



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

June 5, 2015

Director George T. Soloman
North Carolina Department of Public Safety – Prisons
4260 Mail Service Center
Raleigh, NC 27699-4260

Re: Notice of Findings
[Redacted] v. N.C. Dep't of Pub. Safety (14-OCR-428)

Dear Director Soloman:

Thank you for the documentation that the North Carolina Department of Public Safety (NCDPS) submitted to the Office for Civil Rights (OCR), Office of Justice Programs, U.S. Department of Justice (DOJ) in connection with the administrative Complaint that [Redacted] (Complainant) filed against the NCDPS. In his Complaint, the Complainant, a Hispanic male with limited English proficiency (LEP), alleges that staff at the Tabor Correctional Institution (TCI) have discriminated against him based on race, national origin, sex, or actual or perceived sexual orientation¹ on several occasions.

The OCR has completed our review of the documentation provided by both the NCDPS and the Complainant and has determined that there is insufficient evidence of a violation of Title VI of the Civil Rights Act of 1964 (Title VI), the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), the Violence Against Women Act of 1994, as amended (VAWA), and their implementing regulations. Our findings are set forth below for your review.

Factual Background

A. February 2014 Incident (Exact Date Unknown)

The Complainant alleges that the following occurred sometime in February 2014:

The Complainant was walking toward the dining room at the TCI at lunchtime when a NCDPS officer (Caucasian, male) (hereinafter referred to as "Officer A") stopped the Complainant and inquired whether he wore makeup, and began laughing in a sarcastic manner. Officer A then spoke with another NCDPS officer in the dining room area (Caucasian, male) (hereinafter referred to as "Officer B"), and as the Complainant was later leaving the dining room Officer A and Officer B stopped him and asked him sexually harassing questions such as whether the Complainant was gay, where did he get his makeup from, and if he was a "state seniorita." The Complainant filed a grievance with the NCDPS on April 16, 2014, alleging that Officer A and Officer B sexually harassed

¹ While the Complainant does not explicitly allege discrimination based on actual or perceived sexual orientation in his Complaint and does not indicate his sexual orientation, the facts as alleged in the Complaint could also set forth a claim of discrimination based on actual or perceived sexual orientation.

him when Officer A asked him if he wore makeup and Officer B asked him if he was a “state seniorita,”² and the NCDPS responded on April 25, 2014, that both Officer A and Officer B denied making these comments and that “a preliminary investigation is being conducted per policy.”

In the NCDPS’ January 23, 2015, response to the OCR’s Notice of Discrimination Complaint and initial Data Request (Data Response), the NCDPS provided the OCR with written statements that the NCDPS obtained from Officer A (dated April 21, 2014) and Officer B (dated April 22, 2014) while investigating the Complainant’s grievance. Officer A denied asking the Complainant if he wore makeup and denied speaking to Officer B about the Complainant, and Officer B stated that Officer A never spoke to him about the Complainant and that he never asked the Complainant if he was a “state seniorita.” The NCDPS indicated in its Data Response that there were no known witnesses to this encounter, and that by the time the Complainant filed a grievance regarding this incident video surveillance footage was no longer available. The NCDPS stated that pursuant to NCDPS Policy & Procedures F.3400, “Inmate Sexual Abuse and Harassment Policy,” the NCDPS conducted a preliminary investigation into the Complainant’s allegation of sexual harassment, and provided the OCR with the April 25, 2014, written report by the NCDPS Prison Rape Elimination Act (PREA) investigator. In this report, the PREA investigator indicated that the officers in question denied making the statements alleged by the Complainant, and found that there is no evidence to substantiate sexual harassment as the incident was only alleged to have happened once and was not repetitive. The NCDPS stated in its Data Response that a recent review by the DPS PREA office again determined that the Complainant’s allegations do not meet the definition of sexual abuse or sexual harassment as contained in Policy F.3400.

B. February 7, 2014 Incident

The Complainant alleges that the following occurred on February 7, 2014:

While the Complainant was eating his breakfast in the dining hall at TCI, he informed a NCDPS officer (Caucasian, male) (hereinafter referred to as “Officer C”) that his tray was missing some items. Officer C replied that he was going to give the Complainant whatever he wanted to, and told the Complainant to “[t]ake your tray, you stinking ass wet-back.” On February 7, the Complainant filed a grievance with the NCDPS regarding this ethnic slur, and the NCDPS responded on February 11, 2014, that there is no Officer C on the “Green Unit” and the NCDPS does not know who this grievance is regarding. The Complainant filed another grievance on February 26, 2014, clarifying that Officer C was not in the “Green Unit” but was in the dining hall, and the NCDPS responded on March 10 that the Complainant is served from a special allergy menu and that there has never been any racial slurs or remarks by any food service staff.

In its Data Response, the NCDPS said that a NCDPS Food Service Manager spoke with Officer C about the Complainant’s allegation prior to responding to the Complainant’s grievance; on May 4, 2015, the NCDPS provided the OCR with a May 4, 2015, written statement from the Food Services Manager, in which she indicated that Officer C denied the Complainant’s allegations when she spoke with him. The NCDPS also provided the OCR with a May 4, 2015, written statement from Officer C, who said that when he interacted with the Complainant on February 7, 2014, he assured the Complainant that his meal was prepared correctly and told him to move on, and that “I did not then nor have I ever used an ethnic slur or profanity toward inmate [Complainant].” According to

² In the Complainant’s grievance submitted to the NCDPS, he did not specifically allege that the officers asked him if he was gay, as he did in his Complaint to the OCR.

the NCDPS' Data Response, there were no known witnesses to this encounter and there is no available video surveillance footage of the area in question.

C. June 6, 2014 Incident

Lastly, the Complainant alleges that the following occurred on June 6, 2014:

At approximately 8:50 a.m., the Complainant presented at the infirmary at TCI for a medical appointment that he scheduled on May 29, 2014; when the Complainant submitted the Sick Call Appointment Request on May 29, he had completed the form in Spanish. A nurse (Caucasian, female) (hereinafter referred to as "Nurse A") who was working in the infirmary on June 6 told the Complainant that he could not receive his scheduled medical appointment and that the Complainant must be in the wrong country because "we only speak English here." Nurse A further told the Complainant that if he did not schedule a medical appointment in English he would not receive treatment. The Complainant tried to explain that he was LEP and cannot write in English but Nurse A would not listen. The Complainant believes that there are many Hispanic inmates at TCI who cannot write in English and therefore do not receive medical treatment. On June 6, 2014, the Complainant filed a grievance with the NCDPS writing in Spanish what had occurred,³ and on June 9 a NCDPS screening officer responded that his grievance was rejected because per policy inmates may obtain assistance in completing grievances from other inmates and the Complainant has submitted prior grievances in English.

In the NCDPS' Data Response, the NCDPS indicated that the screening officer's rejection of the Complainant's grievance was not in accordance with the NCDPS policy and that the NCDPS has taken steps to correct this error. The NCDPS said that after receiving notification of the Complainant's Complaint filed with the OCR, the NCDPS conducted an informal investigation into the Complainant's allegations. According to the NCDPS' Data Response, when the Complainant presented at the infirmary on June 6, Nurse A requested that the Complainant return to the infirmary at the end of the sick call period. In its March 27, 2015, response to the OCR's supplemental Data Request (Supplemental Data Response), the NCDPS provided the OCR with a February 10, 2015, written statement prepared by Nurse A, in which Nurse A said that the Complainant told her that he could speak and understand English but could not write in English, and that she requested that he return at the end of the sick call to provide him with as much time as necessary to verbalize his sick call needs. Nurse A indicated that she advised the Complainant that they may need to go to the main medical unit at the end of the sick call to utilize the telephonic interpretation service, and she denied telling the Complainant that "we only speak English here" or that the Complainant would not receive treatment unless he submitted sick call requests in English. Nurse A also indicated in her written statement that when the Complainant failed to return to the infirmary at the end of the sick call as requested, she asked a commanding officer to send the Complainant to the infirmary. A Sick Call Appointment Request form completed by Nurse A on June 6 indicates that the Complainant returned to the infirmary at approximately 1:52 p.m. and received treatment from Nurse A, and that the Complainant verbalized understanding of Nurse A's medical advice. In Nurse A's written statement, she stated that the Complainant never requested an interpreter to communicate with her. According to the NCDPS' Data Response, there were no known witnesses to this encounter and there is no video surveillance of the area where Nurse A communicated with the Complainant.

³ The Complainant's grievances regarding the two prior incidents discussed in his Complaint were written in English.

In the NCDPS's Data Response, the NCDPS asserted that the Complainant was able to effectively communicate with Nurse A in English when he returned to the infirmary on June 6. The NCDPS said that when the Complainant was admitted to the NCDPS in 2009, the NCDPS deemed him to be a "Non-English speaker" and enrolled him in an English as a Second Language (ESL) program and housed him in an ESL facility⁴ until September 5, 2010. At that time, the Complainant successfully passed an English-language screening examination and he was transferred to a non-ESL facility. According to its Data Response, the NCDPS does not conduct any training for its officers or medical providers on communicating with a non-English speaking inmate, but all facilities can access the telephonic interpreter services Language Solution. The NCDPS provided the OCR with copies of twenty-one Sick Call Appointment Requests that the Complainant submitted from December 9, 2011 through October 14, 2014, with accompanying notes from a medical provider indicating that the Complainant received treatment in response to each request; the Complainant submitted seventeen of these requests in English and four in Spanish. In its Data Response and Supplemental Data Response, the NCDPS said that requests for interpreter services should be documented in an offender's case management notes, and that there are no notes indicating any requests for an interpreter by the Complainant or that the Complainant was ever unable to communicate effectively with NCDPS staff in English.

NCDPS Policies and Procedures Relevant to the Allegations

In its Data Response, the NCDPS provided the OCR with several of its written policies and procedures that are relevant to the Complainant's allegations and which were in effect at the time of the February and June, 2014, incidents. According to Section .0202(e)(1) of NCDPS Policy & Procedures A.0200, "Conduct of Employees" (issued August 16, 2010), employees shall treat all inmates with equal dignity and courtesy, and no decision regarding discipline, transfer, or selection of inmates for work assignments or rehabilitative programs will be made on the basis of race, creed, color, national origin, sex, disability, or political views. Sections .0202(e)(2) and (g) state that the use of abusive, indecent, or profane language in the presence of inmates is forbidden, and that employees cursing at inmates or involved in incidents involving racial harassment or intimidation will be disciplined in accordance with personnel policy. Section .0202(f)(5) of Policy and Procedures A.0200 further states that an employee shall not engage in sexual misconduct or harassment with an inmate as discussed in the NCDPS' Policy & Procedures F.3400, "Inmate Sexual Abuse and Harassment Policy."

Sections .3405 and .3406 of the current version of Policy & Procedures F.3400, issued on January 1, 2014, states that it is the policy of the NCDPS to provide a safe, humane and appropriately secure environment for all inmates, free from the threat of sexual abuse and sexual harassment, and that the NCDPS has a standard of zero-tolerance of sexual abuse and sexual harassment toward inmates. Section .3404(n)(2) of this policy defines sexual harassment as "[r]epeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures." Pursuant to Section .3406(f)(7)(A)(iii), if an alleged act of sexual abuse or sexual harassment is reported or discovered, a sexual abuse or sexual harassment investigator shall conduct an immediate

⁴ As discussed in the next section of this Notice of Findings, an ESL facility provides special services such as signage that convey information in both English and Spanish, ESL courses, and assignment to a case manager who has the ability to communicate in foreign languages or has access to staff or materials which will enable effective communications.

preliminary investigation to determine if the incident meets the standards of PREA. The TCI's Standard Operating Procedures 4.6100, "Inmate Sexual Abuse and Sexual Harassment Policy" (issued August 21, 2013), contains the same provisions regarding sexual abuse and sexual harassment referenced above.

In regard to interacting with inmates who are LEP, pursuant to Section .1802 of NCDPS Policy & Procedures E.1800, "Non-English Speaking Inmate Program" (issued March 6, 2001), it is the policy of the NCDPS that non-English speaking inmates receive the same primary services provided to all other inmates along with similar opportunities in assignments, promotional opportunities, case management/correctional counseling, and other services. Policy & Procedures E.1800; the NCDPS' Diagnostic Center Procedures Section 417, "Interpreter Services" (issued March 31, 2010); and Section 3-025 of the NCDPS' Program Services Resource Manual (revised July 2007) all state that if an inmate appears to have difficulty understanding or speaking English, the NCDPS will use a screening instrument to evaluate the inmate's ability to speak English; if an inmate receives a failing score on the screening instrument, the NCDPS will house the inmate in a facility that has been designated as an ESL site until the inmate is determined to have a basic ability to understand and communicate in English. According to Section .1804(b) of Policy and Procedures E.1800, facilities designated as an ESL site will provide special services such as facility signs that convey information in English and Spanish, ESL courses, and assignment to a case manager who has the ability to communicate in foreign languages or who access to staff or materials which will enable effective communications. Section .1806 further states that ESL facilities, along with other NCDPS facilities as necessary, can use volunteers, paid interpreters, and the telephonic interpreter Language Solutions to communicate with LEP inmates. Additionally, Policy AD IV-6 from the NCDPS' Health Services Policy and Procedure Manual, "Access to Foreign Language Translation" (effective January 2012), states that inmates unable to understand English shall have access to health care procedures explained by a translator⁵ or translation service provided by the NCDPS, and that telephonic interpretation services are available twenty-four hours a day by contacting Propio Language Services.

The NCDPS also provided the OCR with relevant policies regarding the processing of inmate grievances. Section .0302(a)(3) of NCDPS Policy & Procedures G.0300, "Administrative Remedy Procedure" (issued August 1, 2013) and Section II of TCI Standard Operating Procedures .4200, "Administrative Remedy Procedure/Grievances" (issued June 13, 2013) state that inmates may obtain assistance in completing their grievances from other inmates where classification and housing assignments permit. Sections .0306 and Section IX of these policies further state that the NCDPS may reject an inmate's grievance for several listed reasons, including a failure to follow the Administrative Remedy Procedures.

Legal Analysis

Title VI provides that "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §

⁵ Please be advised that the word "translator" refers to an individual who provides *written* language assistance services by translating text from one language (source language) into an equivalent written text in another language (target language). An "interpreter" refers to an individual who provides oral language assistance services by listening to communication in a source language and orally converting it into a target language. It appears that Policy AD IV-6 should be entitled "Access to Foreign Language Interpretation" and discuss services provided by an interpreter.

2000d. Additionally, the Safe Streets Act, under which the NCDPS receives DOJ funding, contains a non-discrimination provision modeled after Title VI that prohibits funding recipients from discriminating on the basis of race, color, national origin, sex, and religion. 42 U.S.C. § 3789d(c)(1). As a recipient of funding authorized by VAWA, the NCDPS is also subject to the non-discrimination provision within VAWA, which prohibits recipients from discriminating on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, or disability. 42 U.S.C. § 13925(b)(13). To prove discrimination under these statutory provisions, the evidence must establish an intent to discriminate. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Discriminatory intent may be shown by such factors as substantial disparate impact, a history of discriminatory actions, procedural and substantive departures from the norms generally followed by the decisionmaker, and discriminatory statements. *Id.*

Discrimination based on national origin includes discrimination based on LEP status. *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (*abrogated on other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001)). To avoid discrimination, DOJ funding recipients have a responsibility to take reasonable steps to ensure meaningful access to their programs and activities to LEP individuals. See 28 C.F.R. § 42.104(b)(2); 28 C.F.R. § 42.203(e); *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 Fed. Reg. 41455 (June 12, 2002).

Discrimination based on sex includes discrimination based on sex stereotyping, that is, acting on a belief that an individual has not conformed to gender norms. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989); *Zeuner v. Rare Hospitality Intern., Inc.*, 338 F.Supp.2d 626, 638 (M.D.N.C. 2004). Pursuant to the DOJ's regulations setting forth the PREA National Standards, sexual harassment involves repeated verbal comments or gestures of a sexual nature to an inmate by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures. 28 C.F.R. § 115.6. Further, case law states that to establish a claim of sexual harassment, the harassment must be sufficiently severe or pervasive to create a hostile or abusive environment. *Jennings v. Keller*, 482 F.3d 686, 695 (4th Cir. 2007). Harassment is sufficiently severe or pervasive when it creates "an environment that a reasonable person would find hostile or abusive" and that the person himself or herself "subjectively perceive[s] . . . to be abusive." *Id.* at 696 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Isolated incidents, unless extremely serious, will not amount to discriminatory harassment. *Id.*

Based on the OCR's review of the information that has been submitted by both the Complainant and the NCDPS, the OCR finds that for each of the three incidents discussed in the Complainant, the evidence is insufficient to demonstrate that the NCDPS discriminated against the Complainant based on race, national origin, sex, or actual or perceived sexual orientation. In analyzing the standards set forth under *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, with one exception related to the processing of the Complainant's grievance, there is insufficient evidence that the NCDPS' actions deviated from established norms or procedures that were in effect at the time of the incidents. As for the February 2014 incident where the Complainant alleged that Officer A and Officer B engaged in sexual harassment, both officers deny making the statements that the Complainant perceived to be harassing, and in the absence of independent witness testimony or video or audio footage, the OCR cannot conclusively determine whether the officers made these statements to the Complainant. Nonetheless, even if the officers did make the statements to the

Complainant, the statements only occurred on one occasion. NCDPS policies, the DOJ's regulations setting forth the PREA National Standards, and federal case law all make clear that comments must be repeated or sufficiently severe or pervasive to constitute sexual harassment, and that an isolated comment is generally not sufficient. The NCDPS conducted a preliminary investigation pursuant to departmental policy and reached the same conclusion.

Regarding the February 7 incident where Officer C allegedly called the Complainant an ethnic slur, again, Officer C denies making this statement and there is no witness or documentary evidence to prove what was said. While the use of an ethnic slur would appear to be contrary to the NCDPS' policy on conduct of employees, the evidence before the OCR is insufficient to conclusively demonstrate what was said. Additionally, an isolated slur would not rise to the level of racial or national origin harassment under federal law.

As for the June 6 incident, the evidence in the record appears to demonstrate that the complainant did receive medical services from Nurse A, that he told her that he could speak and understand English, that he did not request an interpreter even after Nurse A told him she may need to use an interpreter, and that he has received medical attention from the NCDPS on at least twenty other occasions. While the Complainant alleges that Nurse A told him that he would not receive services unless he submitted a sick call request in English, she denies making that statement and there is no available witness or video or audio footage to demonstrate what was said. In fact, the evidence demonstrates that Nurse A actively took steps to secure the presence of the Complainant at the infirmary when he failed to show up as requested. The evidence is insufficient to demonstrate that Nurse A failed to provide the Complainant with services that were available to others or that she was not able to effectively communicate with the Complainant in violation of NCDPS policy and federal law.

In regard to the other relevant factors under the *Village of Arlington Heights* analysis, as discussed above, while the Complainant alleges that NCDPS officers made discriminatory statements about his national origin and gender, the available evidence does not allow the OCR to conclusively determine whether such statements occurred. It does not appear that the NCDPS has a history of discrimination on the basis of race, national origin, or sex; according to the NCDPS' Data Response, from January 1, 2012 through December 31, 2014, there have not been any lawsuits or local or state administrative actions alleging race, national origin, or sex discrimination, including sexual harassment, filed by inmates against the NCDPS.⁶

Based on all of the information discussed above, the OCR has determined that the evidence is insufficient to demonstrate that the NCDPS intentionally discriminated against the Complainant in violation of Title VI, the Safe Streets Act, VAWA and their implementing regulations. Accordingly, we are closing the administrative Complaint filed by the Complainant.

However, the OCR would like to bring several issues to your attention. The NCDPS has indicated that it does not currently conduct any training for its officers and medical providers on communicating with LEP inmates. While the NCDPS does have written policies in place to address

⁶ In its Data Request, the OCR had also requested information on all inmate grievances from January 1, 2012, to the present which allege race, national origin, or sex discrimination, including sexual harassment. In its Data Response, the NCDPS indicated that the NCDPS currently does not possess an automated system to track inmate grievances and therefore does not have a way to review the over 6,041 inmate grievances filed during this timeframe to search for the requested information without undue burden.

communicating with LEP inmates, it is imperative that the NCDPS periodically train all employees and medical providers on these policies so they are aware of the available language assistance resources and the NCDPS' obligation to ensure meaningful access to LEP inmates and visitors to all programs and services. As discussed in the DOJ's *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, it is important to ensure that all employees in public contact positions are properly trained on an agency's LEP policies and procedures; the more frequent the contact with LEP persons, the greater the need for in-depth training. 67 Fed. Reg. 41455, 41465. Additionally, the NCDPS acknowledged in its Data Response that a NCDPS employee improperly rejected the Complainant's grievance because it was written in Spanish. The NCDPS should ensure that all employees responsible for processing inmate grievances are fully aware of the NCDPS' policies regarding the processing of grievances along with policies regarding interacting with LEP inmates, and that employees should not be rejecting grievances from LEP inmates but rather should take steps to effectively communicate with them through the use of qualified interpreters and translators as necessary.

Thank you for your cooperation in this review. If you have any questions, please contact OCR attorney Shelley Langguth at (202) 305-2353. Please be advised that the OCR's closure of this Complaint is limited to the specific facts of the matters discussed therein, and does not preclude the DOJ from taking additional appropriate action to evaluate the NCDPS' compliance with Title VI, the Safe Streets Act, and VAWA. Our closure of this matter also does not impact the NCDPS' requirement to continue to comply with Title VI, the Safe Streets Act, and VAWA, provided that it remains subject to these laws.

/s/ Michael L. Alston

cc: Mary Beth Carroll
Chief of Executive Services
North Carolina Department of Public Safety
4261 Mail Service Center
Raleigh, NC 27699-4261