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DOC # ██████████

GRIEVANT

v.

MARYLAND DIVISION
OF CORRECTION

* BEFORE JOHN T. HENDERSON, JR.,
* ADMINISTRATIVE LAW JUDGE
* THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH NO.: DPSC-IGO-002V-20-15211
* IGO NO.: ██████████

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DECISION

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STATEMENT OF THE CASE

On September 10, 2019, the Grievant filed a complaint with the Warden of the ██████████
██████████ (██████) alleging he was sexually assaulted by correctional officer ██████████
██████████ (COII ██████████) during a pat down search. Both the Warden and the Commissioner
dismissed the case due to the pendency of an investigation into the incident by the Intelligence
and Investigation Division of the Department of Public Safety and Correctional Services (IID)
concerning allegations of a sexual act covered by the Prisoner Rape Elimination Act (PREA) and
that it was not subject to a determination under the administrative adjustment process. On
October 18, 2019, the investigation into the PREA claim was closed as unsubstantiated and the
Grievant filed his complaint with the Inmate Grievance Office (IGO) on January 3, 2020.

I held a hearing on November 12, 2020 via video conference.¹, Md. Code Ann., Corr. Servs. §§ 10-207(c) & 10-208(a) (2017). I was located at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland, and the parties were at [REDACTED] in [REDACTED], Maryland and [REDACTED] [REDACTED], in [REDACTED], Maryland.

The Grievant represented himself. Lieutenant [REDACTED] Inmate Coordinator, represented the Division of Correction (DOC).

The contested case provisions of the Administrative Procedure Act, the IGO's General Regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); Code of Maryland Regulations (COMAR) 12.07.01; and COMAR 28.02.01.

ISSUES

1. Was the Grievant sexually assaulted by COII [REDACTED] during a pat down search on September 7, 2019?
2. Was the decision of the DOC denying the Grievant's Administrative Remedy Procedure (ARP) complaint arbitrary and capricious, or inconsistent with the law?
3. If so to one or both questions herein, what is the remedy available to the Grievant?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Transmittal for Inmate Grievance Hearings, for hearing dated received by OAH, July 22, 2020
- Notice to Presiding Administrative Law Judge (ALJ)

¹ The hearing was originally scheduled for August 13, 2020 and convened that day. The Grievant requested a postponement which I granted on the record.

- IGO Notice of Hearing, June 23, 2020
- IGO Referral to the OAH, April 2, 2020; Rules of Procedure for Grievance Hearings; Referral to OAH Form, date of Commissioner's Response, December 10, 2019
- Email from DOC to IGO, January 22, 2020
- Department of Public Safety and Correctional Services (DPSCS) IID, September 9, 2019; Incident Narrative, September 9, 2019
- Designated as Exhibit 1: photograph of Grievant, printed October 2, 2019; Offender Case Management System (OCMS) concerning the Grievant, printed October 2, 2019
- Designated as Exhibit 2: Narrative of the interview with IID Sgt. [REDACTED] printed November 7, 2019; PREA Report, September 9, 2019
- DOC Administrative Remedy Response, sent to the Executive Director, IGO, received by IGO, January 3, 2020
- DOC Administrative Remedy Response, sent to the Commissioner of Correction, dated December 10, 2019
- Grievant's Request for Administrative Remedy, dated September 10, 2019
- Affidavit/Verified Declaration of Inmate [REDACTED] (Inmate [REDACTED]), dated September 17, 2019
- Grievant's Informal Inmate Complaint Form, dated September 7, 2019

I admitted into evidence exhibits offered by the Grievant as follows:²

- Email to OAH from Lt. [REDACTED] November 12, 2020
- DPSCS IID Incident Report, September 9, 2019
- Designated as Exhibit 1: photograph of Grievant, printed October 2, 2019; OCMS concerning the Grievant, printed October 2, 2019
- Designated as Exhibit 2: Narrative of the interview with IID Sgt. [REDACTED] printed November 7, 2019; PREA Report, September 9, 2019
- Grievant's Appeal of DOC Administrative Remedy Response, December 20, 2019
- Grievant's Request for Administrative Remedy, received by DOC December 26, 2019
- Informal Inmate Complaint Form, received by DOC December 26, 2019
- Headquarters Appeal of Administrative Remedy Response to Commissioner of Correction, December 18, 2019
- Headquarters Appeal of Administrative Remedy Response to the Executive Director, IGO, January 7, 2020
- Letter from DOC to the Grievant, February 11, 2020
- Grievant's Request for Administrative Remedy, September 10, 2019
- Summary (2 copies) of Mental Health Records from Psychology Department to the Grievant, January 6, 2020
- Six photographs of Grievant's prescription for [REDACTED] ([REDACTED]) 10 mg Tab, March 5, 2020

² At the hearing, I ordered Lt. [REDACTED] to submit the Grievant's exhibits to me. November 12, 2020, at 1:07 p.m., Lt. [REDACTED] emailed the exhibits to OAH and objected to the following exhibit offered by the Grievant: Affidavit of Inmate [REDACTED]. I have overruled the objection. The Affidavit of Inmate [REDACTED] is admitted as evidence in these proceedings.

Testimony

The Grievant testified on his own behalf and did not present other witnesses.

The DOC did not present any witnesses or offer testimony. Lt. [REDACTED] Correctional Officer, argued in closing on behalf of the DOC.

FINDINGS OF FACT

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

1. At all times relevant to this proceeding, the Grievant was housed at [REDACTED] a DOC facility.
2. On September 7, 2019, at approximately 9:00 a.m., while he was returning from his work assignment at [REDACTED] the Grievant was stopped in front of his cell by COII [REDACTED] and subjected to a pat down search.
3. The Grievant had no prior contact with COII [REDACTED]
4. COII [REDACTED] was acting on a report that the Grievant had contraband, or weapons on his person.
5. During the course of the search, COII [REDACTED] cupped his hand around the Grievant's genitals, making contact with his testicles and penis.
6. The Grievant immediately objected to being touched in his genital area by COII [REDACTED]
7. COII [REDACTED] told the Grievant that he, as correctional officer, could do whatever he wanted and would conduct similar searches in the future.
8. Inmate [REDACTED] witnessed the pat down search, saw the Grievant jump during the search and heard the Grievant exclaim "what are you doing you can't pat me down like that."

9. On September 9, 2019, the Grievant reported the incident to [REDACTED] at the [REDACTED] and filed an Internal Complaint and a PREA compliant against COII [REDACTED]

DISCUSSION

In an inmate grievance concerning an institutional administrative decision, the Grievant bears the burden of proving, by a preponderance of the evidence, that the DOC's action was arbitrary and capricious, or inconsistent with the law. COMAR 12.07.01.08A(1), C(1). An ALJ 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).

In this matter, the Grievant testified consistent with the IGO record, that he was physically assaulted by COII [REDACTED] during a pat down search that occurred on September 7, 2019. The Grievant was an inmate at [REDACTED] at the time. The Grievant claimed COII [REDACTED] improperly and in a sexual manner groped the Grievant's genitals during a pat down search.

The investigation reports from the IGO record determined that COII [REDACTED] was justified in conducting the pat down search pursuant to his receiving information that the Grievant was in possession of contraband or weapons. COII [REDACTED] did not find any contraband or a weapon after the pat down search. The DOC did not present COII [REDACTED] as a witness, nor did it present any witness to testify on its behalf.

The Grievant provided an affidavit from Inmate [REDACTED] dated September 17, 2019.³ Inmate [REDACTED] testified within the affidavit that he witnessed the pat down search, saw the Grievant jump during the search and heard the Grievant exclaim “what are you doing you can’t pat me down like that.”

On September 9, 2019, the Grievant filed a PREA complaint against COII [REDACTED]⁴ The PREA investigation resulted in an “unsubstantiated” outcome, pursuant to PREA report number [REDACTED] dated October 18, 2019.

The Grievant proceeded to complain to DOC about his allegation of sexual assault by submitting the ARP on September 10, 2019. COMAR 12.02.28.04B(5) states that an inmate may not use the ARP⁵ to resolve a complaint concerning the following acts by staff or another inmate which shall be addressed according to DPSCS procedures for addressing complaints under the PREA:

- (a) Rape;
- (b) Sexual assault, sexual harassment, sexual abuse; and
- (c) Other sexual misconduct.

The regulation is clear that the Grievant may not use the ARP to resolve a complaint of sexual assault committed by a correctional officer. In this case, the Grievant submitted his

³ Lt. [REDACTED] objected to the affidavit arguing that “there is no evidence that [the] affidavit written by Inmate [REDACTED] was actually signed by Inmate [REDACTED].” Lt. [REDACTED] seems to suggest that the affidavit required a notary to attest to the signature of the affiant. The affidavit conformed to Maryland Court Rule 1-304 which allows affiants to make a statement affirming personal knowledge to the facts stated within the affidavit.

⁴ “In 2003, Congress enacted the Prison Rape Elimination Act, 42 U.S.C. §§ 15601-15609 (“PREA” or “the Act”), to address the problem of sexual assault in the nation’s prisons. Broadly stated, the Act creates a mechanism for the adoption of national standards for the housing and care of inmates, and, as relevant here, conditions a state’s eligibility for five percent of its federal prison-related funding on the state’s ability to certify that the correctional facilities “under the operational control of the state’s executive branch” have adopted, and are in full compliance with, those standards. 42 U.S.C. § 15607(e)(2)(A) (requiring certification); 28 C.F.R. § 115.501(b) (describing extent of certification obligation).” *See* 99 Md. Op. Atty. Gen. 3, at 1 (January 28, 2014). <https://www.marylandattorneygeneral.gov/Opinions%20Documents/2014/99OAG3.pdf> (Last viewed, January 27, 2021)

⁵ “Administrative Remedy Procedure (ARP)” means a formal process established by the Commissioner of Correction to address inmate complaints concerning conditions of confinement.” COMAR 12.02.28.02B (1).

complaint within the PREA process. For that reason, I do not rule on whether the Grievant has proven by a preponderance of the evidence that a sexual assault was committed upon him by COII [REDACTED] as the PREA process has determined an unsubstantiated claim. COMAR 12.02.28.04B(5). In addition, I further find that the Grievant has not sustained his burden of proof in this case that the DOC acted arbitrary and capricious, or inconsistent with the law when it denied his ARP complaint. The Grievant was allowed all available processes the law and regulations provided for his claim of sexual assault upon him by a correctional officer.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Grievant failed to meet his burden to prove that he is entitled to pursue his complaint within the ARP process. COMAR 12.02.28.04B (5). I further conclude as a matter of law that the Grievant failed to meet his burden to prove that the DOC failed to follow any applicable laws, regulations, policies, or procedures that are arbitrary and capricious or inconsistent with the law. COMAR 12.07.01.08A(1) and COMAR 12.07.01.08C(2).

ORDER

Having concluded that the grievance is without merit, I **ORDER** that it is **DENIED** and **DISMISSED**.

January 28, 2021
Date Decision Mailed

Signature Appears on Original
[REDACTED]

John T. Henderson, Jr.
Administrative Law Judge

JTH/emh
#190235

REVIEW RIGHTS

You are entitled to file a petition for judicial review with the circuit court for the county in which the institution you are confined is located within thirty (30) days of the mailing of the decision. Md. Code Ann., Corr. Servs. § 10-210(b) (2017); Md. Rules 7-201 through 7-210. A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. This decision may only be reversed or modified on appeal if any substantial right may have been prejudiced because a finding, conclusion, or decision of the final decision maker: (1) is unconstitutional; (2) exceeds the statutory authority or jurisdiction of the final decision maker; (3) results from an unlawful procedure; (4) is affected by any other error of law; (5) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (6) is arbitrary or capricious. Md. Code Ann., State Gov't § 10-222(h)(3) (Supp. 2020). Judicial review of disputed issues of fact shall be confined to the record for judicial review supplemented by additional evidence taken. Md. Code Ann., State Gov't § 10-222(f)(1) (Supp. 2020). The Office of Administrative Hearings is not a party to any review process.

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