

Issues: Administrative Review of Hearing Officer's Decision in Case No. 8466, and Compliance – Grievance Procedure: Other Issue; Ruling Date: August 9, 2007; Ruling #2007-1549, 2007-1550; Agency: Department of Corrections; Outcome: Remanded to Hearing Officer for clarification, Hearing Decision In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW and  
COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2007-1549 and 2007-1550  
August 9, 2007

The Department of Corrections (DOC or the agency) seeks a compliance ruling from this Department regarding the hearing decision in case number 8466. The decision involved the agency's use of a polygraph test on a Case Management Counselor who allegedly was having sexual relations with an inmate. In addition to administratively challenging the hearing decision, the agency asserts that the original hearing decision should be modified by removing from the text of the decision the actual questions posed to the grievant during the polygraph test so that the agency can continue to use those questions in the future.

FACTS

The facts, as set forth in the hearing decision in case number 8466, are set forth below.<sup>1</sup>

The Department of Corrections employs Grievant as a Case Management Counselor at one of its Facilities. She began working for the Agency on January 10, 2005. Grievant's duties include counseling inmates in the Agency's sex offender program and substance abuse programs. Grievant reports to the Treatment Program Supervisor (TPS). The TPS reports to the Assistant Warden who reports to the Warden.

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<sup>1</sup> January 26, 2007 Hearing Decision, pp. 2-9. Not all of the actual questions used in the polygraph examination are listed in this ruling. Instead, representative questions that were listed in this Department's October 16, 2006 qualification decision are presented in this ruling. The October 16<sup>th</sup> decision has been posted on EDR's website since October 31, 2006, and to date, the agency has made no objection to its publication. In addition, for the sake of brevity, several footnotes from the original decision have been omitted from this decision.

The Office of Inspector General is a unit of the Department of Corrections responsible for conducting criminal and administrative investigations and inquiries. Employees of the Office report to the Inspector General who reports to the Agency Head.<sup>2</sup> Special Agents working as part of the Office of Inspector General may be located in various Facilities but they do not report to the Facility Wardens. Special Agents have police powers such as to arrest and to carry weapons. During the course of investigations at Facilities, Wardens may have control of the Facilities but Special Agents are in control of the “scene”. If a conflict arises between the wishes of a Warden and of a Special Agent regarding an investigation, the Special Agent has greater authority.<sup>3</sup>

DOC employees are obligated to provide assistance to investigators of the Office of Inspector General. DOC Procedure 10-4(D) provides:

1. Employees must answer questions of official interest and provide the investigators with any evidence or information they have that might pertain to the investigation, provided their constitutional rights are not violated.
2. Refusal to provide required assistance constitutes grounds for disciplinary action.

On August 31, 2005, Inmate L placed a note in Grievant’s inbox. She read the note the following day, September 1, 2005. The note contained sexually explicit language. Grievant sought out Inmate L and confronted him. Inmate L asked Grievant if she had received his request. Grievant instructed Inmate L to show his identification which he did. Inmate L asked if he could come see her. Grievant responded “no” because of what he had written. Grievant went to Captain B and informed him of her interaction with Inmate L. Captain B told Grievant to make a copy of the note and that he would speak with Inmate L.

Inmate L met with Captain B and told Captain B that Grievant and Inmate R were having sex and that he wanted to have sex with her as well.

On September 2, 2005, Grievant received a telephone call from the TPS telling Grievant to turn in her keys but not sign out and that serious allegations had been made regarding Grievant. Grievant met with the Facility Investigator. The Facility Investigator was not part of the

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<sup>2</sup> The Internal Affairs Unit of the Office of Inspector General is staffed with individuals who can conduct police investigations.

<sup>3</sup> See DOC Procedure Number 10-4.9(D).

Agency's Office of Inspector General.<sup>4</sup> He explained the charges to Grievant as he and she drove from the Facility to the regional office of the Office of Inspector General.

Once Grievant reached the regional office of the Office of Inspector General, she met with Special Agent D for approximately 2.5 hours. Special Agent D asked Grievant if she had had sex with Inmate R. He told Grievant that Inmate L said she was having sex with Inmate R. Grievant denied having sex with Inmate R and said that the allegation was ridiculous. Grievant wrote a seven page statement. Grievant was crying<sup>5</sup> during the meeting because of the harsh treatment of Special Agent D. Special Agent D asked Grievant if she felt like Sharon Stone in the movie, Basic Instinct.<sup>6</sup> Special Agent D said he did not believe her denial of having sex with Inmate R. He told Grievant to "come clean now."<sup>7</sup>

On September 6, 2005, Special Agent D requested of the Senior Assistant Chief that Grievant receive a polygraph examination regarding the allegation that she had sexual intercourse with Inmate R. Special Agent M recommended to the Senior Assistant chief that a polygraph be taken.

On September 9, 2005, Special Agent D called the TPS and informed her that Grievant's polygraph test had been scheduled for Thursday, September 22, 2005 at 9 a.m. at the regional location of the Office of Inspector General. On September 13, 2005, the Senior Assistant Chief sent Special Agent M an email approving the polygraph of Grievant. Grievant asked the Facility Investigator to accompany her to the regional location.

Special Agent M is a sworn law enforcement officer functioning as the polygraph unit coordinator for the Agency. He is one of three employees conducting polygraphs for the Agency. He was certified as a

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<sup>4</sup> The Facility Investigator worked at Grievant's Facility and reported to the Warden.

<sup>5</sup> There is no reason for the Hearing Officer to believe that Grievant is unusually sensitive or cries easily.

<sup>6</sup> During the movie Basic Instinct, the character played by actress Sharon Stone is suspected of a crime and is interrogated by law enforcement officers. During the interrogation she crosses and uncrosses her legs exposing her genitals.

<sup>7</sup> Special Agent D did not need 2.5 hours to obtain the necessary information from Grievant. The information Special Agent D needed from Grievant was simple and straightforward. There was no basis for him to discuss the movie, Basic Instinct or to say he did not believe Grievant and that she should come clean now. Special Agent D acted contrary to DOC Procedure Number 10-4.10(B) requiring that, "[a]gents shall respect the rights of employees, inmates, and others, and shall be courteous in conducting investigations." There is a difference between questioning an employee and interrogating an employee. In particular, the intensity of questioning and the pressure put on the person is much greater for an interrogation than a questioning. In some cases it may be appropriate to interrogate an employee. In Grievant's case, there was no basis to interrogate Grievant. The only information Special Agent D had regarding Grievant's guilt came from a single convicted felon.

polygraph examiner in 1989.<sup>8</sup> He has performed over nine hundred examinations.

On September 22, 2005, Grievant traveled with the Facility Investigator to the regional location of the Office of Inspector General to take a polygraph. Special Agent M took Grievant to the examination room and told her how the process worked.<sup>9</sup> Special Agent M advised Grievant of the Polygraph Standards of Practice and told her to fill out three forms including a waiver of her Miranda Rights and a consent form.<sup>10</sup> He told her he would be asking her questions about whether she had had sex with Inmate R. She believed Special Agent M intended only to ask her questions about Inmate R.

Grievant sat in a chair as Special Agent M asked Grievant 43 questions about her sexual behavior. Special Agent M held a piece of paper and gave the appearance of writing down Grievant's responses as he asked her questions.<sup>11</sup> The questions he asked were:

[The following is a partial listing of the approximately 43 questions posed to the grievant in paraphrased form: Prior to joining the agency, have you ever masturbated, looked at pornography, engaged in oral sex, had unnatural sex, had sex with someone of the same gender, cheated in a relationship, had sex with a dead body, had sex with multiple people, or done anything sexually for which you were ashamed.]<sup>12</sup>

Grievant answered all of the questions Special Agent M asked because she believed she would not pass the test without doing so.<sup>13</sup> Grievant believed she had to take the polygraph examination to prove she did nothing wrong. She felt extremely uncomfortable answering the approximately 43 questions posed by Special Agent M.<sup>14</sup> She commented to Special Agent M that he knew more about her than did her mother.

After considering Grievant's responses to the 43 questions, Special Agent M formulated the actual test questions. He attached the polygraph components to her body and explained their function. He then asked her

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<sup>8</sup> Polygraph examiners are licensed by the Department of Professional and Occupational Regulation. See, Va. Code § 54.1-1800 to § 54.1-1806, and 18 VAC 30-120-30 et seq.

<sup>9</sup> Special Agent M had not met Grievant prior to the polygraph examination.

<sup>10</sup> The consent form stated Grievant consented to questions about having sex with an inmate. The Miranda Right's form was not submitted as evidence.

<sup>11</sup> The "pretest" questioning lasted between 45 minutes and an hour. Special Agent M later destroyed the notes he had taken as part of his standard practice.

<sup>12</sup> See EDR Ruling 2007-1421, at n. 1. See also n. 1 of this ruling.

<sup>13</sup> As Special Agent M began asking the questions about her prior sexual behavior, she told him that she felt the questions were "really personal".

<sup>14</sup> Grievant testified she felt as if she were standing naked in the room.

three groups of questions in different order. The questions were drawn from the following questions:

[Actual questions posed are omitted here.]

The polygraph examination lasted approximately two hours.

After Grievant finished her polygraph examination, Inmate R met with Special Agent M to have a polygraph examination. As Special Agent M presented Inmate R with the three forms and was explaining the process with Inmate R, Special Agent M concluded he could not give the polygraph to Inmate R. Special Agent M then began an interrogation and Inmate R confessed that he lied about having sex with Grievant. No polygraph was taken of Inmate R.

Special Agent M drafted a polygraph examination report on September 22, 2005. The report stated:

The purpose of this examination is to refute the allegations that [Grievant] engaged in sexual intercourse with [Inmate R] at [Facility]. The following relevant questions were asked:

1. Did [Inmate R] touch you in a sexual manner?
2. Did [Inmate R] touch you in a sexual manner, at [Facility]?

An evaluation of the polygraph charts determined [Grievant] to be non-deceptive when she answered, "No" to the relevant questions.

On September 22, 2005, Special Agent D called the TPS and informed her that Grievant had passed the polygraph test. The TPS informed Grievant of Special Agent D's call.

On January 30, 2006, the Department of Corrections Equal Employment Opportunity Office acknowledged receiving Grievant's allegation of sexual harassment. The Department's EEO division issued its determination on April 24, 2006 and wrote to Grievant:

While we can understand your discomfort at the questions asked, we have determined that these types of questions have been used in polygraphs involving both male and female examinees and therefore we did not find evidence of discriminatory practices in the administering of the polygraphs based on gender.

On April 11, 2006, the TPS called Grievant and informed her that she needed to participate in an investigation. Grievant asked the TPS if she would be Grievant's witness because Grievant did not trust the employees in Internal Affairs. Grievant went to meet with Special Agent H and Ms. T. Grievant explained that the TPS was her witness but Grievant was told she could not have a witness and the TPS left the interview. Special Agent H asked Grievant to write a statement and Grievant complied. Grievant's statement was not acceptable to Special Agent H so he asked her to re-write it. She did so. Grievant stated that she would not provide the statement to the Special Agent H unless she could make a copy of it herself. She held her hand on the paper and Special Agent H told her "You will remove your hand right now."

Grievant left the interview with Special Agent H and began crying in the hallway. On April 13, 2006, Grievant met with Warden B and he suspended<sup>15</sup> her and instructed her to leave the Facility. Two hours later, the TPS called Grievant and told Grievant to come back to work and said that Grievant would be paid for the period of suspension.

Sergeant B sought out Grievant and told her that Inmate J said he wanted to get a charge against himself so he could remain at the Facility and not be transferred to another Facility with a lower security level. Sergeant B asked Grievant to speak with Inmate J to dissuade him from getting a charge. Grievant spoke with Inmate J but was unable to persuade Inmate J. Grievant told Sergeant B she was unable to change the inmate's mind. She told Sergeant B that she told Inmate J there was no way he would stay at the Facility because of the point system. The Agency began an investigation.

On April 20, 2006, the TPS informed Grievant she needed to speak with Special Agent D. Grievant said she would talk to anybody but him. The TPS told Grievant, Grievant could not refuse. The TPS said she would remain in the interview. Special Agent D allowed the TPS to remain in the room. Special Agent D asked Grievant questions about Inmate J. Special Agent D accused Grievant of trying to get Inmate J to get a charge by misbehaving. In addition, Special Agent D told Grievant that he worked there often and that he did not care whether she liked him or not. Grievant left the meeting and started crying. She went to the treatment area where a lot of other counselors were working. Several tried to calm down Grievant but were not successful. Grievant asked the TPS if she could go home and the TPS agreed. Another counselor accompanied

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<sup>15</sup> No evidence was presented regarding why the Warden suspended Grievant.

Grievant home. No one from the Office of Inspector General questioned Sergeant B who referred Inmate J to Grievant.

Grievant has a part-time job as a cashier at a local department store. She was working as a cashier and looked up to see that her next customer was Special Agent D. Special Agent D said "Good evening" and smiled. Several cash register lines were open with cashiers and no waiting. Special Agent D saw Grievant. Instead of choosing one of the other lines, Special Agent D chose to check out in the line where Grievant was working as a cashier. Grievant quickly asked another employee to assume her duties as cashier and Grievant walked away crying. She walked to the Assistant Manager's office and explained what had happened. Shortly thereafter the cashier who relieved Grievant told Grievant that Special Agent D "flipped out" and demanded that Grievant could not walk away and leave her post at the service line.

On April 28, 2006, Grievant and Special Agent D attended an "anniversary" group lunch offered to Facility employees. Grievant sat down at a rectangular table with Counselor A to her side. Special Agent D walked to nearby table and sat down so that he directly faced Grievant. During the lunch and presentation, Special Agent D glared at Grievant in intimidating manner. Counselor A observed Special Agent D's behavior and observed Grievant suffer from signs of what Counselor A recognized as a panic attack including rapid pulse, increased breathing rate, chest pain, crying, and feelings of terror.

Grievant sought employment at another DOC Facility located several hours distance from her current Facility. She applied for a position and was offered employment in August 2006. The position was with the same title and pay as her current position. She was informed that she had to resign from her existing position. She believed the Agency was creating a pretext to remove her from the Agency so she refused to resign. She did not believe she had to resign from one DOC Facility to be transferred to another Facility. Her offer of employment was revoked.<sup>16</sup>

As a result of the stress caused by working at the Facility, Grievant had had at least six counseling sessions with a Licensed Professional Counselor beginning in June 2006.<sup>17</sup>

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<sup>16</sup> Grievant did not present any documents demonstrating the terms of the new Facility's offer of employment and did not call that Facility's Human Resource Officer. Accordingly, there is insufficient information for the Hearing Officer to conclude that the new Facility's staff was working in conjunction with other Agency staff to cause Grievant to leave the Agency.

<sup>17</sup> Grievant Exhibit 9. During the sessions with the Counselor, Grievant "addressed work stress and coping skills" according to the Counselor's note.



The hearing officer held that the agency, acting through Special Agent M, intruded into the grievant's private life and violated her right to liberty by asking her questions about her personal and private sexual behavior outside of DOC and prior to her employment with the agency.<sup>18</sup> He concluded that "Employees of the Commonwealth of Virginia have the right to be free from invasive and offensive intrusions into their private, consensual, lawful, sexual behavior and relationships."<sup>19</sup> He clarified that:

The Hearing Officer is not suggesting that sex between employees and inmates is beyond the scope of the Department of Corrections' investigation or administrative proceedings. It is not likely that an employee would have a reasonable expectation of privacy in a correctional facility. It is not likely that an inmate in the custody of the Department would have the legal capacity to give full consent to sexual behavior. Thus, sexual behavior between employees and inmates would not likely be private consensual sexual behavior.<sup>20</sup>

The hearing officer went on to reject the justifications proffered by the agency for its actions, such as that "it was necessary to ask certain questions of Grievant in order to establish a base from which it could measure the accuracy of Grievant's response to the appropriate questions of whether she had sex with an inmate," finding that "there was no scientific or other reason that would require the Special Agent M to ask the specific questions he asked about Grievant's prior private sexual behavior."<sup>21</sup> The hearing officer also found that "Special Agent D's offensive comments, lengthy interrogation, visits to her part time employment workplace, and glaring at her during group functions created an abusive and hostile work environment for Grievant."<sup>22</sup>

As a result of his findings the hearing officer, the hearing officer recommended the following:

- The Agency permit Grievant to transfer to another Facility of her preference to serve in a similar position. Grievant's transfer should occur upon the opening of a position to which she is suitable for transfer.
- The Agency not involve Grievant in any investigations handled by investigators of the Office of Inspector General without first obtaining the approval of the Agency Head, Regional Director or Inspector General after consideration of the need for information from Grievant.
- The Agency discontinue polygraph procedures involving questioning anyone about private consensual sexual behavior by adults.<sup>23</sup>

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<sup>18</sup> January 26, 2007 Hearing Decision, p. 10.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, note 29.

<sup>21</sup> January 26, 2007, Hearing Decision, p. 11.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 15.

In addition, the hearing officer ordered the agency:

- to refrain from inquiring into Grievant's private consensual sexual relationships and behavior; and
- to cease the hostile work environment it has created for Grievant. The Agency is ordered to refrain from further creating or promoting a hostile work environment for Grievant. To accomplish this, the Agency is ordered to prohibit Special Agent D from interacting with Grievant absent extraordinary circumstances requiring interaction for legitimate business needs of the Agency. Grievant shall be permitted to have a witness of her own choosing when such extraordinary interactions are necessary.<sup>24</sup>

On February 13, 2007, the agency delivered to the Division of Hearings a request that the hearing officer reconsider his decision. In the request, the agency also requested that the hearing officer remove from his decision the list of actual questions posed during the polygraph examination. On April 23, 2007, the hearing officer affirmed his earlier decision and concluded that there was no reason to conclude that the agency cannot develop a set of less intrusive yet still effective questions for future polygraph examinations.

## DISCUSSION

### *I. Administrative Review*

#### A. The Hearing Officer's Orders

The agency objects to the hearing officer's orders to: (1) refrain from inquiring into the grievant's private consensual sexual relationships and behavior; and (2) cease the hostile work environment it has created for the grievant, by (a) prohibiting Special Agent D from interacting with the grievant, absent extraordinary circumstances requiring interaction for legitimate business needs of the agency, and (b) granting the grievant the right to have a witness of her own choosing when such extraordinary interactions are necessary. The agency claims that the orders are inconsistent with state law, regulations, and policy and EDR procedure.

#### *1. Order to Refrain from Inquiring into the Grievant's Private Consensual Sexual Relationships and Behavior*

The agency objects to this order on several grounds. First, it objects on the basis of law and state regulations. Such objections are properly raised with the circuit court in the jurisdiction in which the grievance arose.<sup>25</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

As to objections based on state and agency policy, such objections are properly raised with the Director of the Department of Human Resources Management (DHRM).<sup>26</sup> If the agency wishes to request that the hearing decision be reviewed by the DHRM Director on the basis that the decision does not conform to policy, the agency must make a written request to the DHRM Director, which must be **received within 15 calendar days of this decision**. Because the initial requests for review were timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

Finally, the agency contends it will be unduly hampered should new allegations of sexual misconduct arise. Because the agency does not cite to any particular provision of the grievance procedure, this Department will consider this objection in the context of abuse of discretion by the hearing officer, which we reject for the following reasons. The hearing officer's order to refrain from inquiring into the grievant's private consensual sexual relationships was based solely on a legal determination that the agency violated the grievant's Constitutional liberty interest in privacy. If the agency challenges this legal determination with the circuit court and prevails, the hearing officer's *order* to refrain from such questioning will presumably be set aside by the court (absent a decision from the circuit court implementing the hearing officer's *recommendation* to refrain from such questioning),<sup>27</sup> because the *order* is based solely on law. If the order is set aside, the agency will be free to so inquire for legitimate reasons in the future. The agency's ability to question the grievant would be subject to certain limitations, however. For example, as discussed below, Agent D would not be permitted to conduct such an investigation, absent extraordinary circumstances. Nothing in this order, however, would prevent an agent other than Agent D from fully exploring any potential future allegations of sexual relations with an inmate, which, as the decision appropriately recognizes, should not be considered consensual relations.<sup>28</sup>

On the other hand, if the circuit court upholds the hearing officer's conclusion that questioning the grievant about her private consensual sexual relationships violates the grievant's liberty interest, clearly the order to refrain from such questioning would be enforceable.

## 2. *Order to Cease the Hostile Work Environment*

The agency objects to this order on the basis of law, policy and "EDR procedure." As discussed above, objections of law are directed to the circuit court and policy based objections are made with DHRM. As to "EDR procedure," the agency again does not cite to any particular provision of the grievance procedure as having been violated. Thus, we will once more analyze this objection in the context of abuse of discretion.

In light of the hearing officer's determination that the agency had created a hostile work environment, we cannot conclude that the hearing officer's order to cease the

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<sup>26</sup> Va. Code § 2.2-3006(A); *Grievance Procedure Manual* § 7.2(a).

<sup>27</sup> The *recommendation* to cease such questioning is discussed in a following section of this ruling.

<sup>28</sup> January 26, 2007 Hearing Decision, p. 10, note 29.

hostile workplace constitutes an abuse of discretion. However, we find the provision granting the grievant the right to select a witness of her choosing if extraordinary circumstances require interaction with Special Agency D to be overly broad because it could unnecessarily hamper the Agency's ability to conduct further investigations. While we find no abuse of discretion in granting the grievant access to a witness should such an extraordinary circumstance arise, the order must be modified to make it clear the grievant's right to a witness of choice is not without limits. For example, it would presumably not be reasonable for the grievant to demand that an "extraordinary circumstance" investigation be delayed so that someone who resides out of state could be brought in to serve as her witness. Accordingly, the decision is remanded to the hearing officer for further clarification. In his reconsidered opinion, the hearing officer must place reasonable limits on the grievant's ability to select a witness of choice, balancing the grievant's need for protection from further harassment against the agency's need to expeditiously investigate potential new claims of misconduct.

#### B. The Hearing Officer's Recommendations

The agency objects to the hearing officer's recommendation that the agency (1) not involve the grievant in any investigations handled by investigators of the Office of Inspector General without first obtaining the approval of the Agency Head, Regional Director or Inspector General, and (2) discontinue polygraph procedures involving questioning anyone about private consensual sexual behavior by adults. The agency contends that the hearing officer's two recommendations are "overly broad and intrusive," and that the latter is inconsistent with applicable law and regulations.

##### *1. The Recommendation to Not Involve the Grievant in any Investigations Handled by Investigators of the Office of Inspector General without First Obtaining the Approval of the Agency Head, Regional Director or Inspector General.*

The EDR standard for reviewing a recommendation is whether the hearing officer's recommendation is tantamount to an abuse of discretion. As to the allegation that this recommendation is overly broad and intrusive, EDR recognizes that management reserves that exclusive right to manage the affairs and operations of state government, and that the hearing officer is not a "super personnel officer."<sup>29</sup> Nevertheless, the grievance procedure has long held that where a hearing officer does not have the authority to order a particular action, he may offer prudent recommendations that would be reasonable in resolving the issues between the parties. Standing alone, recommendations, which must conform to law and policy, do not compel the agency to act. However, by statute, a party may petition the circuit court in the jurisdiction in which the grievance arose for an order implementing a recommendation. If the circuit court orders implementation of the recommendation, only then is the agency bound to act on the recommendation.

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<sup>29</sup> Va. Code § 2.2-3004(B); Rules for Conducting Grievance Hearings (VI)(A).

As to the agency's position that this particular recommendation is overly broad and intrusive, we do not find the agency's argument persuasive. Here, the Hearing Officer found that Agent D (a member of the Internal Affairs Unit, which is in turn under the Office of the Inspector General), created a hostile workplace for the grievant. Given this finding, it does not appear to be overly intrusive to require Investigators in the Office of the Inspector General merely to secure approval from the Agency Head, Regional Director or Inspector General prior to initiating further investigations of the grievant. Such approval could likely be obtained through a single phone call or e-mail stating the legitimate basis for the investigation. Such simple acts do not appear to be overly intrusive in light of the hearing officer's finding that an Investigator had harassed the grievant. Moreover, by listing three possible sources for approval, the hearing officer appears to have limited the chance that there would be any significant delay associated with the investigation approval process. Thus, we find no violation of the grievance procedure with respect to this particular recommendation.

*2. Recommendation to Discontinue Polygraph Procedures Involving Questioning Anyone about Private Consensual Sexual Behavior by Adults.*

The agency asserts that this recommendation is overly broad and intrusive. It also asserts that it is inconsistent with applicable law and regulations.

Beginning with the later objection, as stated above, claims that a decision is contradictory to law are properly raised with the circuit court. As to the contention that the hearing officer's recommendation regarding the discontinuance of questioning DOC employees about their private consensual sexual behavior was overly broad and intrusive, we cannot concur. Here, the hearing officer has held that the questions used by the agency infringed on the Constitutional liberty interest of the grievant, a DOC employee. As discussed above, the agency has objected to this holding as unlawful and therefore will need to raise this objection with the circuit court. Moreover, as described above, circuit court approval of a hearing officer's recommendation is necessary before any recommendation will be ordered to be implemented. Thus, given the circuit court's statutory role to (1) determine the question of the legality of the privacy holding, and (2) enforce hearing officer recommendations, we must allow the court to pass judgment on this recommendation and will not intervene.

*Publication of the Polygraph Questions*

In addition, the agency has requested that the actual questions posed to the grievant, which were listed in the original hearing decision, be redacted prior to publication. According to the agency, publication of the questions would pose a security threat by revealing them to other DOC employees, thus diminishing their value to the agency.

This Department will publish the original decision in a redacted manner until the circuit court rules on the question of the legality of the questions. If the circuit court

concludes (and any subsequent appeal confirms) that the questions were unconstitutional or otherwise unlawful, a copy of the original hearing decision containing all questions will replace the redacted version.<sup>30</sup> If the questions are ultimately deemed lawful, because the agency has provided evidence that publication will jeopardize the agency's ability to use the questions in the future,<sup>31</sup> the redacted copy shall remain and the remaining questions will not be published.

### CONCLUSION AND APPEAL RIGHTS

The decision is remanded to the hearing officer to address the overly broad order granting the grievant a witness of choice. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>32</sup> If the grievant does not elect to appeal to DHRM, the decision will become final when the hearing officer issues his revised decision. If the grievant appeals to DHRM, the decision becomes final when the DHRM Director issues her decision, *and* the hearing officer has issued all revised decisions ordered by the EDR and DHRM Directors. The date of the last of these decisions shall be considered the date upon which the hearing decision becomes final. Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>33</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>34</sup>

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Claudia T. Farr  
Director

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<sup>30</sup> If the questioning was determined to be unlawful, it would have to cease. Accordingly, because the security issue would be made moot, there would be no legitimate reason for not publishing the decision in its entirety.

<sup>31</sup> See February 12, 2006 affidavit of Assistant Inspector General of DOC, and February 24, 2007 letter from the Chairman of the Grievance & Ethics Committee of the American Polygraph Association.

<sup>32</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>33</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>34</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).