

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF HUMAN RIGHTS

)
) DIRECTOR'S INQUIRY,
) JERI HUGHES,
)

) Complainants,
)

) Transgender Discrimination Claims
)

) v.
)

) D.C. DEPARTMENT OF CORRECTIONS)
)

) Respondents.
)
)

D.C. DEPARTMENT OF CORRECTIONS' RESPONSE TO COMPLAINANT'S
ALLEGATIONS AND DIRECTOR'S INQUIRY OF DISCRIMINATION

Pursuant to the Director's Inquiry issued on July 16, 2008, based on a complaint filed by Jeri Hughes on the same date alleging discrimination by the D.C. Department of Corrections ("DOC") in the development of policies and procedures for services and housing for transgender persons, the agency responds as follows:

On January 14, 2008, the DOC, specifically the Director, Devon Brown, Deputy Director, Patricia Britton, and General Counsel, Maria Amato, met with the DC Transcoalition, including the complainant, Jeri Hughes, to discuss concerns they had regarding the housing and safety of transgender inmates in DOC custody. Also in attendance was Christopher Dyer, a representative from the Mayor's Office on Gay Lesbian, Bisexual and Transgender Affairs, and a representative from the City Administrator's Office. Subsequent to this meeting, the DOC began discussing this issue internally and with other stakeholders to assess DOC practices relating to transgender inmates. As a result of this discussion, the DOC developed an Operations Memorandum governing "Gender Classification and Housing" (OMF"), which is the policy that is the subject of

this complaint. The purpose of the OM was to adopt formal measures to protect the safety of transgender inmates, to ensure that transgender inmates are treated with dignity and respect, and to accommodate the gender identity and expression of transgender inmates to the extent consistent with their safety and security, the order and safety of DOC facilities, and sound corrections practices.

In her complaint, the complainant alleges that the OM discriminates against transgender inmates. The complainant opposes the DOC's practice of housing transgender inmates according to their biological gender, rather than the gender of their expression. Complainant suggests that a female to male preoperative transgender person should be housed in a male unit, despite the fact that the inmate's genitals are female, and vice versa, and that a failure to house inmates according to their gender expression violates the D.C. Human Rights Act and the regulations relating to gender identity and expression issued under that act. In addition, the complainant argues that the OM discriminates against transgender inmates by failing to provide them with prison clothing and toiletries consistent with their gender identity and expression. Finally, the complainant challenges the methodology the DOC used in the development of the policy, alleging that the agency did not involve or seek the input of the transgender community, even though the Office on Gay, Lesbian, Bisexual, and Transgender Affairs participated in the development of the policy, the DOC met with the transgender community prior to its development, and the policy itself addresses many of this community's concerns. In fact, the DOC continues to meet with and work with the D.C. Transcoalition, although the complainant has not participated in the discussions since filing the complaint.¹

¹ The OM was developed after several discussions and meetings between the DC Transcoalition and the Mayor's Office of Gay, Lesbian Bisexual and Transgender Affairs (GLBT), a meeting with the DC Transcoalition on January 14, 2008 and several discussions and collaborations with stakeholders over a 5 month period. The DOC and the DC Transcoalition met again on July 15, 2008 and on September 19, 2008.

I. The DOC Operations Memorandum on “Gender Classification and Housing”

The newly developed OM protects the rights of transgender prisoners in a number of important ways. It unequivocally states that it is DOC policy to interact with the transgender community in a manner that is professional, respectful, and courteous. Additionally, it clearly establishes that it is DOC policy to handle transgender detainees in a manner that ensures that they are processed and housed safely and efficiently. For the safety, security, and order of the facility, the DOOC classifies and houses male and female offenders in separate housing units, and the DOC will classify an inmate who has male genitals as a male and one who has female genitals as a female, regardless of the individual’s gender expression. However, in order to address the special needs of transgender persons, if an inmate’s gender-related identity, appearance, overt expression, or behavior differs from traditional gender expressions based on the individual’s genitalia or from a gender designation made by any public entity, the OM requires staff to base the inmate’s housing assignment on his or her safety and security needs, in addition to housing availability and the inmate’s genitalia. The protections and accommodations afforded by the OM include private and confidential clarification of an inmate’s primary sex characteristics, protection in a separate holding cell, private strip search, and an assessment of the vulnerability of the inmate, which include the inmate’s own assessment of his or her comfort in the general population or protective custody. Further, the DOOC policy ensures that inmates can continue hormone replacement therapy they were receiving while in the community, requires staff to address all inmates in a gender neutral manner, and requires discipline against employees found to subject transgender inmates to verbal or physical harassment or a hostile environment.

Despite all of the protections for transgender prisoners included in the OM, complainant rejects the policy as “gross abuse and bigotry.” Complainant bases this characterization on the

fact that the OM requires transgender prisoners to be classified based on their genitalia and does not require the DOC to issue to transgender inmates clothing and toiletries that is consistent with their gender identity. Complainant is correct that under the OM the DOC will continue to house inmates in accordance with their biological sex. This is the universal practice of corrections facilities across the country, and is accepted as the standard of care for the safety, security and order of jails and prisons. The basis of the housing selection is that a person housed with prisoners with genitalia of the opposite sex, regardless of gender expression, is a target for assault, presents the risk of consensual or coerced sexual contact, and has a high probability of causing anxiety and increased incidents of fighting and abuse with other inmates. Transgender inmates are provided with the clothing and toiletries of the gender of the unit to which they are assigned and not that of their gender expression for the same reasons.

II. The Human Rights Act and Accompanying Regulations.

Although the complainant bases her claim of discrimination on section 273 of the Human Rights Act of 1977 (“Act”), effective October 1, 2002, D.C. Law 14-189, D.C. Official Code § 2-1402.73 (2007 Repl), this section of the Act does not support her claim that the OM discriminates against transgender inmates based on their gender identity or expression. This section states:

Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

The term “gender identity or expression is defined under section 102 of the Act (D.C. Official Code § 2-1201.02) as “a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.” The prohibition provides broad protection to transgender individuals and prevents the District from denying them access to facilities, services, programs, and benefits because they are transgender. However, it does not, in and of itself, require the District to provide access to gender-specific facilities consistent with the individual’s gender identity or expression, and it contains an explicit exception for practices that are otherwise lawful and reasonable. As a result, nothing in the Act explicitly requires the DOC to house transgender inmates in the gender-specific facilities of their choice, and the reasonableness of the DOC’s current practice is demonstrated by the fact that housing prisoners according to their genitalia is the standard practice in corrections facilities across the country. There is therefore no basis for an assertion that the DOC’s housing and classification policy violates the express provisions of the Act.

Although the Act itself does not require the DOC to house prisoners according to their gender identity or expression, several provisions in the rules that the Office of Human Rights and the Commission on Human Rights promulgated to implement the Act create an ambiguity concerning how the Act should be interpreted in this context. The rules governing discrimination based on gender identity or expression are contained in Chapter 8 of Title 4 of the *District of Columbia Municipal Regulations* (“DCMR”). Pursuant to 4 DCMR § 800.1(e), one of the purposes of the rules is “to ensure that transgender people are treated in a manner that is consistent with their identity or expression, rather than according to their presumed or assigned sex or gender.” Similarly, 4 DCMR § 801.1(d) makes it a discriminatory practice for the District government to deny “access to restroom facilities and other gender-specific facilities that are

consistent with a person's gender identity or expression." Finally, under 4 DCMR § 802.1, the District government must "allow the individual the right to use gender-specific restrooms and other gender-specific facilities such as dressing rooms, homeless shelters, and group homes that are consistent with their gender identity or expression." These sections establish a policy that requires the District to recognize the gender identities of transgender individuals and accommodate the expression of these identities when making restrooms and other facilities available to the general public.

Although the rules require the District government to respect the gender identities of transgender individuals and allow these individuals to use public facilities consistent with these identities, the rules do not, and were not intended to, require the DOC to accommodate the housing preferences of incarcerated transgender inmates. Jails are not like restrooms, dressing rooms, homeless shelters, or other facilities that the government provides for the benefit of the public at large. Jails serve a correctional function, house demonstrably dangerous individuals, and require security measures that simply do not apply in non-custodial environments. Moreover, the process of assessing and classifying an individual's gender when the person is in transition can be complex, and allowing incarcerated individuals to self-identify as transgender for the purpose of assignment to a housing unit of the opposite sex could place the inmate and others in the housing unit at risk. It is therefore apparent that the rules that require the District to accommodate gender identity and expression in providing access to public facilities do not apply to prisons, and the DOC housing and classification policy stated in the OM does not violate these rules. The Office of Human Rights and the Commission on Human Rights apparently supports this interpretation of the Act and the applicable rules; they have issued a proposed rulemaking

that clarifies that the requirement of access to gender-specific facilities does not apply to individuals in District custody.

The complainant's claim that the OM's requirement that transgender inmates wear jail attire consistent with their genitalia and housing assignment violates the Act and the implementing rules is also unfounded. As noted above, the Act does not itself make a failure to affirmatively accommodate an individual's gender identity or expression a discriminatory practice, and 4 DCMR § 804.2 explicitly allows the District to prescribe standards of dress that serve a reasonable business purpose. The uniforms issued in both male and female facilities are gender-neutral, consisting of jumpsuits in male facilities and pants and shirts in female facilities, and the toiletries issued to male and female inmates do not differ significantly. Transgender inmates are therefore not required to assume an appearance at odds with their gender identities while in custody, and the DOC has found that security issues are reduced if all inmates in the same facility are similarly attired.

Even though neither the Act nor the implementing rules requires the DOC to provide transgender inmates with the specific assignments, clothing, and personal items the complainant demands, the OM accommodates the needs of transgender inmates to a significant degree. Pursuant to the OM, the DOC supports the inmate's gender expression by protecting the inmate's privacy during intake, by providing appropriate undergarments for transitioning inmates with secondary sex characteristics of the opposite gender, and by providing for the continuation of hormone treatment that would allow an inmate to maintain these characteristics while incarcerated. Most significantly, the OM requires DOC staff to consider an inmate's gender identity or expression in determining whether his or her transgender status or gender expression makes the inmate potentially vulnerable and requires an assignment to protective custody.

Contrary to the complainant's allegation, protective custody is not punitive and does not consist of isolation. Inmates in protective custody have recreational opportunities, access to law library materials and commissary, telephone calls, visitation, and access to other protective custody inmates when placed in communal protective custody. These and other provisions of the OM honor the gender identity and expression of transgender inmates while preserving the safety and security of these inmates, other prisoners, and the facility as a whole. This policy therefore fully complies with the purposes and provisions of the Act.

III. The "Business Necessity" Exception.

Even if the rules requiring access to gender-specific facilities consistent with gender identity or expression did apply to jails and other custodial environments, the policies stated in the OM would still be justified by the "business necessity" exception to the Act. Section 103 of the Act (D.C. Official Code § 2-1401.03) exempts practices which have discriminatory effects where the practice is a business necessity and not devised to contravene the Act. D.C. Official Code § 2-1401.03(a) states:

(a) Any practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that such practice is not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by business necessity. Under this chapter, a "business necessity" exception is applicable only in each individual case where it can be proved by a respondent that, without such exception, such business cannot be conducted; a "business necessity" exception cannot be justified by the facts of increased cost to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person...

The practice of housing inmates consistent with their anatomy constitutes a business necessity under this section. It is followed solely for the purposes of safety, security and order

and is not based upon bias, stereotype or other inappropriate purpose. As noted above, this practice represents the standard used nationwide by correctional facilities in the housing of inmates. The possession of genitalia of the opposite sex of others in a facility renders an inmate vulnerable to attack and exploitation regardless of the inmate's gender expression. Housing according to gender is a basic tenet of maintaining the safety of persons in communal living environments, especially where nudity may be involved, close proximity in living quarters, and in the case of a jail, a predatory, unenlightened and potentially violent culture exists. While educational facilities or other public accommodations, such as college dormitories, may house persons together regardless of genitalia, or may assign transgender individuals according to gender identity, such an approach is problematic where the population has problems with impulse control, tolerance and following rules and regulations.

Moreover, laws such as common tort law, civil rights laws and the Prison Rape Elimination Act of 2003 ("PREA"), 42 USC §§ 15601, *et seq.*, mandate that a jail take affirmative steps to protect inmates from rape and sexually exploitative victimization while incarcerated, which cuts to the heart of the very purpose of segregation according to genitalia.

The findings issued by Congress to support the PREA offer the most compelling evidence in support of the necessity for housing prisoners based on their anatomy. The findings set forth in § 15601 state, *inter alia*, that:²

- 1) 2,100,146 persons were incarcerated in the United States at the end of 2001...;
- 2) experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison... The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000...;

² In Court, such findings would be subject to great evidentiary weight and judicial notice.

- 3) Inmates with mental illness are at increased risk of sexual victimization...;
- 4) Young first-time offenders are at increased risk of sexual victimization...;
- 7) HIV and AIDS are major public health problems within America's correctional facilities... Infection rates for other sexually transmitted diseases, tuberculosis, and hepatitis B and C are also far greater for prisoners than for the American population as a whole. Prison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims ...;
- 8) Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released--as 600,000 inmates are each year...;
- 9) The frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions, both within prison and, upon release of perpetrators and victims from prison, in the community at large...;
- 10) Prison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots..;
- 11) Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance...;
- 12) Members of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates...;
- 13) The high incidence of sexual assault within prisons involves actual and potential violations of the *United States Constitution*. In *Farmer v. Brennan*, 511 U.S. 825 [128 L. Ed. 2d 811] (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Eighth Amendment rights of State and local prisoners are protected through the Due Process Clause of the Fourteenth Amendment...;
- 14) The high incidence of prison rape undermines...health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment and homelessness.

(42 USCS § 15601). Congress found that state and local government failure to take adequate steps to protect inmates from sexual assault:

(A) increases the costs incurred by Federal, State, and local jurisdictions to administer their prison systems;

(B) increases the levels of violence, directed at inmates and at staff, within prisons;

(C) increases health care expenditures, both inside and outside of prison systems, and reduces the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases;

(D) increases mental health care expenditures, both inside and outside of prison systems, by substantially increasing the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates;

(E) increases the risks of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape; and

(F) increases the level of interracial tensions and strife within prisons and, upon release of perpetrators and victims, in the community at large.

Given these findings, the DOC's responsibility to prevent increased violence against inmates, prevent diseases such as HIV/AIDS, prevent the increase of mental illness such as post traumatic stress disorder and suicide, and prevent recidivism, civil strife, and interracial tensions is no small concern to be dismissed out of hand by the complainant through bald, unsupported allegations of "bigotry." The implementation of a classification and assignment system that would house individuals of different biological genders in the same facility would unjustifiably increase the risk of sexual violence to both transgender and non-transgender inmates alike, and the DOC is therefore justified under the business necessity exception in rejecting such an approach. Further, the transgender community's legitimate concern about the potential increased risk of sexual assault on transgender inmates housed according to their genitalia are more than

adequately addressed by the provisions of the OM that require vulnerability assessments of transgender prisoners and, where appropriate, assignment to protective custody.

The transgender community has pointed to a “Model” transgender policy for housing inmates in the L.A. County Jail according to their gender expression, but further inquiry by the DOC revealed that the policy was proposed by transgender advocates to the jail but was not accepted and is not in practice due to inmate safety concerns. The policy would have required housing according to expression as well as issuing clothing, personal toiletry products, undergarments and cosmetic items in a manner consistent with the inmate’s expression, and addressing the inmates according to the gender they choose to express, such as sir or madam. The complainant argues that transgender inmates should be issued the clothing of their gender expression, not biological sex, stating that the DOC “cannot present rational argument” that wearing clothes and underwear of the inmate’s expression will “in any way threaten the safety, security and order at their facilities.” However, the complainant is incorrect and not knowledgeable about the factors that can destabilize an incarcerated housing unit, incite a fight or an assault, or present a danger in the correctional environment. The fact is that the presence of an inmate in the clothing of the opposite gender, addressed as the opposite gender and provided with cosmetics and the accoutrements of the opposite sex increases the negative attention of often violent, unenlightened and intolerant inmates and increases the probability of assault. Therefore, in the best interests of the safety, security and order of the inmates and staff, DOC provides transgender inmates with clothing that is consistent with their biological sex and housing unit. This policy reflects the best judgment of correctional experts and is supported by the fact that correctional entities across the country have adopted similar practices.

IV. Conclusion

The DOOC regrets that the complainant has stepped away from the DOOC's ongoing discussions with the DC Transcoalition and is dissatisfied with the progress made in the policy developed by the agency. The Department is willing to make accommodations for transgender inmates, but none that would compromise the safety, security and order of the facility. For example, in addition to the accommodations stated in the OM, the DOOC permits transgender visitors to visit in the clothing of their expression and access bathrooms consistent with their identities. The Metropolitan Police Department has agreed to identify transgender persons as "vulnerable" in order to alert DOOC as to the potential need for protective housing assignments upon arrival at the D.C. Jail. The Superior Court has also met with the transgender community, and the Court is considering expanding alternatives to incarceration, including community housing and halfway houses for transgender commitments, which are the best approach given the types of crimes for which transgender individuals are typically arrested. The DOOC believes that it has made significant progress in addressing the needs of the transgender inmates and is prepared to continue working with the complainant and the transgender community in a collaborative effort to address any additional concerns.

Although the DOOC follows a standard correctional approach by housing according to genitalia, this policy is fully consistent with the Act and its accompanying regulations. Both provide strong protection against discrimination on the basis of gender identity or expression, but neither the Act nor the rules requires the DOOC to classify or house incarcerated transgender individuals, or to provide them with clothing and toiletries consistent with their self-identified gender expression. The DOOC's willingness to accommodate the needs of transgender prisoners, as reflected in the OM, establishes that the DOOC has no intent to discriminate against these

inmates, and the DOC's need to protect and maintain the safety, security and order of the jail, its inmates, employees and visitors, and the community, provides a compelling justification for the DOC's policy to house and clothe inmates according to their biological gender.

DATE: October 3, 2008

Respectfully submitted,

Peter Nickles
Acting ~~Attorney General~~ for the District of Columbia



Maria Amato
Office of the Attorney General
General Counsel
D.C. Department of Corrections
1923 Vermont Ave. NW
Suite 102 North
Washington, D.C. 20001
Telephone: (202) 671-2042
Facsimile: (202) 671-2514