NEON BROWN, DOC #421675,	*	**BEFORE DENISE OAKES SHAFFER,**
GRIEVANT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
PATUXENT INSTITUTION	*	**OF ADMINISTRATIVE HEARINGS**
	*	**OAH No.: DPSC-IGO-002V-14-33232**
	*	**IGO No.: 20141133**

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STATEMENT OF THE CASE

On May 27, 2014, the Grievant filed a grievance with the Inmate Grievance Office (IGO), which the IGO summarized as follows:

> *This grievance is an "appeal" from the disposition of ARP-PATX-0126-14, which is incorporated by reference herein. In essence, the Grievant, who claims to be a transgender woman, complains that upon his/her transfer to the Patuxent Institution on February 4, 2014, she was improperly discriminated against by Patuxent staff.*[1]

On September 23, 2014, I held a hearing via videoconference. Md. Code Ann., Corr. Servs. § 10-207(c) (2008); Md. Code Ann., State Gov't § 10-211 (2014); and Code of Maryland Regulations (COMAR) 28.02.01.20B(2). I was located at the Office of Administrative Hearings (OAH), and the parties were located at Patuxent Institution (Patuxent) in Jessup, Maryland and

[1] The Grievant self-identifies as female.

4.8.15

Maryland Correctional Training Center (MCTC) in Hagerstown, Maryland. Rebecca Simpson, Esquire, and Jer Welter, Esquire, represented the Grievant, who was present at MCTC. Kristina Donnelly, IGO Coordinator, represented Patuxent. I held the first day of hearing on September 23, 2014, and I granted the Grievant's motion to continue the hearing for at least thirty days to allow time to obtain affidavits in support of her position.

On November 19, 2014, Michael Doyle and Lisa Arnquist, Assistant Attorneys General, entered their appearance on behalf of Patuxent. On November 20, 2014, I conducted a telephone conference with the parties to resolve discovery issues. On November 25, 2014, I convened the second day of the hearing via videoconference. Ms. Simpson and Mr. Welter represented the Grievant, who was present. Ms. Donnelly, Ms. Arnquist and Ben Legum represented Patuxent. At the request of the parties, I allowed written closing arguments. The record in this case closed on January 9, 2015.

The contested case provisions of the Administrative Procedure Act, the General Regulations of the IGO, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 12.07.01; and COMAR 28.02.01.

ISSUES

1. Is the OAH authorized to recommend relief as requested in this grievance?
2. Are the Prison Rape Elimination Act (PREA) standards applicable to Patuxent?
3. Was the February 6, 2014, strip search conducted by Patuxent on the Grievant compliant with PREA regulations?
4. Was the Grievant's housing determination compliant with PREA regulations?

5. Was the Grievant denied access to various privileges, programs, education, and work opportunities while she remained in segregation?

6. Did Patuxent have a formal policy regarding the handling of transgender inmates or the training of its employees to be in compliance with PREA regulations?

7. Was the Grievant subjected to harassment or torment by Patuxent employees?

8. Was the Grievant subjected to sexual abuse by Patuxent employees?

9. And, if so, what remedy is available to the Grievant?

SUMMARY OF THE EVIDENCE

Exhibits

I incorporated the entire IGO file into the record, which contained the following documents:

IGO Ex. 1 – Grievance, received by the IGO on May 27, 2014, with the following attachments:
- Headquarters Appeal of Administrative Remedy Response, dated March 26, 2014
- Request for Administrative Remedy, dated February 19, 2014

IGO Ex. 2 – Prehearing Order, dated July 28, 2014

IGO Ex. 3 – Notice of Hearing, dated July 28, 2014

IGO Ex. 4 – Request for Postponement, received by the IGO on September 2, 2014

IGO Ex. 5 – Supplemental Prehearing Order, dated September 12, 2014

IGO Ex. 6 – Information packet sent from Patuxent to the IGO, with the following documents:
- Receipt of Warden's Response, dated March 26, 2014
- Request for Administrative Remedy, dated February 19, 2014

IGO Ex. 7 – Email correspondence, dated September 12, 16, and 17, 2014, with the following attachment:
- Request for Documents, Records, and Physical Evidence, dated September 16, 2014

IGO Ex. 8 – Notice to Presiding [Administrative Law Judge], dated September 17, 2014

IGO Ex. 9 – Transmittal for Inmate Grievance Hearings (DPSCS-IGO), received by the OAH on September 17, 2014

IGO Ex. 10 – Request for Documents, Records, and Physical Evidence, received by the IGO on September 18, 2014

IGO Ex. 11 – OAH-IGO Postponement/Continued Case Form, dated September 23, 2014

IGO Ex. 12 – Notice of Hearing, dated October 1, 2014

IGO Ex. 13 – Request for Documents, Records, and Physical Evidence, received by the IGO on October 6, 2014

IGO Ex. 14 – Letter from Rebecca Simpson to the IGO, received by the IGO on October 24, 2014, with the following attachment:[2]

- Affidavit of Russell Dietrich, dated October 15, 2014

IGO Ex. 15 – Email correspondence, dated November 10 and 12, 2014, with the following attachments:

- Request for Presence of Witnesses, dated November 10, 2014
- Affidavit of Russell Dietrich, dated October 15, 2014

IGO Ex. 16 – Request for Presence of Witnesses, received by the IGO on November 12, 2014, with the following attachment:

- Affidavit of Russell Dietrich, dated October 15, 2014

IGO Ex. 17 – Email from the IGO to Rebecca Simpson, dated November 13, 2014, with the following attachment:

- Letter from the IGO to Rebecca Simpson, dated November 13, 2014

IGO Ex. 18 – Transmittal for Inmate Grievance Hearings (DPSCS-IGO), received by the OAH on November 19, 2014

IGO Ex. 19 – Notice to Presiding [Administrative Law Judge], dated November 19, 2014

I admitted the following exhibits on Patuxent's behalf:

Patux. Ex. 1 – Emergency Directive EmD.DOC.110.0026, effective April 30, 2009

Patux. Ex. 2 – Handwritten tier notes, multiple entries

Patux. Ex. 3 – Inmate Telephone System Call Records, generated on November 13, 2014

[2] Attached to this exhibit, as well as IGO Ex. 15 and 16, is an Affidavit of William Thomas Foxwell. This Affidavit is not admitted as evidence.

I admitted the following exhibits on the Grievant's behalf:

Griev. Ex. 1 – Summary of Psychological File, dated August 13, 2014

Griev. Ex. 2 – Letter from the Grievant, dated February 12, 2014

Griev. Ex. 3 – PREA Intake Screening, dated February 27, 2014

Griev. Ex. 4 – Email correspondence, dated various dates in February and March 2014

Griev. Ex. 5 – Case Management Assignment Sheet, dated February 14, 2014

Griev. Ex. 6 – Notice of Assignment to Administrative Segregation, dated February 4, 2014

Griev. Ex. 7 – Email correspondence, dated February 4, 2014

Griev. Ex. 8 – Waiver and Notification of Case Management Action, dated February 19, 2014

Griev. Ex. 9 – Teaching plan, undated

Griev. Ex. 10 – Transgender Inmates policy, reviewed October 2012

Griev. Ex. 11A – Administrative Remedy Procedure Withdrawal Form, dated March 28, 2014

Griev. Ex. 11B – Administrative Remedy Procedure Withdrawal Form, dated April 11, 2014

Griev. Ex. 11C – Administrative Remedy Procedure Withdrawal Form, dated March 19, 2014

Griev. Ex. 11D – Administrative Remedy Procedure Withdrawal Form, dated April 9, 2014

Griev. Ex. 12 – Administrative Remedy Procedure Case Summary, dated March 19, 2014

Griev. Ex. 13 – Request for a Formal Investigation, undated

Griev. Ex. 14 – Not admitted

Griev. Ex. 15 – Affidavit of Russell Dietrich, dated October 15, 2014

Griev. Ex. 16 – Not admitted

Griev. Ex. 17 – Grievant's Medical Records from Patuxent

Testimony

The Grievant testified on her own behalf and presented the following witness:[3]

- Russell Dietrich, inmate at Baltimore City Correctional Center (BCCC), appeared via telephone

Patuxent presented the following witnesses:

- Orlando Johnson, Chief of Security, Patuxent
- James Fleming, Chief of Psychology Services and Administrative Supervisor, Patuxent
- Damon Fayall, Medical Administrator, Patuxent
- Dawn Halsey, Sergeant, Patuxent
- Liqouri Stith, Security Guard, Patuxent

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. On February 4, 2014, and at all times relevant to this proceeding, the Grievant was housed at Patuxent.

2. On February 4, 2014, the Grievant was transferred from the Baltimore City Detention Center to Patuxent for a mental health assessment. Upon her arrival, Patuxent separated the Grievant from the other inmates she arrived with and took her to the medical unit where she was examined by medical personnel and strip searched.

3. All incoming inmates to Patuxent are strip searched by Patuxent employees in the intake area.

[3] The Grievant called William Thomas Foxwell, inmate at Baltimore City Correctional Center, as a witness but he refused to testify. Because Mr. Foxwell clearly stated that he wanted to have no involvement with this matter, I sustained Patuxent's objection to the admission of his affidavit.

4. At the direction of the Chief of Security, Orlando Johnson, the Grievant was taken to the medical unit so that a determination could be made "if the inmate made the transition from female to male." [Griev. Ex. 7]

5. On the medical unit, the Grievant was examined in the presence of Damon Fayall, medical administrator for Patuxent as well as nurse practitioner. The medical staff informed Chief Johnson that the Grievant "not only had breasts but . . . also had male genital[s]." [Tr. 1, p. 74-75].

6. Sergeant Dawn Halsey, a female officer, strip searched the top half of the Grievant's body. An unidentified male officer strip searched the lower half of the Grievant's body. This strip search occurred in the presence of medical staff. Chief Johnson was also present but did not observe the search.

7. One of the purposes of the Grievant's strip search was to determine if the Grievant was in possession of any contraband.

8. No disparaging remarks were directed toward the Grievant by Patuxent employees during the strip search.

9. Patuxent did not have any policy in place providing guidance on how to strip search transgender inmates.

10. Patuxent employees never received any formal training on how to a strip search transgender inmates.

11. Immediately after the strip search, Chief Johnson determined the Grievant's housing placement based solely on the fact that the Grievant had male genitals. Chief Johnson assigned the Grievant to administrative segregation because she was a transgender inmate and posed a "possible threat to the security of the institution." [Griev.

Ex. 6]. A risk assessment of the Grievant's vulnerability was not performed at this time. Patuxent listed two bases[4] for the Grievant's assignment: (1) "reasons exist to believe that you are dangerous to the security of the institution and/or inmates and/or staff;" and (2) "you are being considered for placement on voluntary or involuntary protective custody." [Griev. Ex. 6]

12. Before the Grievant arrived at Patuxent, Patuxent officials conferred and agreed that the Grievant should be placed in the administrative segregation unit solely because of her status as a transgender inmate. [Griev. Ex. 7]

13. Inmates in Patuxent's Assessment Unit are assessed by a psychiatric team to determine their mental health needs. This assessment is an extension of the classification process. The assessments typically take thirty to thirty-five days.

14. On February 20, 2014, the Patuxent psychiatric team completed the Grievant's mental health assessment. Nevertheless, the Grievant remained housed in Patuxent's administrative segregation unit for another fifty days.

15. On February 20, 2014, Patricia Goins-Johnson, Warden of Patuxent, stated in an email to Patuxent employees that the Grievant should not remain at Patuxent in the administrative segregation unit. [Griev. Ex. 4]

16. On February 27, 2014,[5] twenty-three days after the Grievant arrived at Patuxent and was placed in administrative segregation, and seven days after the completion of the Grievant's mental health assessment, the Grievant's case manager, Simon Hall, filled

[4] Grievant's exhibit # 6 also contained a handwritten note that the Grievant "could be a victim of sexual assault." Everything else on the exhibit was typed. No one identified the author of that note or testified as to when it was added to the exhibit. I have accorded it no weight.

[5] In its brief, Patuxent incorrectly identified the date of this assessment as February 17, 2014. This is a significant error in light of the arguments made by the Grievant. In fact, no assessment was done until the Grievant began complaining formally through the ARP process.

out a PREA intake screening form. [Griev. Ex. 3] The Grievant remained housed in Patuxent's administrative segregation unit.

17. Patuxent had no policy in place regarding housing transgender inmates.

18. Patuxent employees were not trained in how to make appropriate housing determinations for transgender inmates.

19. Unlike other Division of Correction (DOC) facilities, Patuxent does not offer any of its inmates work related opportunities, educational opportunities, or visitation privileges. Most inmates at Patuxent are there solely for evaluation purposes.

20. Recreation was one of the few privileges accorded to inmates present at Patuxent for an assessment. The Grievant only received recreation once while in segregation at Patuxent.

21. While at Patuxent, the Grievant was regularly afforded opportunities to take a shower. On some occasions, the Grievant refused to shower when given the opportunity. At no time were the Grievant's shower privileges suspended. [Patux. Ex. 2]

22. Inmates at Patuxent are allowed to use the telephone two or three times a week. While at Patuxent, the Grievant was permitted equal access to telephone privileges. The Grievant initiated thirty-two calls while she was housed at Patuxent. These calls ranged from one to thirty minutes in duration. [Patux. Ex. 3]

23. The Grievant was not denied medical treatment while at Patuxent. The Grievant was seen by medical professionals on numerous occasions. [Patux. Ex. 2]

24. Throughout her time at Patuxent, the Grievant was taunted and harassed by Patuxent employees, particularly, Sergeant Dawn Halsey, who repeatedly referred to the Grievant as an "it." Sergeant Halsey told the Grievant that she was not a real woman and

should kill herself. [Tr. 1, p. 29] These statements left the Grievant feeling belittled and contemplating suicide. [Tr. 1, p. 25]

25. Video surveillance footage of Patuxent's administrative segregation unit was destroyed pursuant to Patuxent's routine internal procedures.

26. Unidentified correctional officers stared into the Grievant's cell, not for the required purpose of determining whether she was alive, but to gawk and "giggle" at her. [Tr. 1, p. 43-44] The unidentified correctional officers would threaten the Grievant and call her names. [Tr. 1, p. 26] These interactions would leave the Grievant in tears. [Tr. 2, p. 37]

27. On at least one occasion, unidentified correctional officers pulled a curtain back to stare at the Grievant while she showered. This type of observation was not done for security purposes.

28. Patuxent had no policy in place mandating a zero tolerance towards sexual abuse or harassment of transgender inmates.

29. Patuxent employees had not received any training with regard to the PREA and its impact on transgender inmates.

30. Beginning in February and continuing until her transfer, the Grievant complained about her treatment at Patuxent through the Administrative Remedy Procedure (ARP) process as well as to Dr. James Fleming, Patuxent's Chief of Psychology Services. These complaints have not been investigated.

31. On April 11, 2014, the Grievant was transferred to the Maryland Correctional Training Center (MCTC) as a result of a successful ARP.

32. The Grievant is currently housed in the general population at MCTC.

DISCUSSION

Legal framework

In an inmate grievance concerning an institutional administrative decision, the Grievant bears the burden of proving, by a preponderance of the evidence, that Patuxent's action was arbitrary and capricious, or inconsistent with the law. COMAR 12.07.01.08A(1), C(1). An Administrative Law Judge may determine that an administrative decision is arbitrary and capricious, or inconsistent with the law, if:

> (a) The decision maker or makers did not follow applicable laws, regulations, policy or procedures;
> (b) The applicable laws, regulations, policy or procedures were intended to provide the grievant a procedural benefit; and
> (c) The failure to follow applicable laws, regulations, policy or procedures prejudiced the grievant.

COMAR 12.07.01.08C(2).

OAH is authorized to recommend the relief sought by the Grievant

Patuxent argues that OAH does not have "authority" to grant relief in this matter. The procedure governing Inmate Grievance Hearings is well established in statute and regulation. If an Administrative Law Judge (ALJ) at OAH finds that Patuxent's actions were arbitrary, capricious or inconsistent with the law, that ALJ has an obligation to issue a proposed decision and to recommend relief. Md. Code Ann. Corr. Servs. § 10-209(b)(2) (2008). The Secretary of the Division of Public Safety and Correctional Services (DPSCS) then issues the final decision, "taking any action the Secretary considers appropriate in light of the findings of the Office of Administrative Hearings." Md. Code Ann. Corr. Servs. § 10-209(c)(2) (2008). Patuxent's argument in its brief that the OAH is not empowered to grant relief appears to be based on a misunderstanding of the interaction between the Secretary of the DPSCS and the OAH in an Inmate Grievance case. As I will be making findings in favor of the Grievant in this decision, I

will issue a proposed decision and recommend relief that is within the authority of the Secretary of DPSCS to grant. As is required by statute, the Secretary of DPSCS will issue the final decision in this matter, and determine what relief, if any, is appropriate. I do not believe that Patuxent intended to argue that the Secretary of DPSCS was without authority to grant the relief the Grievant seeks. In the event that it did, I find that argument unpersuasive and will make recommendations to the Secretary of DPSCS based upon my findings of fact and analysis of the applicable law.

PREA standards apply to Patuxent

With respect to the applicable law, the Grievant asserts that I should consider PREA and its implementing regulations. Patuxent argues that I should not consider PREA because it does not create a private cause of action. I note that the Grievant is not pursuing a private cause of action in this grievance. Rather, the Grievant is asserting, through the ARP and IGO process, that PREA is an "applicable law, regulation, policy or procedure" that is intended to provide her with "a procedural benefit," that the law, regulation, policy or procedure was violated by Patuxent employees, and that the violation "prejudiced" the Grievant. COMAR 12.07.01.08C(2). The fact that the Grievant would not be able to file a separate claim based on PREA in a federal or state court has no bearing on this administrative proceeding. Hence, I will consider PREA to determine the issues in this matter.

I find that the PREA standards are applicable to Patuxent and to all state confinement facilities, because the State has voluntarily agreed to be bound by these standards in exchange for federal funding. *See* 99 Md. Op. Atty. Gen. 4, at 7 (January 28, 2014). These regulations require each state to implement procedures designed to protect vulnerable inmates from sexual abuse, and harassment. In fact PREA requires the DPSCS to have a "written policy mandating zero

tolerance towards all forms of sexual abuse and sexual harassment." 28 C.F.R. § 115.11(a) (2014). Thus, these regulations are applicable and designed to confer a procedural benefit on an inmate.

The Grievant alleged that Patuxent failed to comply with several federal and state regulations and made multiple arguments in support of her claim that Patuxent employees acted arbitrarily and capriciously. I will address each of these arguments in turn.

Intake strip search

The Grievant argued that the strip search conducted by Patuxent did not comply with the PREA regulations, COMAR 12.14.04.05 (protecting inmates from physical and mental abuse and harassment) and DPSCS policy. The relevant PREA regulations are found at 28 C.F.R. § 115.15(a)-(c), (e) and (f):

> (a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.
> (b) As of August 20, 2015, or August 21, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.
> (c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.
> . . . .
> (e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.
> (f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

Patuxent argued that the Grievant was appropriately strip searched. Patuxent maintained that it was in compliance with 28 C.F.R. § 115.15 by first having a medical practitioner determine the Grievant's genital status to determine if the strip search should be conducted by a male or a female officer. Patuxent alleged that since the Grievant had a penis, a male officer examined the Grievant from the waist down; and, since the Grievant had female breasts, a female officer examined her from the waist up. The Grievant argued that she was strip searched solely for the purpose of determining her genital status.

First, I find that PREA, COMAR 12.14.04.05, and the DPSCS policies regarding strip searches are applicable and are intended to provide the Grievant a procedural benefit. Patuxent did not argue that COMAR or DPSCS policies are inapplicable. I do not find, however, that the PREA, COMAR regulations, or any DPSCS policies were violated by the strip search conducted on February 4, 2014. Patuxent established that every arriving inmate was subject to a strip search. Chief Johnson had received notification that the Grievant was a transgender inmate. Rather than have the Grievant strip searched in the intake area, Chief Johnson directed that she be taken to the medical unit. Once on the unit, the Grievant spoke with medical personnel. While it is clear that Chief Johnson and the medical personnel sought to determine whether the Grievant had male or female genitals that was *not the only* reason for the strip search.

I have carefully reviewed the testimony of the Grievant and Mr. Fayall. The evidence does not support a finding that the Grievant was strip searched for the sole purpose of establishing her genital status. Rather, the Grievant was examined, like all other inmates, for the purpose of determining if she was in possession of contraband. Chief Johnson determined that the Grievant's strip search would be performed in two stages. First, a female correctional officer would be present with medical personnel while the Grievant was unclothed and searched for

contraband from the waist up. The role of this female correctional officer was the same in this strip search as it is in every strip search – to check for contraband. Once the Grievant put her top back on, a male correctional officer continued to perform the strip search from the waist down. Again, the role of this male correctional officer was to check for contraband. In both instances, the role of the medical personnel was to confirm the Grievant's representation of her transgender status; not for the sole purpose of determining her genital status.

The Grievant points to advice found in the "frequently asked questions" portion of the National PREA Resource Center to argue that the strip search was inappropriate. In that source, the Center was asked: "Can you please clarify the parameters of conducting a search of transgender or intersex inmate/resident?" The response follows:

> Operationally three options are in current practice for searches of transgender or intersex inmates/residents/detainees: 1) searches conducted only by medical staff; 2) searches conducted by female staff only; . . . and 3) asking inmates/residents/detainees to identify the gender of staff with whom they would feel most comfortable conducting the search.

National PREA Resource Center Frequently Asked Questions, Cross-Gender Supervision, available at http://www.prearesourcescenter.org/faq/cross-gendersupervision, (last visited February 28, 2015).

Patuxent was required by its policy not to subject the Grievant, or the correctional officers, to a cross-gendered strip search. [Patux. Ex. 1] While I cannot agree that the strip search method carried out by Patuxent was ideal or a "best practice" as defined by the PREA Resource Center, it was not a search that violated the regulation, since it was not done solely for the purpose of establishing the Grievant's gender. The search in this instance was necessary to permit the Grievant's entry into Patuxent and to maintain the security of the institution. Thus, the strip search did not violate the regulations cited by the Grievant.

The Grievant also testified that she was harassed during the strip search by Chief Johnson and other correctional officers. She alleged that Chief Johnson told her he had "to find out what she was" and that "she shouldn't be what she was." [Tr. 1, p. 22-23] Chief Johnson denied making these comments. [Tr. 1, p. 76] I find that the Grievant has not met her burden on this point. I am persuaded by the testimony of Mr. Fayall, who was present during the entire procedure, that no such comments were made. [Tr. 1, p. 118-119] I found Mr. Fayall to be a credible witness. His demeanor while testifying indicated that he was uncomfortable with the fact that there was no policy in place to address strip searching a transgender inmate. Further, he sought out such a policy after this strip search took place. He was honest about his discomfort and I believed him when he stated that he did not hear Chief Johnson or any other correctional officer make any disparaging remarks during the strip search.

Every Patuxent employee testified that there was no policy in place governing strip searches for transgender inmates. Similarly, each testified that they had not received training regarding how to strip search a transgender inmate. The strip search was described by Patuxent employees, including Chief Johnson, as a "make it up as you go" event. While I have concluded that the method chosen did not violate applicable law, I recommend that the DPSCS develop a written policy setting forth the strip search procedure for an inmate who identifies as transgendered.

Housing determination

The Grievant alleged that her housing determination was not compliant with PREA regulations. In support, the Grievant cites to 28 C.F.R. § 115.41(a), which states, "[a]ll inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of

being sexually abused by other inmates or sexually abusive toward other inmates." Further, 28 C.F.R. § 115.42(e) and (g) states:

> (e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.
> (g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

Additionally, 28 C.F.R. § 115.43(a)-(c) states:

> (a) Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.
> (b) Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:
> (1) The opportunities that have been limited;
> (2) The duration of the limitation; and
> (3) The reasons for such limitations.
> (c) The facility shall assign such inmates to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

Patuxent argued that the Grievant was placed in the administrative segregation unit based on the determination of Chief Johnson. Chief Johnson made the determination that the Grievant was a threat to the security of the institution. At no time during her intake on February 4, 2014, did the Patuxent employees conduct an assessment of the Grievant's vulnerability. Rather, since the Grievant had female breasts and self-identified as female, Chief Johnson concluded that the Grievant would "cause mayhem" if housed with the all-male general population of Patuxent. [Tr. 1, p. 91] Conversely, Chief Johnson determined that since the Grievant had a penis, it would be unsafe to house her with the all-female general population of Patuxent. In his testimony, Chief

Johnson acknowledged that he was aware that the Grievant wanted to be housed in the general population.

The email exchange regarding the Grievant before she arrived clearly establishes that the Grievant was going to be assigned to segregation based solely on the fact that she identified as transgender. [Griev. Ex. 7] Well before the Grievant arrived, and before any member of Patuxent's staff evaluated her, Chief Johnson determined that the Grievant should be placed on the administrative segregation housing unit. No individual assessment of her vulnerability or threat to the institution was performed at this point.

The Patuxent Assessment Unit concluded its mental health assessment of the Grievant on February 20, 2014, yet the Grievant remained housed at Patuxent for another month and a half. On February 27, 2014, Patuxent's case management team finally performed the required vulnerability intake assessment, yet no action was taken to transfer the Grievant out from administrative segregation based upon that assessment. As a result, the Grievant was held in administrative segregation for sixty-six days – the entire duration that she was housed at Patuxent. The Grievant filed a complaint through the ARP process which was eventually processed and determined to be meritorious. It was not until the Warden addressed this complaint that the Grievant was finally transferred to MCTC, on April 11, 2014, where she is currently housed safely in the general population.

With respect to the Grievant's housing assignment, I find that the PREA is an applicable law that is intended to confer a procedural benefit on the Grievant. PREA expressly requires that an intake screening be performed within seventy-two hours of an inmate's arrival, 28 C.F.R. § 115.41, and that inmates shall not be segregated based solely on their transgendered status, unless all other alternatives have been considered. 28 C.F.R. § 115.43 (2014). In this case, there

was no initial intake assessment as required by PREA. In fact, no attempt was made to determine whether the Grievant was vulnerable until February 27, 2014, twenty-three days after she arrived at Patuxent and seven days after her assessment was complete. At no time were any other alternatives considered.

Moreover, the email chain beginning with Ms. Nwaka on February 17, 2014 and continuing until March 17, 2014, makes it clear that Patuxent's employees were aware that the Grievant's placement in the administrative segregation unit was inappropriate, yet no one took action to rectify the situation. [Griev. Ex. 4] As early as February 20, 2014, the same day the Patuxent Assessment Unit completed the Grievant's assessment, Warden Goins-Johnson stated: "This inmate is minimum security and a decision needs to be made of where he should be housed. Please advise me ASAP. He cannot remain here on admin seg[regation]." [Griev. Ex. 4]. Yet the Grievant remained in the administrative segregation unit until she was released to MCTC on April 11, 2014. As a result, I find that Patuxent violated PREA when Chief Johnson assigned the Grievant to segregation on February 4, 2014, until her transfer to MCTC on April 11, 2014. Thus, Patuxent is in violation of the regulations cited by the Grievant. My proposed remedy will be explained below in the remedy section of this discussion.

The Grievant's access to privileges while at Patuxent

The Grievant further alleged that she was denied access to various privileges, programs, education, and work opportunities, while she remained in segregation following the completion of her mental health evaluation by the Patuxent Assessment Unit. Such privileges include access

to recreation, the telephone and the shower, and the medical facilities.[6] The Grievant alleges that denial of access to these privileges contravenes the PREA regulations and establishes prejudice. As support, the Grievant cites to 28 C.F.R. § 115.43(b), which states the following:

> (b) Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:
> (1) The opportunities that have been limited;
> (2) The duration of the limitation; and
> (3) The reasons for such limitations.

Additionally, the Grievant argued that these deprivations kept her from earning associated diminution credits afforded to an inmate under the Maryland Correctional Services Article, section 3-704.

Patuxent argued that the Patuxent Institution is unlike any other DOC facility since the majority of inmates are present solely for evaluation purposes. As such, Patuxent does not have the same level of programming that is available at other DOC facilities. Patuxent argued that the records maintained by correctional staff contradict the Grievant's claims that she was denied access to use the telephone or utilize the shower facilities. Patuxent also denied that the Grievant was unable to attend medical appointments.

Inmates located at Patuxent are housed at this institute purely for evaluation purposes. [Tr. 1, p. 103] As such, these inmates are not afforded the same level of programming or privileges found in other DOC prisons. Thus, the privileges offered to the Grievant would have been very limited in nature. No testimony was advanced by either Patuxent or the Grievant that

[6] The Grievant argued that I should take an adverse inference against Patuxent for their failure to produce the video surveillance recordings of the administrative segregation tier. The Grievant argued that this video surveillance footage would prove that the Grievant was denied certain privileges and was harassed by Patuxent employees while housed at Patuxent. Patuxent argued that the video surveillance recordings were destroyed pursuant to routine internal procedures. The Grievant was unable to show that Patuxent intentionally withheld these video surveillance recordings or that these recordings were destroyed for reasons other than pursuant to internal procedures. Thus, I will not take an adverse inference as requested.

would lead me to believe that Patuxent offered any inmates work related opportunities, educational opportunities, or visitation privileges. However, it is undisputed that Patuxent does offer its inmates recreation and certain other limited privileges during their stay. I will assess if these limited privileges were offered to the Grievant at Patuxent.

The Grievant testified that she only received recreation once while she was housed in the segregation unit at Patuxent. Recreation was one of the few privileges accorded to inmates present at Patuxent for a mental health assessment. Patuxent did not present evidence or argue in its brief that the Grievant was permitted recreation while at Patuxent. Therefore, I find that the Grievant has met her burden of proof that she did not receive this privilege while housed on the segregation unit.

The Grievant testified that she was denied the opportunity to shower as frequently as other inmates and was unable to shower during the first week and a half to two weeks after her arrival at Patuxent. I am not persuaded that the Grievant was routinely denied shower privileges. Lieutenant Liqouri Stith, who served as one of the supervisors of the administrative segregation unit, testified that based on his review of the records the Grievant regularly took showers or refused to take showers when afforded the opportunity. [Tr. 2, p. 109-112] Further, a logbook detailing the activities of the administrative segregation unit during the Grievant's stay contain written entries that directly contradict the Grievant's testimony that she was denied shower privileges during the first week and a half to two weeks of her stay at Patuxent. [Patux. Ex. 2] This logbook clearly shows that showers were offered to the Grievant during this time span. [Patux. Ex. 2, pages 132, 140 and 146] Further, I am unconvinced that the Grievant was denied shower privileges based on her status as a transgender inmate.

Similarly, the Grievant also testified that she was denied telephone privileges, and was only afforded the opportunity to make phone calls once a week. I am unpersuaded that the Grievant was routinely denied telephone privileges while at Patuxent. Lieutenant Stith testified that inmates located in administrative segregation are permitted to use the telephone two to three times a week. [Tr. 2, p. 119] Patuxent kept telephone records of phone calls initiated by the Grievant. [Patux. Ex. 3] These telephone records show that the Grievant made thirty-two telephone calls, ranging from one to thirty minutes in length, while she was housed at Patuxent. Thus, I am unconvinced that Patuxent denied the Grievant telephone privileges. Further, I am unconvinced that the Grievant was denied phone privileges based on her status as a transgender inmate.

Even if the Grievant's telephone and shower privileges were limited in number, the United States Supreme Court has recognized that states may create liberty interests protected by the Due Process Clause of the Fourteenth Amendment by imposing hardship on inmates that is "atypical and significant" as compared to "the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). In *Sandin*, the Court held that "discipline in segregated confinement" is not the type of atypical, significant hardship that would entitle an inmate to the procedural protections set forth in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Sandin*, 515 U.S. at 485-86. To determine if the Grievant's confinement on administrative segregation imposes an atypical and significant hardship in relation to the ordinary incidents of prison life and, therefore, invokes a liberty interest, I must use the totality of the circumstances to measure the conditions under which the Grievant is imprisoned against the conditions imposed on inmates not on administrative segregation. *See Farmer v. Kavanagh*, 494 F. Supp. 2d 345 (D. Md. 2007); *see also, Wilkinson v. Austin,* 545 U.S. 209 (2005). In the instant matter, no evidence was

introduced to show that inmates in Patuxent's general population received more telephone or shower privileges than the Grievant.

Wilkinson is an example of when the Supreme Court determined that an inmate's confinement imposed an atypical and significant hardship in relation to the ordinary incidents of prison life and found that the inmates did in fact have a liberty interest. The Court cited a combination of factors, including the facility's almost complete prohibition on human contact, the nearly 24-hour cell lighting, the extremely limited exercise, and especially the indefinite duration of placement at the facility and the fact that placement at the facility disqualified inmates from being considered for parole. *Wilkinson.* 545 U.S. at 223-224. While it is clear that cell restriction is associated with a loss of privileges, infrequent shower and telephone usage is both relatively slight and also temporary, which is in stark contrast to the conditions in *Wilkinson.* In the Grievant's case, shower and phone privileges were not withheld. The Grievant highlighted no particular, specific harm caused by this reduction in privileges. Reduced privileges are within the range of confinement normally to be expected when serving a prison term. Additionally, the Grievant was unable to prove that she was denied shower or telephone privileges due to her transgender status.

Finally, the Grievant also testified that she was denied medical treatment while at Patuxent. [Tr. 1, p. 31-33] This testimony was refuted by Mr. Fayall, who testified that he was unaware of any incident where the Grievant was denied any medical treatment. [Tr. 1, p. 117] Mr. Fayall further testified that there were a number of occasions where the Grievant requested to be seen by a medical professional and was seen as a result. [Tr. 1, p. 129-130] Additionally, there are a number of entries in the administrative segregation logbook that reveal that the Grievant was seen by a medical professional. [Patux. Ex. 2, p. 145, 162, 180, 181, 194, 204, 208,

245, 276, 328, 343, 346, 355, and 373][7] As a result, I am unpersuaded that the Grievant was denied medical attention while she was at Patuxent because of her transgender status.

Formal written policy consistent with PREA/Harassment of the Grievant

The Grievant alleges that Patuxent failed to train its employees on how to comply with PREA regulations. The Grievant argued that this led to a hostile environment in which she was subjected to harassment. As support, the Grievant cites to 28 C.F.R. § 115.31(a)(9), which states: "[t]he agency shall train all employees who may have contact with inmates on: [h]ow to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates[.]"

The Grievant further alleged that Patuxent did not have any appropriate policy in place to address issues surrounding transgender inmates. As support, the Grievant cites to 28 C.F.R. § 115.11, which mandates:

> (a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.
> (b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.
> (c) Where an agency operates more than one facility, each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

The Grievant also cites to COMAR 12.14.04.05A(2), which states, "[t]he managing official shall have a written policy which[] [e]stablishes inmate protection from physical and mental abuse, and harassment[.]"

Patuxent argued that the Grievant failed to prove that any disparaging remarks were made by Patuxent employees. Patuxent maintained that the Grievant's testimony was vague and non-

[7] The logbook contains handwritten entries. This citation contains the entries I was able to decipher. There may be additional entries not listed in this citation.

specific, failing to identify specific statements or disparaging remarks. Patuxent relied on the fact that Russell Dietrich, another inmate located in Patuxent's administrative segregation unit during the time period in question, was unable to identify any disparaging statements or remarks made to the Grievant, including any remarks or statements made by Sergeant Halsey. Further, Patuxent argued that Sergeant Halsey never made any disparaging statements or remarks towards the Grievant.

With respect to Patuxent establishing an appropriate policy to address its employees' interactions with transgender inmates, I find that PREA is an applicable law that is intended to confer a procedural benefit on the Grievant. I am persuaded that Patuxent is in violation of PREA by failing to have this type of policy in place, and thus, by extension, also failed to train all employees in how to effectively and professionally communicate with transgender inmates. The majority of Patuxent's witnesses specifically testified that they never had any training with how to work with transgender inmates and further testified that Patuxent did not have any policies in place to provide such guidance. Chief Johnson testified that he was unaware that PREA included specific provisions regarding transgender inmates [Tr. 1, p. 86], and confirmed that Patuxent did not have a policy regarding transgender inmates. [Tr. 1, p. 84-89] Mr. Fayall testified that he was forwarded a Division of Correction Directive (DCD) after his dealings with the Grievant but received no training regarding the DCD.[8] [Tr. 1, p. 122] Sergeant Halsey testified that she has never had any training in how to interact with transgender inmates. [Tr. 2, p. 86] Finally, Lieutenant Stith confirmed in his testimony that Patuxent did not have a policy regarding interaction with transgender inmates [Tr. 2, p. 103], and further testified that he had never received any training in how to interact with transgender inmates. [Tr. 2, p. 124-125] I am

[8] Mr. Fayall was unable to recall the DCD number or describe it in any type of detail. This DCD was not offered into evidence.

convinced by this testimony that Patuxent lacked any formal policy to address sexual abuse or harassment of transgender inmates and, further, failed to train their employees on how to interact with transgender inmates. This is a clear violation of the regulations cited by the Grievant. My proposed remedy will be explained below in the remedy section of this discussion.

As a result of Patuxent's lack of having a formal written policy dealing with the handling of transgender inmates, Patuxent employees did not know how to comply with PREA regulations. I agree with the Grievant that this created a hostile environment in which the Grievant was subject to harassment. It is apparent from the Grievant's testimony that she was subjected to demeaning comments and behavior from certain Patuxent employees throughout her stay. This type of negative interaction may have been eliminated if Patuxent had an appropriate policy in place. The Grievant testified that while at Patuxent, she was "harassed or threatened or mocked or laughed at" on a daily basis. [Tr. 1, p. 28] The Grievant testified that she received this treatment from Sergeant Halsey as well as other unnamed officers. When asked to provide specific details on the harassment she ensued, the Grievant mainly testified as to the behavior and comments made by Sergeant Halsey. The Grievant summarized Sergeant Halsey's comments as follows, "She told me that I should kill myself, that I'm - - I'm not a woman, I would never be her. And she don't know why I'm here." [Tr. 1, p. 29] As a result, the Grievant testified that she felt "belittled and beat down" [Tr. 1, p. 25] and contemplated suicide [Tr. 1, p. 30]. The Grievant also summarized the comments made by certain unnamed officers as follows: "The officers, they just treat me like crap. They talk - - they call me all types of fags, and how - - why do I want to get breasts, what makes me think that I'm a woman." [Tr. 1, p. 32-33]

Based on the Grievant's testimony, I am persuaded that this type of disparaging behavior began almost immediately and continued throughout the Grievant's stay at Patuxent. Upon the

Grievant's entry to Patuxent, she was laughed at and told she was "disgusting," and was made to feel like "some type of animal . . . like I was just less than a human being." [Tr. 1, p. 23-24] This type of harassment continued while the Grievant was on the administrative segregation unit. The Grievant convincingly testified that officers would "come to my cell directly . . . and laugh at me and threaten me and call me all types of names." [Tr. 1, p. 26] This type of behavior was especially carried out by Sergeant Halsey, who repeatedly referred to the Grievant as an "it" and would make statements such as "I'm happy it's leaving and we glad it's not going to be here no more." [Tr. 1, p. 41]

I am further convinced that this type of disparaging behavior occurred based on the testimony of Mr. Dietrich. Mr. Dietrich was housed next to the Grievant in Patuxent's administrative segregation unit. I afforded a significant amount of weight to Mr. Dietrich's testimony on these points because Mr. Dietrich does not stand to gain anything by supporting the Grievant's allegations and had no prior connection to the Grievant. Moreover, considering that he remained incarcerated at the time of his testimony, and that he was testifying against the officials responsible for his custody, I find that he would not have testified unless he felt compelled to do so by his belief that the Grievant had been wronged. Mr. Dietrich testified that various Patuxent employees would make "inappropriate" statements to the Grievant which "made her cry." [Tr. 2, p. 37] Mr. Dietrich also corroborated the Grievant's testimony that officers would come to the Grievant's cell and stare at her, describing their actions as if "they were looking at a circus side show." [Tr. 1, p. 43] The only individual that Mr. Dietrich was able to recall tormenting the Grievant was Sergeant Halsey, but he testified that other officers, whose names he could not remember, also acted inappropriately toward the Grievant. [Tr. 2, p. 39]

The Grievant also disclosed her dissatisfaction with her treatment at Patuxent to Dr. Fleming. Dr. Fleming convincingly testified that he recalled one or two occasions where the Grievant revealed that she was harassed by Patuxent employees. Dr. Fleming testified as follows, "[the Grievant] said to me at least once, if not on another occasion that people were coming up to the tier and looking at her . . . Also she just felt that she was not being treated respectfully." [Tr. 1, p. 104-105] This testimony provides further proof that the Grievant was victimized during her time at Patuxent.

I was unconvinced by Sergeant Halsey's blanket denials that she did not harass or demean the Grievant. The Grievant and Mr. Dietrich both testified as to instances where Sergeant Halsey, as well as other correctional officers, acted disrespectfully towards the Grievant. Further, out of all of the individuals who ridiculed the Grievant, Sergeant Halsey was the only individual whose name both the Grievant and Mr. Dietrich could specifically recall. Based on the testimony of the Grievant and Mr. Dietrich, I am convinced that certain Patuxent employees, specifically Sergeant Halsey, acted inappropriately toward the Grievant, in violation of PREA. I further agree with the Grievant's position that this behavior created a hostile environment. I will discuss my proposed remedy for these violations below in the remedy section of this discussion.

Sexual abuse

Finally, the Grievant alleges that Patuxent employees engaged in sexual abuse as defined in 28 C.F.R. § 115.6. Under this regulation, sexual abuse includes "[v]oyeurism by a staff member, contractor, or volunteer" which means:

> "an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or

her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions."

Using this definition, the Grievant argues that she was subject to sexual abuse when multiple officers participated in her strip search and when officers watched her shower.

With respect to the Grievant's right to be free from sexual abuse, I find that the PREA is an applicable law intended to confer a procedural benefit. As I have discussed above, I do not believe that the Grievant's strip search was conducted in violation of PREA. Hence, I disagree that the Grievant's strip search amounted to voyeurism. However, for the reasons outlined directly below, I agree with the Grievant's position that Patuxent's employees inappropriately watched her shower, in violation of PREA.

Mr. Dietrich credibly testified that correctional officers, on at least one occasion, would peak through and watch the Grievant shower. Mr. Dietrich testified as follows, "But they [the correctional officers] roll back the drape until it was fully exposed, and I've seen the COs [correctional officers] sitting there watching, you know. And I've actually seen a CO pull another CO from the corridor itself, come in and check this out basically." [Tr. 2, p. 39] I believe Mr. Dietrich's testimony; he has no reason to fabricate these incidents and was unwavering in his testimony during cross examination. I agree that such behavior constituted voyeurism and amounted to sexual abuse, in violation of PREA, violating the regulations cited by the Grievant. As a result, such action warrants some relief. My proposed remedy is discussed below.

Remedy

The Grievant seeks the following remedies: (1) referral for an internal investigation and appropriate reprisal and sanction of Sergeant Halsey and other Patuxent employees who caused her harm; (2) promulgation by DPSCS of comprehensive policies and training regarding

transgender inmates which are compliant with PREA; (3) $75,000.00 in damages for serious psychological harm; (4) twenty diminution credits; and (5) other and further appropriate relief.

In response, Patuxent argued that I am without authority to recommend that disciplinary action be taken against Sergeant Halsey or any other Patuxent employee, nor the authority to order that certain policies be established. Patuxent relies on Maryland State Personnel and Pensions Article, section 3-302, and argues that these decisions are the exclusive rights of DPSCS and cannot be ordered by the OAH. As to damages, Patuxent argues that the Grievant failed to establish that she suffered serious psychological harm as a result of her encounters at Patuxent and that the medical report provided by the Grievant does not attribute the diagnosis of Post-Traumatic Stress Disorder (PTSD) to her time spent at Patuxent. Nor has the Grievant established sufficient proof of her damages to warrant an award of $75,000.00. Finally, Patuxent argues that the Maryland Correctional Services Article, title 3, subtitle 7, does not provide for an award of diminution credits in this case.

I agree with Patuxent that it would be inappropriate for me to recommend that any specific disciplinary action be taken against Sergeant Halsey or any other Patuxent employee. It is more appropriate for an internal disciplinary decision, such as this, to be made by the Secretary of DPSCS after a complete investigation. Since Sergeant Halsey was the only individual that the Grievant and Mr. Dietrich could specifically identify, I recommend that the Secretary of DPSCS consider this proposed decision and determine what, if any, disciplinary action should be taken against Sergeant Halsey. The Secretary of DPSCS is in a better position to fully consider Sergeant Halsey's employment history with the DPSCS as well as any mitigating circumstances.

I fully agree with the Grievant that Patuxent must promulgate comprehensive policies and institute training regarding transgender inmates that comply with PREA. Such policies should

provide guidance regarding: strip search procedure for transgender inmates; housing determinations for transgender inmates; and appropriate interaction between correctional officers and transgender inmates. I further propose that it should be mandatory for the correctional officers of Patuxent, especially Sergeant Halsey, to attend training sessions on these policies. In light of how the Grievant was treated and housed at Patuxent, such a remedy is essential. This proposal would not just benefit subsequent transgender inmates, but would further benefit Patuxent, ensuring that they remain compliant with PREA.

I agree with Patuxent that the Grievant failed to establish sufficient proof of her damages to warrant an award of $75,000.00. Nevertheless, as highlighted above, the Grievant successfully established that while she was housed at Patuxent she was routinely denied recreation privileges, was victimized and humiliated by Patuxent's employees, and was inappropriately watched by correctional officers, constituting sexual assault through voyeurism. Under these circumstances, the Grievant is entitled to some compensation for the humiliation and sexual abuse she endured. However, I do not conclude that the Grievant has sustained her burden to show that her requested remedy in the amount of $75,000.00 is reasonable. Although the Grievant submitted a doctor's report showing that she suffers from PTSD, there is no indication that this diagnosis is affiliated with the events that occurred during her stay at Patuxent. [Griev. Ex. 1] In fact, this diagnosis is dated August 13, 2014, which is more than four months after the Grievant was released from Patuxent. I cannot speculate as the source of the PTSD and thus I cannot associate this diagnosis with the events that occurred at Patuxent. After carefully considering all of the evidence in this matter, I conclude that an award in the amount of $5,000.00 is reasonable and not excessive.

Finally, the Grievant seeks twenty diminution credits in recognition of the fifty days she was held in administrative segregation at Patuxent, after her mental health assessment was complete. I agree. Patuxent completed its mental health evaluation of the Grievant on February 20, 2014, yet the Grievant was not transferred to another institution until April 11, 2014. Instead, the Grievant remained, inappropriately, in the administrative segregation unit at Patuxent. As relief, I propose that the Grievant be awarded the appropriate number of diminution credits she would have otherwise received, calculated from February 21, 2014 through April 11, 2014.

CONCLUSIONS OF LAW

I conclude as a matter of law as follows:

(1) The Office of Administrative Hearings is authorized to hear this grievance. Md. Code Ann., Corr. Servs. § 10-209 (2008);

(2) The Prison Rape Elimination Act standards are applicable to Patuxent and all state confinement facilities. 99 Md. Opp. Atty. Gen. 4 at 7 (January 28, 2014);

(3) The strip search conducted by Patuxent on the Grievant was appropriate. COMAR 12.14.04.05 and 28 C.F.R. § 115.15(a)-(c), (e) and (f) (2014);

(4) The Grievant's housing determination was not compliant with the applicable regulations. 28 C.F.R. § 115.42(e) and (g) (2014); and 28 C.F.R. § 115.43(a)-(c) (2014);

(5) The Grievant was denied access to recreational privileges. 28 C.F.R. § 115.43(b) (2014);

(6) The Grievant was not denied access to work related or educational opportunities, visitation privileges, shower privileges, phone privileges, or medical privileges during her

confinement at Patuxent. 28 C.F.R. § 115.43(b) (2014); *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995);

(7) Patuxent failed to have a formal written policy regarding transgender inmates and failed to train its employees in how to be compliant with the Prison Rape Elimination Act. 28 C.F.R. § 115.11 (2014);

(8) Patuxent employees harassed and tormented the Grievant. 28 C.F.R. § 115.11 (2014); and

(9) The Grievant was subject to sexual abuse through voyeurism of Patuxent employees. 28 C.F.R. § 115.6 (2014).

PROPOSED ORDER

Having concluded that the grievance is meritorious in part, I **PROPOSE** that it be **GRANTED IN PART** and **RECOMMEND** the following:

(1) The Secretary of DPSCS should consider this proposed decision and determine what, if any, disciplinary action should be taken against Sergeant Halsey;

(2) Patuxent must promulgate comprehensive policies and institute mandatory training regarding transgender inmates, in compliance with the Prison Rape Elimination Act. These policies are to include guidance regarding: strip search procedures for transgender inmates; housing determinations for transgender inmates; and appropriate interaction between correctional officers and transgender inmates. Sergeant Halsey should be in attendance at these training sessions;

(3) DPSCS is to award the Grievant $5,000.00 for being denied recreation privileges, being victimized and humiliated by Patuxent's employees, and for being inappropriately watched

in the shower facilities by correctional officers, constituting sexual abuse through voyeurism; and

(4) DPSCS is to award the Grievant the appropriate number of diminution credits she would have otherwise received, calculated from February 21, 2014 through April 11, 2014.

April 1, 2015
Date Decision Issued

Denise Oakes Shaffer
Administrative Law Judge

DOS/fe
#154050

NEON BROWN, DOC #421675,	*	**BEFORE DENISE OAKES SHAFFER,**
GRIEVANT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
PATUXENT INSTITUTION	*	**OF ADMINISTRATIVE HEARINGS**
	*	**OAH No.: DPSC-IGO-002V-14-33232**
	*	**IGO No.: 20141133**

* * * * * * * * * * * * *

FILE EXHIBIT LIST

I incorporated the entire IGO file into the record, which contained the following documents:

IGO Ex. 1 – Grievance, received by the IGO on May 27, 2014, with the following attachments:
- Headquarters Appeal of Administrative Remedy Response, dated March 26, 2014
- Request for Administrative Remedy, dated February 19, 2014

IGO Ex. 2 – Prehearing Order, dated July 28, 2014

IGO Ex. 3 – Notice of Hearing, dated July 28, 2014

IGO Ex. 4 – Request for Postponement, received by the IGO on September 2, 2014

IGO Ex. 5 – Supplemental Prehearing Order, dated September 12, 2014

IGO Ex. 6 – Information packet sent from Patuxent to the IGO, with the following documents:
- Receipt of Warden's Response, dated March 26, 2014
- Request for Administrative Remedy, dated February 19, 2014

IGO Ex. 7 – Email correspondence, dated September 12, 16, and 17, 2014, with the following attachment:
- Request for Documents, Records, and Physical Evidence, dated September 16, 2014

IGO Ex. 8 – Notice to Presiding [Administrative Law Judge], dated September 17, 2014

IGO Ex. 9 – Transmittal for Inmate Grievance Hearings (DPSCS-IGO), received by the OAH on September 17, 2014

IGO Ex. 10 – Request for Documents, Records, and Physical Evidence, received by the IGO on September 18, 2014

IGO Ex. 11 – OAH-IGO Postponement/Continued Case Form, dated September 23, 2014

IGO Ex. 12 – Notice of Hearing, dated October 1, 2014

IGO Ex. 13 – Request for Documents, Records, and Physical Evidence, received by the IGO on October 6, 2014

IGO Ex. 14 – Letter from Rebecca Simpson to the IGO, received by the IGO on October 24, 2014, with the following attachments:[9]
- Affidavit of Russell Dietrich, dated October 15, 2014
- Affidavit of William Thomas Foxwell, dated October 15, 2014

IGO Ex. 15 – Email correspondence, dated November 10 and 12, 2014, with the following attachments:
- Request for Presence of Witnesses, dated November 10, 2014
- Affidavit of William Thomas Foxwell, dated October 15, 2014
- Affidavit of Russell Dietrich, dated October 15, 2014

IGO Ex. 16 – Request for Presence of Witnesses, received by the IGO on November 12, 2014, with the following attachments:
- Affidavit of Russell Dietrich, dated October 15, 2014
- Affidavit of William Thomas Foxwell, dated October 15, 2014

IGO Ex. 17 – Email from the IGO to Rebecca Simpson, dated November 13, 2014, with the following attachment:
- Letter from the IGO to Rebecca Simpson, dated November 13, 2014

IGO Ex. 18 – Transmittal for Inmate Grievance Hearings (DPSCS-IGO), received by the OAH on November 19, 2014

IGO Ex. 19 – Notice to Presiding [Administrative Law Judge], dated November 19, 2014

I admitted the following exhibits on Patuxent's behalf:

Patux. Ex. 1 – Emergency Directive EmD.DOC.110.0026, effective April 30, 2009

Patux. Ex. 2 – Handwritten tier notes, multiple entries

Patux. Ex. 3 – Inmate Telephone System Call Records, generated on November 13, 2014

[9] Attached to this exhibit, as well as IGO Ex. 15 and 16, is an Affidavit of William Thomas Foxwell. This Affidavit is not admitted as evidence.

I admitted the following exhibits on the Grievant's behalf:

Griev. Ex. 1 – Summary of Psychological File, dated August 13, 2014

Griev. Ex. 2 – Letter from the Grievant, dated February 12, 2014

Griev. Ex. 3 – [Prison Rape Elimination Act] Intake Screening, dated February 27, 2014

Griev. Ex. 4 – Email correspondence, dated various dates in February and March 2014

Griev. Ex. 5 – Case Management Assignment Sheet, dated February 14, 2014

Griev. Ex. 6 – Notice of Assignment to Administrative Segregation, dated February 4, 2014

Griev. Ex. 7 – Email correspondence, dated February 4, 2014

Griev. Ex. 8 – Waiver and Notification of Case Management Action, dated February 19, 2014

Griev. Ex. 9 – Teaching plan, undated

Griev. Ex. 10 – Transgender Inmates policy, reviewed October 2012

Griev. Ex. 11A – Administrative Remedy Procedure Withdrawal Form, dated March 28, 2014

Griev. Ex. 11B – Administrative Remedy Procedure Withdrawal Form, dated April 11, 2014

Griev. Ex. 11C – Administrative Remedy Procedure Withdrawal Form, dated March 19, 2014

Griev. Ex. 11D – Administrative Remedy Procedure Withdrawal Form, dated April 9, 2014

Griev. Ex. 12 – Administrative Remedy Procedure Case Summary, dated March 19, 2014

Griev. Ex. 13 – Request for a Formal Investigation, undated

Griev. Ex. 14 – Not admitted

Griev. Ex. 15 – Affidavit of Russell Dietrich, dated October 15, 2014

Griev. Ex. 16 – Not admitted

Griev. Ex. 17 – Grievant's Medical Records from Patuxent

NEON BROWN, DOC # 421-675,	*	BEFORE DENISE OAKES SHAFFER,
Grievant,	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,	*	OF ADMINISTRATIVE HEARINGS
	*	OAH NO.: DPSCS-IGO-002V-14-33232
Respondent.	*	IGO No.: 20141133

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ORDER OF THE SECRETARY

In her grievance, Neon Brown ("the grievant"), who self-identifies as female, alleges that Patuxent Institution ("Patuxent") staff improperly discriminated against her. Administrative Law Judge ("ALJ") Denise Oakes Shaffer held hearings via video-conference on September 23, 2014 and November 25, 2014. On April 1, 2015, the ALJ issued a Proposed Decision. Based on her findings of fact (Proposed Decision at pages 6-10), and her analysis of the law, the ALJ drew nine conclusions of law (Proposed Decision at pages 32-33). The ALJ also issued a proposed order, in which she recommends granting the following relief to the grievant:

> (1) The Secretary of DPSCS should consider this proposed decision and determine what, if any, disciplinary action should be taken against Sergeant Halsey;
>
> (2) Patuxent must promulgate comprehensive policies and institute mandatory training regarding transgender inmates, in compliance with the Prison Rape Elimination Act. These policies are to include guidance regarding: strip search procedures for transgender inmates; housing determinations for transgender inmates; and appropriate interaction between correctional officers and transgender inmates.

Sergeant [Dawn] Halsey should be in attendance at these training sessions;

(3) DPSCS is to award the Grievant $5,000.00 for being denied recreational privileges, being victimized and humiliated by Patuxent's employees, and for being inappropriately watched in the shower facilities by correctional officers, constituting sexual abuse through voyeurism; and

(4) DPSCS is to award the Grievant the appropriate number of diminution credits she would have otherwise received, calculated from February 21, 2014 through April 11, 2014.

ALJ's Proposed Decision at pages 33-34.

Based on an examination of the record in this case, including the grievance, the testimony and evidence presented at the hearing before the ALJ, and the decision of the ALJ, I adopt in full the first, second, and third recommendations made by the ALJ in her Proposed Order;[1] I reject, however, the ALJ's fourth recommendation, and I therefore decline to direct the Division of Correction to award the grievant diminution credits for the period from February 21, 2014 through April 11, 2014.

The award of diminution credits by the Division of Correction is controlled entirely by statute. Md. Ann. Code, Correctional Services Article ("CS"), §§ 3-701, *et seq*. By statute, the Division of Correction is authorized to award an inmate educational, industrial, or special project credits only if the inmate has in fact earned these credits by

[1] With respect to the first recommendation, it appears to be too late for the appointing authority to take any disciplinary action against Sergeant Halsey. *See* Md. Ann. Code, State Personnel and Pensions Article, § 11-106(b) (requiring an appointing authority to take disciplinary action against an employee within thirty days of learning of the employee's misconduct). I will therefore direct the Warden of Patuxent to determine whether there is some other action, short of discipline, and in addition to training, that may be taken to ensure that Sergeant Halsey refrains from taunting and harassing inmates in the future.

working, by going to school, or by participating in a special project. CS §§ 3-705 through 3-707. The record is clear that Patuxent does not offer programming to any inmate housed at Patuxent. It is thus abundantly clear that the Grievant did not go to school, work, or engage in a special project, while she was housed at Patuxent. The Division of Correction therefore does not have the legal authority to award the Grievant diminution credits for the period from February 21, 2014 through April 11, 2014. Moreover, I find that the Grievant's claim that she would have earned diminution credits if she had been housed at a maintaining facility in the Division of Correction is entirely speculative. Finally, I note that there is no indication in this record that the Grievant remained at the Patuxent from February 21, 2014 to April 11, 2014, solely -- or even partly -- because she self-identifies as a female.

Accordingly, for the foregoing reasons, the first three recommendations of the ALJ's Proposed Order are AFFIRMED, and the fourth recommendation of the ALJ's Proposed Order is REVERSED, as indicated above.

SO ORDERED this 17 day of August, 2015.

Secretary
Dept. of Public Safety and Correctional Services