Issue: Forced to submit to random strip search in room with video camera; Hearing Date: February 6, 2002; Decision Date: February 7, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5373; **Administrative Review: Hearing Officer Reconsideration Request received 02/20/02; Reconsideration Decision Date: 02/25/02; Outcome: No basis to change decision; request denied; Administrative Review: DHRM Ruling requested 02/20/02; DHRM Ruling Date: 04/02/02; Outcome: No policy violation found; no reason to interfere with decision**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5373

Hearing Date: February 6, 2002
Decision Issued: February 7, 2002

PROCEDURAL HISTORY

On March 15, 2001, Grievant filed a grievance claiming that:

> *On 2 March 2001, I was forced to submit to a random strip search, in a room with a video camera, which is a violation of IOP, DOP, State and Federal laws.*

He requested relief consisting of "Destruction or the proof of destruction of any video tapes. A formal, written apology[1] and removal of any documentation from my records."

The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 10, 2002, the Director of Department of Employment Dispute Resolution issued Ruling No. 2001-113 qualifying the grievance for hearing. On January 16, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 6, 2002, a hearing was held at the Agency's regional office.

[1] The Hearing Officer does not have the authority to order an agency to issue an apology. Even if the Hearing Officer had such authority and ordered an apology, an ordered apology is unlikely to be a genuine apology.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Party Representative
Three Corrections Officers
Major
Assistant Warden Operations
Special Agent
Site Technician
Building and Grounds Superintendent

ISSUE

Whether the Agency misapplied its policy governing searches.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. *Grievance Procedure Manual ("GPM") § 5.8*. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. *GPM § 9*.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as an HVAC Supervisor within its Buildings and Grounds unit at one of its correctional institutions. He is not a sworn corrections officer.

On March 2, 2001, Grievant was waiting in the "shakedown line" to enter the Institution. The Operations Officer signaled him to come down the hall with her to the training room. She did not tell Grievant why he was being sent to the training room. The Major and Assistant Warden of Operations were inside the training room. The Major informed Grievant he would be strip searched. Initially Grievant refused to be searched and asked the Major if he was suspected of bringing in contraband. The Major avoided answering Grievant's question. Grievant said he did not want to be searched by corrections officers with whom he had to work on a daily basis. He wanted to have the search performed by officers from a neighboring institution. The Major responded that the Major would conduct the search and not officers in the institution.

Grievant agreed to the strip search because he knew that if he refused he would be subject to disciplinary action and possible suspension.

At the Major's direction, Grievant removed each article of clothing and handed it to the Major for examination. Once Grievant was unclothed, the Major instructed him to squat and cough. Grievant felt humiliated and degraded during the search. He was aware that a camera was located in the room. No contraband was found and Grievant then dressed and went to his work area outside of the Institution's fences in the Buildings and Grounds unit. Grievant was upset at having been strip searched. He felt nauseous. He asked his supervisor to leave for the day and he went home due to illness.

On the ceiling of the training room is a camera. The camera was working during the strip search. It was recording images on a video tape located in the surveillance room. Only four people[2] in the institution had the codes sufficient to enable them to turn on the monitor inside the surveillance room and observe the images being captured by the camera. Access to the video tapes is also restricted to authorized personnel.

Grievant was one of four people who were searched on March 2, 2001. Two of the other four had last names beginning with M and the third had a last name beginning with N.

On June 28, 1999, Grievant signed a notification of Conditions of Employment for Non-Security Staff. This document states, "All employees entering the prison compound are subject to search of their persons and belongings."[3] On November 25, 1998, Grievant also signed a document entitled, "Conditions of Employment"[4] stating:

> As a condition of employment, I have been advised, discussed and fully understand that I am subject to be searched each time I enter a facility of the Department of Corrections, Division of Adult Institutions. I further understand that various types of searches may be performed on my person and my possessions, which I may take into the facility; but that written consent for conducting strip and/or body cavity searches of my person must first be obtained.[5] I also understand that when requested to

[2] The training room camera was installed to enable the Institution to record training presentations. It is not clear that the Major realized the camera was activated when he was conducting strip searches. Although it seemed unusual to limit access to a training room camera to four people, the Hearing Officer has no reason to disbelieve the Agency's contention that only four people could have had seen the camera images and that none of those people did so on March 2, 2001.

[3] Agency Exhibit D.

[4] Agency Exhibit E.

[5] The Institution did not first obtain Grievant's written consent before conducting a strip search. The requirement for prior written consent, however, does not appear in the Institutional Operating Procedures and, thus, does not appear to be the actual policy of the Institution.

> consent to a search, I am not obligated to submit to same; but know that I shall be subject to disciplinary action under the Virginia Department of Corrections Employee Standards of Conduct and Performance.

CONCLUSIONS OF LAW

Requiring an employee to remove his clothing for a full body inspection by another employee is clearly a significant invasion of privacy. The Institution has established a policy targeting situations where an infringement of privacy is appropriate to accomplish a public safety goal of the institution. In light of the degree of harm to an employee that may result from the Institution's failure to follow its policy, few aspects of that policy should be waived or deemed harmless error.

Institutional Operating Procedure ("IOP") 443 sets forth circumstances when inmates, employees, and visitors may be searched.[6] It identifies different procedures depending on whether the search is an external search, frisk search, strip search, or body cavity search. An employee entering the Institution is subject to a "strip search or body cavity search provided there is a real suspicion that contraband may be introduced into the institution." The Institution had the authority to conduct a strip search under IOP 443 because it had reliable information from two informants that Grievant and several others may be bringing in tobacco contraband into the facility.

The Institution failed to follow several portions of IOP 443. For example, real suspicion is defined as:

> "Subjective suspicion supported by objective, documented facts that would reasonably lead an experienced and prudent institutional official, based upon a totality of the circumstances, to suspect that contraband is being transported into or within the institution by an inmate, visitor or employee." (Emphasis added.)

IOP 443 does not define the meaning of "documented facts". The Hearing Officer interprets the word "documented" to mean supported in writing by some notation, email, memorandum, letter, or other written document. No one in the institution made any notation regarding the informant's allegations. Although the Agency presented evidence of facts supporting a real suspicion, there are no documented facts supporting a real suspicion. The Agency's failure to document facts supporting the real suspicion was contrary to IOP 443.

IOP 443-7.1(A) provides that, "Every reasonable effort shall be made to obtain the individual's cooperation to voluntarily surrender to staff the suspected contraband."

[6] IOP 443 was signed by the Institution's Warden on December 4, 2000. Its substance and content pattern the Department's Policy 443 which is applicable to the Department as a whole.

Grievant was not asked if he was carrying any tobacco or asked to surrender suspected contraband. The Agency's failure to ask for contraband was contrary to IOP 443.

IOP 443-7.1(D) provides that the strip search shall be conducted in "an appropriate area where privacy can be ensured." Conducting a strip search in a room with an operating camera in the ceiling is not an appropriate area where privacy can be ensured.[7] Expecting the Grievant to accept the Agency's later statements that the camera was not directed at him and that no one had viewed the video tapes is unreasonable. The Agency's actions were contrary to IOP 443.

Evidence conflicts regarding the status of the video tapes used to record images from the training room camera. The Site Technician stated that the video tapes used on March 2, 2001 were reused at a later date and, thus, any images on the tapes were recorded over. In an email to the Warden, the Assistant Warden for Operations wrote, "I have secured both tapes and they will be erased on Friday, April 6, 2001."[8] During the grievance step process, the final agency respondent stated, "It has been verified that the video camera in the room where you were searched was not functioning during your search …." The Third Step respondent stated, "Further investigation into the videotaping revealed that the camera was not functioning at all and could not have possibly recorded your search. However, to avoid subsequent concerns, [Major] and the institutional investigator destroyed (by burning the tape) the tape." The Site Technician, however, testified that the camera was operating and the video tape was recording during the search. Moreover, if the tapes had been destroyed, they could not have been taped over. Given the Agency's failure to secure Grievant's privacy, the Agency should investigate the existence of the tapes and provide Grievant with a written explanation of the status of those tapes.

Grievant contends the Agency violated IOP 443 by conducting a random strip search of employee's with last names beginning with M and N. There is evidence supporting this contention. For example, of the four individuals searched on March 2, 2001 three had last names beginning with the initial M and one with the initial N. In addition, testimony from the other employees searched on March 2, 2001 showed that all of them had been told by different institution managers that the searches were random. The Agency's evidence, however, showed that the Major had spoken with two informants who he believed were reliable. One informant was a corrections officer and the other was an inmate. Both informants identified Grievant as bringing in contraband to the institution. The Hearing Officer concludes that the Institution had a real suspicion that Grievant was bringing in contraband to the facility, but that several employee had

[7] The Institution's failure to comply with IOP 443 does not appear to be intentional. In an email to the Assistant Warden for Operations, the Warden writes, "If we have the strip searches on tape, then we need to see that those tapes are not available to anyone outside of the individuals who did the shakedown. *** It was not our intent to video the searches. This must not reoccur in the future. Please advise me on this as soon as possible."

[8] Agency Exhibit I.

been incorrectly informed (intentionally or unintentionally) that the searches were random.

DECISION

The Agency's search of Grievant was contrary to portions of the Institution's Operating Procedure 443. The Agency is ordered to comply with all applicable law and policy governing employee searches.

The status of the training room camera videotapes used on March 2, 2001 is unclear. The Agency is ordered to investigate the status of those tapes and provide Grievant with a letter indicating whether the March 2, 2001 tapes exist. If the tapes exist, the Agency is ordered to destroy the tapes. If the tapes do not exist, the Agency is directed to inform Grievant of when and how the tapes were destroyed.

The Agency is ordered to remove any documents in Grievant's personnel file, fact file, or other file regarding his being strip searched or being suspected of bringing in contraband giving rise to his search on March 2, 2001.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.
Hearing Officer