the subject of investigations; (3) being placed on the least desirable shifts; (4) having performance evaluations lowered; (5) being denied training that the agency previously had agreed to provide; (6) being excluded from meetings; (7) being ostracized and accused of being untrustworthy; (8) being issued “bogus” disciplinary memoranda; and (9) having quality step increases revoked.

Many employees identified “vouchering” as a tool used by management for retaliation and a reason for not reporting employment discrimination. According to them, vouchering is an agency-wide informal system used when an employee applies for a promotion or reassignment. Through the vouchering system, the hiring warden calls the employee’s current and past wardens for recommendations. During this phone call the current or past warden relays information regarding the employee’s job duties and qualifications. However, there are no strict boundaries during these phone calls, and employees are aware that wardens many times relay an employee’s EEO activities to the hiring warden. Management officials themselves stated that wardens often identify an employee as an EEO “troublemaker” or “snitch” during a vouchering call.

Finding #2 *BOP employees lack confidence in BOP’s EEO program.* – A consistent theme among the EEOC interviews was that employees lacked confidence in BOP’s EEO program. Although some of the lack of confidence may be attributable to their lack of knowledge and awareness of their rights, most of it is attributable to an employee perception: (a) that management has an attitude that EEO is not important, (b) that management believes employees who speak with EEO counselors are just whining and looking for money, (c) that there is no confidentiality in the EEO process because counselors report everything to the wardens, and (d) that BOP tolerates harassment and does nothing to punish management officials who engage in it.

Finding #3 *BOP employees – both managers and non-supervisory employees – are unfamiliar with the EEO process and rights.* – To support its EEO program, BOP provides EEO training to employees during its Annual Refresher Training (ART), which lasts one week and covers a wide range of topics. However, interviewees indicated that the EEO portion of the ART training consisted of a dry reading of slides, generally is rushed through, is a “sleeper” that can be ignored, and lasts about 10-15 minutes. A number of managers and employees indicated that the EEO training was presented in a monotonous manner that communicated that BOP has a cavalier view of that training.

The inadequacy of BOP's EEO training best reveals itself through managers' and employees' lack of the basic foundational knowledge of the EEO complaint process. For example, some managers did not know what management's rights were during the EEO process, were unfamiliar with what was confidential during the complaint process, did not know when employees were entitled to an investigation, did not know who conducted the investigations, and were not familiar with the deadlines for responding to reports of discrimination, retaliations, and harassment.

Employees displayed a similar lack of knowledge of the formal EEO complaint process, including various procedures that arise during the investigation stage. In addition, many employees simply were not aware of their rights during the EEO process.

The lack of quality EEO training also was apparent in the area of workplace harassment as there appeared to be no clear and comprehensive guidance for managers and employees on how to report harassment, or what the agency's legal obligations and responsibilities are, if any, once harassment is reported in the workplace.

Recommendations

EEOC believes that the changes required to remedy the issues addressed in their findings – fear of retaliation, lack of confidence in BOP's EEO program, and lack of familiarity with the EEO process and employee rights – must be implemented in a proactive and measured way that includes time frames and monitoring. Moreover, the changes recommended clearly must occur throughout the agency – in both headquarters and field operations.

Recommendation #1 BOP's EEO office must be realigned.

- The EEO Director should report directly to the agency head.

BOP's EEO Director is currently located within BOP's Office of General Counsel and he/she reports to the General Counsel. The EEOC report concludes that this organizational structure is in clear violation of EEOC regulations and directives. EEOC's regulations establish that the EEO Director "shall" be under the immediate supervision of the agency head. EEOC's Management Directive 110 explains that "by placing the EEO Director in a direct reporting relationship to the head of the agency, the agency underscores the importance of equal employment opportunity to the mission of each federal agency and ensures that the EEO Director is able to act with the greatest degree of independence."

- The EEO office should be moved out of the Office of General Counsel.

Both the EEO office (which is responsible for enforcing laws against workplace discrimination) and the Labor Law Branch (which is responsible for defending the agency in EEO matters) are located within BOP's Office of General Counsel. The EEOC

report concludes that this organizational structure violates EEOC regulations and directives. These regulations and directives require agencies to maintain distance between the investigative fact-finding and the defensive functions of the agency in order to enhance the credibility and integrity of the EEO complaints process.

Recommendation #2 BOP must increase management support for EEO.

EEOC Management Directive 715 requires agency heads and other senior management officials to demonstrate a firm commitment to equality of opportunity for all employees. The EEOC report recommends that BOP increase management support for EEO through the following changes:

- BOP should revise and reissue its EEO policies.
- BOP immediately should provide mandatory EEO training.
- Managers should be held accountable for EEO violations.
- Each BOP facility should have an EEO counselor.

Recommendation #3 BOP's headquarters EEO office must monitor its field operations.

The EEOC report revealed that BOP's headquarters EEO office is not well connected with the operations of the EEO program at BOP facilities. It therefore recommended that the headquarters EEO office should design and implement a program to monitor EEO program operations at the facilities through the following:

- BOP should conduct EEO counselor conferences.
- BOP should conduct onsite BOP facility reviews.

Recommendation #4 BOP should take steps to ensure confidentiality.

To ensure the confidentiality within the EEO process , the EEOC report recommended that the warden should not be notified of a complaint unless and until the complainant files a formal EEO complaint of discrimination. In addition, it must be stressed to all staff that EEO information is confidential. Anyone found breaching confidentiality should be disciplined "in an appropriate, progressive manner."

Recommendation #5 BOP should abolish the vouchering system.

The EEOC report recommends that BOP abolish the vouchering system, and suggests that hiring recommendations be handled through a more formal process to ensure that inappropriate EEO-related information is not relayed from one warden to another. For example, an individual from Human Resources (HR) can collect a written statement from current and prior wardens explaining an applicant's job duties and performance of those duties. Once an HR official confirms that the written statement's information is

appropriate and does not contain EEO information, the information can be passed to the hiring warden.

In addition, the EEOC report suggests that wardens who disclose EEO information or rely on EEO information during the hiring process should be disciplined.

Congressional Action

In response to the EEOC report and to what it referred to as BOP's "tepid" response to that report, the Senate Appropriations Committee included the following language in its report accompanying the FY 2012 Commerce-Justice-Science Appropriations bill:

“Employee Retaliation. – The Committee is concerned by recent reports published by the Equal Employment Opportunity Commission [EEOC] that found widespread and highest fear of retaliation among BOP employees in the Federal workforce. Between 2003 and 2006, BOP employees filed unusually large numbers of complaints with EEOC that alleged retaliation and harassment as the most common form of discrimination in the workplace. An average 61 percent of BOP's equal employment opportunity [EEO] complaints contained retaliation allegations, compared to an average 40 percent Governmentwide. In addition, reports revealed that BOP employees who engage in the EEO process or report discrimination face even further harassment by their supervisors and colleagues.

The BOP's response to these reports has been tepid at best. The Committee will not tolerate such a lax approach to protecting BOP employees from harassment, as no one should fear retaliation in the workplace. The Committee demands that BOP implement fully the recommendations included in the EEOC's November 2010 Final Program Evaluation Report for the Federal Bureau of Prisons. The Bureau will certify to the Committee that it has implemented and met the EEOC's recommendations, and will submit a report concurrently to the Department's Office of Inspector General for review and comment.”

In addition, the final conference report accompanying the FY 2012 Commerce-Justice-Science Appropriations bill stated that:

“Employee retaliation. – The conferees are concerned that BOP employees were cited recently by the Equal Employment Opportunity Commission (EEOC) as having the highest and most widespread fear of retaliation compared to the rest of the Federal workforce. The conferees expect BOP to certify to the Committees on Appropriations that it has implemented and met the recommendations included in the EEOC's November 2010 Final Program Evaluation Report for the Federal Bureau of Prisons, and submit concurrently a report on its compliance with the recommendations

to the Department's OIG for review and comment.”

The AFGE Council of Prison Locals strongly urges the Committee to demand that BOP implement fully the recommendations included in the EEOC's November 2010 Final Program Evaluation Report for the Federal Bureau of Prisons.