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MARJORIE R. ESMAN
EXECUTIVE DIRECTOR

October 25, 2012

OPEN LETTER REGARDING USE OF PEPPER SPRAY

Via fax 225-655-2319 and
By regular mail
Burl Cain, Warden
Louisiana State Penitentiary
17544 Tunica Trace
Angola, LA 70712

Re: Use of Pepper Spray on LSP Inmates

Dear Warden Cain:

In the past few months, the ACLU of Louisiana has received numerous allegations of excessive or unjustified use of chemical agents, such as OC (*oleoresin capsicum*), upon inmates at Louisiana State Penitentiary (LSP). We write to bring the issue to your attention, and to request that you provide us LSP's policies on chemical spray use, investigate the matter and immediately correct any unlawful practices.

Background

Specifics vary, but the theme of each account is the same: with increasing frequency and decreasing restraint, corrections officers at LSP are using chemical irritant upon offenders in inappropriate ways. The spray is not being used sparingly to discipline unruly or disobedient inmates, but gratuitously to punish offenders who pose no threat and are engaged in lawful activity.

For example, in several complaints, inmates state that chemical spray was discharged into their locked, unventilated cells and left to linger there, forcing them to breathe the acrid fumes for hours at a time. They add either that they were not given opportunities to decontaminate, or that decontamination followed only many hours later – in some cases only when the trapped inmates were in respiratory distress and required medical attention.

Inmates also allege that they were sprayed for complaining about minor problems, such as not being allowed to shower during a regularly-allotted bathing time; or for requesting emergency medical assistance; or for minor incidents such as failing to clear the cell floor of water that had spilled from a blocked toilet. Inmates state that on several occasions, without instigation, they were taken in groups to the showers, stripped naked, doused with pepper spray and simply returned to their cells without explanation.

Perhaps most seriously, quite a few inmates complained that they were sprayed in retaliation for filing administrative grievances, and in some cases were specifically told by corrections officers that they would be sprayed again unless they withdrew their complaints.

Law Regarding Pepper Spray Use

As you are aware, the law does not permit use of chemical agents upon inmates for purely punitive or malicious purposes – use must be justified either by disciplinary need or a threat to security. Indeed, the federal courts of both Louisiana and the U.S. Fifth Circuit Court of Appeal have specifically addressed some of the factual scenarios we describe above. For example, the Fifth Circuit on more than one occasion has held it unlawful to spray inmates who are confined to a cell and pose no threat to corrections officers. *Chambers v. Johnson*, 372 Fed. Appx. 471, 473 (5th Cir. 2010); *Johnson v. Dubroc*, 3 F.3d 436 (5th Cir. 1993) (Eighth Amendment violated where an isolation-tier inmate who loudly called out to another inmate from inside his cell was sprayed in the face, treated and allowed a shower and change of clothes, but then was returned to his still-contaminated cell).¹

Similarly, the Middle District of Louisiana has stated that chemical agents cannot be used against inmates maliciously or for no apparent reason. *Causey v. Poret*, 2007 WL 2701969 (M.D. La. 2007) (Eighth Amendment violated where officers maced, choked, and kicked inmate in the shower after removing him from the kitchen area, where he had been accused of looking at a female officer).

Likewise, the Middle District has recognized excessive force where corrections officers pepper-sprayed an inmate after commanding him to take off all his clothes and locking him in a segregation cell, where he then became argumentative but still posed no threat. *Young v. Hubert*, 2008 WL 2019576 (M.D. La. 2008).²

And of course, retaliation against an inmate for filing a grievance is unlawful in any form, including retaliation by chemical spray, as it violates the First Amendment. *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006) (prison officials may not retaliate against a prisoner for exercising his First Amendment right of access to the courts or to complain through proper channels about a guard's misconduct through the grievance process).

¹ *Cf. Scott v. Hanson*, 330 Fed. Appx. 490, 491 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 638, 175 L. Ed. 2d 491 (2009) (No Eighth Amendment violation when an officer briefly maced an inmate inside his cell, because the inmate had continued his disruptive behavior despite the officer's repeated orders to stop, and because the disruptive behavior interfered with audio equipment used to monitor the inmates and guards); *Williams v. Hoyt*, 556 F.2d 1336, 1338 (5th Cir. 1977) (No constitutional violation where sheriff and deputies used spray only for the control of unruly prisoners and not punitively).

² Courts around the country have ruled similarly. See, e.g., *Iko v Shreve*, 535 F.3d 225 (4th Cir. 2008) (excessive force where officer continued using pepper spray past the point of inmate's compliance with orders, and inmate never reacted violently, was sprayed after he had lain on the ground, was never given medical attention and died from resulting respiratory issues); *Lawrence v. Bowersox*, 297 F.3d 727 (8th Cir. 2002) (excessive force where inmates were confined to their cells, had not disobeyed orders, but their faces, bodies, and entire cell were nonetheless doused with pepper spray); *Vlasich v. Reynoso*, 117 Fed. Appx. 568 (9th Cir. 2004) (excessive force where inmate was sprayed six times, initially after refusing to turn over his food tray, but again after he had complied); *Norton v. City of Marietta*, 432 F.3d 1145, 1153-54 (10th Cir. 2005) (*per curiam*) (excessive force question for jury where inmate claimed he kicked his cell door down but was then non-combative when officers entered his cell and pepper sprayed him).

(3)

Relief

All of the scenarios we have listed above seem to be increasing in frequency, and all cross the line into excessive force, and therefore violate the Eighth and/or First Amendments. We therefore request the following:

- (1) That you investigate the use of chemical agent at LSP to ensure that such use comports with applicable regulations, state and federal law;
- (2) That you immediately curb any unlawful chemical spray practices at LSP and take all measures necessary to ensure that such practices do not recur including training all appropriate personnel on the lawful use of chemical agents;
- (3) That you provide this office with a report of your investigation, including a report of any remedial or corrective measures taken; and
- (4) That you provide this office with a copy of all guidelines, rules and regulations applicable to chemical spray use at LSP³.

I will expect to hear from you within 48 hours. Please do not hesitate to contact us if you have any questions. I look forward to your response.

Sincerely,


Marjorie Esman

³ Please consider this request a Public Records Act request under La. R.S. §44.1, *et seq.*