

Issue: Administrative Review/Hearing decision appeal; Ruling Date: April 10, 2007;  
Ruling #2007-1556; Agency: Department of Corrections; Outcome: hearing officer not  
in compliance



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

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections  
Ruling No. 2007-1556  
April 10, 2007

The grievant has requested that this Department administratively review the hearing officer's decisions in Case Number 8508. For the reasons discussed below, the hearing officer is ordered to consider and address any new issues raised in the grievant's second request for reconsideration dated February 19, 2007.

FACTS

Prior to his termination, the grievant was employed as a Corrections Officer with DOC.<sup>1</sup> On November 27, 2006, the grievant was issued a Group III Written Notice with removal for "failing to count but signing a count sheet indicating he had conducted a physical count."<sup>2</sup> The grievant challenged the disciplinary action by initiating a grievance on November 30, 2006.<sup>3</sup> The November 30<sup>th</sup> grievance was subsequently qualified for a hearing and a hearing was held on February 1, 2007.<sup>4</sup> In a February 2, 2007 decision, the hearing officer upheld the disciplinary action.<sup>5</sup>

On February 9, 2007, the grievant requested that the hearing officer reconsider his decision. In his request, the grievant disagrees with the hearing officer's finding that there were no mitigating circumstances and offers written witness statements dated December 2006 in support of his claim that the way he counted the inmates on the day in question was common practice among security staff. In a February 14, 2007 reconsideration decision, the hearing officer denied the grievant's request for reconsideration.<sup>6</sup> On February 19, 2007, the grievant requested a second reconsideration decision by the hearing officer based on "newly discovered evidence."<sup>7</sup>

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<sup>1</sup> See Decision of Hearing Officer, Case No. 8508 ("Hearing Decision"), issued February 2, 2007.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 5.

<sup>6</sup> See Reconsideration of Hearing Officer, Case No. 8508-R ("First Reconsideration Decision"), issued February 14, 2007.

<sup>7</sup> On February 15, 2007, one of the grievant's co-workers came forward and alleged that prior to the disciplinary action taken against the grievant, he had told his supervisor that physical counts were not taking place in accordance with policy and the supervisor stated that he would "take care of it." According to this witness, the supervisor failed to address the matter and had he done so, the grievant would not have

In a February 21, 2007 decision, the hearing officer declined to address the grievant's February 19, 2007 request for reconsideration on the basis that he lacks jurisdiction to do so.<sup>8</sup> Also on February 21, 2007, the grievant requested an administrative review by the Director of EDR of the hearing officer's original and First Reconsideration Decision. Additionally, on February 23, 2007, the grievant requested an administrative review by the EDR Director of the hearing officer's Second Reconsideration Decision.<sup>9</sup>

### DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."<sup>10</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>11</sup>

As stated above, on February 19, 2007, the grievant sought a second reconsideration decision from the hearing officer based on evidence he allegedly discovered on February 15, 2007, one day after the hearing officer issued his First Reconsideration Decision. In his Second Reconsideration Decision, the hearing officer states the following:

Grievant seeks administrative review of the February 14, 2007 Reconsideration Decision. The Grievance Procedure Manual does not authorize the Hearing Officer to provide administrative review of a Reconsideration Decision. Upon issuance of the Reconsideration Decision on February 14, 2007, the Hearing Officer no longer has jurisdiction of the grievance. Accordingly, Grievant's request is denied.<sup>12</sup>

Contrary to the hearing officer's conclusion, the grievant's February 19<sup>th</sup> request for reconsideration does not appear to be a request for administrative review of the First Reconsideration Decision but rather is a second request for reconsideration of the original

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been punished in this manner. This witness wrote a statement addressed to the hearing officer and asked him to reconsider his findings based upon the information he presented.

<sup>8</sup> See Reconsideration Decision, Case No. 8508-R2 ("Second Reconsideration Decision"), issued February 21, 2007.

<sup>9</sup> Although the grievant's request for administrative review of the hearing officer's Second Reconsideration Decision was received by this Department outside of the 15 calendar day period, this Department will address the grievant's request because the hearing officer's Second Reconsideration Decision raises an issue that could not have been challenged by the grievant until after the Second Reconsideration was issued. See EDR Ruling 2004-870.

<sup>10</sup> Va. Code §§ 2.2-1001(2), (3), and (5).

<sup>11</sup> *Grievance Procedure Manual* §§ 6.4; 7.2.

<sup>12</sup> Second Reconsideration Decision at 1.

decision.<sup>13</sup> The grievance procedure does not expressly allow or disallow a grievant from submitting multiple requests for reconsideration, nor does it expressly allow or disallow the hearing officer from ruling on such requests. However, this Department, which has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure,”<sup>14</sup> concludes that fairly read, the grievance procedure requires that the hearing officer and/or administrative reviewer consider all requests for reconsideration or administrative review that are received within the 15 calendar day time period.

In this case, the fifteenth calendar day after the issuance of the decision was Saturday, February 17, 2007. When the 15<sup>th</sup> day falls on a weekend or holiday, as was the case here, the party shall have until the following business day to timely seek an administrative review.<sup>15</sup> The grievant’s second request for reconsideration was sent to the hearing officer via e-mail on Monday, February 19, 2007.<sup>16</sup> As such, the grievant’s request for a second reconsideration of the original hearing decision was received by the hearing officer within the 15 calendar day time period. As stated above, this Department concludes that the hearing officer has jurisdiction to decide any and all requests for reconsideration that are received within the mandated 15 calendar day time period. Accordingly, the hearing officer is ordered to address and consider those issues raised in the February 19<sup>th</sup> request for reconsideration that were not previously addressed and considered in the First Reconsideration Decision dated February 14<sup>th</sup>. This ruling in no way determines that the hearing officer should modify his original decision, only that consideration of the grievant’s second request for reconsideration is warranted.

#### CONCLUSION AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to address and consider those issues raised in the February 19<sup>th</sup> request for reconsideration that were not previously addressed and considered in the First Reconsideration Decision. In accordance with the grievance procedure, all pending challenges to the Hearing Decision and First Reconsideration Decision will be stayed until the completion of the hearing officer’s reconsideration.<sup>17</sup>

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<sup>13</sup> In his second request for reconsideration, the grievant states: “The issue with the fact that the [December] letters I sent where [sic] not new evidence is understood, but now new evidence has come forward to me today that our supervisor knew about this before hand [sic] and took no action to correct the shift and therefore was accepting the fact that we were counting in this matter.”

<sup>14</sup> Va. Code §§ 2.2-1001(2), (3), and (5).

<sup>15</sup> See EDR Ruling No. 2003-486 (extending time period for requesting administrative review when final day fell on a weekend); EDR Ruling No. 2002-140 (same).

<sup>16</sup> The e-mail was sent to the hearing officer after business hours on February 19<sup>th</sup> and thus, was not opened and viewed by the hearing officer until the following day, February 20<sup>th</sup>.

<sup>17</sup> See Grievance Procedure Manual § 7.2(c) (“If multiple requests for administrative review are pending, a hearing officer’s decision on reconsideration or reopening should be issued before the DHRM and EDR Directors issue their decisions.”)

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's decision becomes a final hearing decision once all timely requests for administrative review have been decided and if ordered by EDR or DHRM, the hearing officer issues a revised decision.<sup>18</sup> 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>19</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>20</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>21</sup>

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Claudia T. Farr  
Director

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<sup>18</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>19</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>20</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

<sup>21</sup> Va. Code § 2.2-1001 (5).