Issue: Qualification/Work Conditions/Management Practices- Records, Confidentiality, Access to Policy; Methods/Means ; Ruling Date: January 10, 2002; Ruling #:2001-113; Agency: Department of Corrections; Outcome: Qualified.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2001-113
January 10, 2002

The grievant has requested a ruling on whether his grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that management misapplied or unfairly applied DOC policies or procedures and violated his civil rights when it required him to submit to a strip-search. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

The grievant is employed with DOC as an HVAC Supervisor. On March 2, 2001, the grievant was escorted by the Operations Officer to the institution's training room where he was asked to consent to a strip-search. The grievant reluctantly consented to a strip-search conducted by the Chief of Security, in the presence of the Assistant Warden of Operations. No contraband was found on the grievant's person.

DISCUSSION

All employee searches at the grievant's place of work are to be conducted in accordance with the institution's Internal Operating Procedure (IOP) 443, entitled *Inmate, Employee and Visitor Searches.* IOP 443 appears to have been drafted in part to protect employees against unreasonable searches and seizures, as provided by the Fourth Amendment of the United States Constitution.[1] Courts have recognized that under the Constitution, a state agency must have "a reasonable and individualized suspicion" that an employee is bringing contraband into a prison before the agency can subject that employee to a strip search.[2] While an agency must adhere to this minimal constitutional requirement, the agency may establish stricter requirements through its policies and procedures. Accordingly, a strip search that adheres to the Constitution may still violate agency policy or procedure.

In this case, IOP 443 lists and defines four types of searches to which employees may be subjected: external searches, frisk/pat-down searches, strip searches, and body cavity

[1] Because the *content* of state personnel policies and procedures may not be challenged through a grievance hearing, this qualification ruling will assume that IOP 443, as drafted, passes constitutional muster. Va. Code § 2.2-3304(C)(iii).

[2] *See*, e.g., Leverette v. Bell, No. 00-1407 (4th Cir. April 13, 2001) at http://www.law.emory.edu/4circuit/apr2001/001407.P.html.

searches.[3] Importantly, however, strip searches and body cavity searches of employees may be conducted "only when *real suspicion* exists" that contraband may be introduced into the institution.[4] IOP 443 defines "real suspicion" 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 employee.[5] Thus, IOP 443 does not authorize random strip searches.

In addition to requiring "real suspicion," IOP 443 also requires, for example, that strip searches can only be authorized by the institution's Warden or Administrative Duty Officer.[6] Further, if the employee consents to the strip search, "every reasonable effort shall be made to obtain the individual's cooperation to voluntarily surrender to staff the suspected contraband."[7] If the employee fails "to cooperate and surrender the suspected contraband, the Watch Commander designated to conduct such searches on approval from the Warden or Administrative Duty Officer shall authorize the strip search, documenting it on Attachment 1 or 2 to insure compliance."[8] The strip search is to be conducted in "an appropriate area where privacy can be ensured."[9]

Management has reported to this Department that the grievant was strip-searched on March 2, 2001 in accordance with DOC policy and procedures and that the search was not randomly conducted. However, this grievance raises a sufficient question as to whether the strip search of the grievant was supported by "objective, documented facts" and was otherwise authorized and conducted as expressly required under IOP 443. For example, although the agency asserts that the grievant was strip-searched due to an informant's tip, other evidence could appear to indicate that the strip searches conducted on the grievant and other employees that day had been initiated on an alphabetical, rather than a "real suspicion" basis. In sum, further exploration by a hearing officer of the facts and the applicable law, policies, and procedures is warranted in this case.

CONCLUSION

For additional information about the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. Please note that this determination cannot be construed as a finding that the agency misapplied or unfairly applied applicable policy or procedure. Only a hearing officer can make such a determination, after a full exploration of the facts. Even if the hearing officer finds that the agency misapplied DOC's policies or procedures, the hearing officer may only direct the agency to apply those policies correctly

[3] IOP 443-7.5.
[4] IOP 443-7.5(C) (emphasis added); see also Attachment 3 to IOP 443.
[5] IOP 443-6.0(A) (emphasis added).
[6] IOP 443-7.1.
[7] IOP 443-7.1(A).
[8] IOP 443-7.1(B).
[9] IOP 443-7.1(D).

now and in the future. Furthermore, a hearing officer may not be able to grant the relief that the grievant requested in his grievance (e.g., order a letter of apology).[10]

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Neil A.G. McPhie, Esquire
Director

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Felicia H. Johnson
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[10] In regards to the other relief that the grievant requested in his grievance, it is undisputed that DOC has already destroyed any videotapes that could have recorded the grievant's strip-search on March 2, 2001. It is also undisputed that no written records of the strip-search have been placed in the grievant's employment records.