Issue: Administrative Review/grievance procedure other issue; Ruling Date: September 21, 2006; Ruling #2007-1409; Agency: Department of Juvenile Justice; Outcome: hearing officer ordered to reopen hearing.

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

# ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling Number 2007-1409
September 21, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8378. For the reasons set forth below, both the original and reconsideration decisions of the hearing officer are vacated and the grievance is remanded for further proceedings in accordance with this ruling.

## FACTS

The grievant was involved in an incident that occurred when the grievant's hand contacted the face of a ward as the grievant attempted to assist officers who were coercing a ward back into his cell. The hearing officer's findings of fact provide the following description of the incident:

> On September 25, 2005, wards living in a housing unit at the Facility were agitated; some of the wards having to be restrained. One of the Ward's friends was restrained and this upset him. The Ward was inside his cell with the door locked. Sergeant E approached the Ward's cell door and opened it slightly in order to determine whether the Ward had attempted to tamper with the door lock to prevent it from locking. The Ward turned his body sideways and began pushing through the door entrance. He was attempting to exit his cell and get into the open area with the Juvenile Correctional Officers. He attempted to get past Sergeant E by ducking under Sergeant E's arms and pushing up against Sergeant E. During this process, the Ward was complaining to Sergeant E about how his friend was being poorly treated. Sergeant E was telling the Ward he should not be concerned about his friend and that he should step back into his cell. As the Ward and Sergeant E argued, the Ward continued to try to get past Sergeant E, but Sergeant E was successful in stopping him. The Ward began to comply with Sergeant E's instructions to move back into his cell. Sergeant E was de-escalating the conflict.

> Just as Sergeant E was resolving the matter with the Ward, The Grievant thrust his right arm over Sergeant E's left shoulder. Grievant's fist hit the left side of the Ward's face. The Grievant was attempting to reach over Sergeant E's shoulder and grab the Ward's arm in order to apply a physical restraint technique approved by the Agency. The Ward perceived Grievant's actions as an attack and became aggressive and combative. At that point, Sergeant E, the Grievant, and several other staff had to use physical force to restrain the Ward in his cell.

Following an investigation of the incident by members of the Inspector General's office, the grievant was charged criminally with misdemeanor assault. The grievant was found not guilty in early March 2006. On March 23, 2006, the agency issued a Group III Written Notice to the grievant based on this incident, which provided for a 10-day suspension. The only description of the conduct included on the form was: "On September 25, 2005, you struck a ward." The grievant, thereafter, initiated this grievance.

On May 2, 2006, at the second resolution step, the agency superintendent concluded:

> There is lack [sic] of sufficient evidence to support that [the grievant] intentionally struck the ward in the face and the court's finding of not guilty of assault, supports this argument. Therefore, there is little, if any, confirmation that the use of excessive force – resulting in the Group III – occurred.
>
> Therefore, I am willing to reduce the Group III to a Group II, for failure to follow proper procedure and established written policy (Section V.B.2.a of the Standards of Conduct). The suspension of 10 days will stand, as [the grievant's] actions had serious consequences, that could have potentially endangered the safety and welfare of the JCO's and ward and created potential injury to all those involved.

The agency superintendent also had discussed the incident with a trainer of the Primary Restraint Technique (PRT). The trainer indicated a number of "interventions" under these techniques that did not occur properly during the incident such as communication between the officers, the way in which the ward was approached, and the way in which the grievant reached for the ward. The agency superintendent recounted these deficiencies during the second resolution step without discussing or citing to a specific written policy that the grievant may have violated.

In a letter to the agency's director and following the May 2, 2006 statement of the agency superintendent, the grievant indicated that "I am now being reprimanded for failure to follow established policies and procedures when restraining a ward. This was never an identified concern nor was it part of the original charge that I have been dealing

with since the beginning of this incident." The grievant also believed that "the issued group III … was downgraded to a group II." In response to this letter, the agency's Human Resource Manager wrote to the grievant on May 18, 2006. In the letter, the Human Resource Manager made a "point of clarification" regarding the grievant's letter to the agency director:

> Please note that [the second resolution step] response included only an offer to reduce the level of discipline. This offer of relief was an attempt to reach a satisfactory accord between you and the Department, and to bring final resolution to your grievance. By advancing your grievance to a hearing, you are considered to have declined this offer, and your Group III notice therefore remains in effect.

After the agency director approved the grievance for hearing and EDR appointed a hearing officer, the grievant sent a letter, with a list of proposed witnesses, to the hearing officer on June 28, 2006. In the letter, the grievant indicated confusion regarding what charges he would be defending against at the hearing. After recounting the differences between the Group III Written Notice and the response at the second resolution step, the grievant stated:

> I am unsure of what my next step or action should be. … My confusion is will my testimony be geared to the original charge of assault or am I know [sic] defending the action taken against me for failure to follow proper procedure and established written policy.
>
> Any guidance that you can provide in this will be greatly appreciated.

By letter of July 5, 2006, the agency's advocate provided a list of witnesses and binder of potential exhibits to the grievant. Included within the binder of potential exhibits was an Institution Operation Procedure on the "Use of Physical Force," along with other materials including the written notice, investigation documents, training modules, and the DHRM Standards of Conduct. It is unclear how or when the grievant actually received these materials. However, on July 6, 2006, the hearing officer held a pre-hearing conference attended by the agency's advocate and the grievant. At this pre-hearing conference, the agency's advocate stipulated that the agency action was no longer a Group III offense, but rather a Group II. The agency's advocate indicated that the agency would be providing the grievant with copies of the policies the agency believed he violated during exhibit exchange. Based on the agency's advocate's statement on July 6, 2006, it can be assumed that the grievant did not receive the binder of potential exhibits by hand-delivery on the date of the letter, and, therefore, received the exhibits at some time after July 6, 2006.

The hearing was held on July 13, 2006. During opening statements, the agency's advocate indicated that the Group III Written Notice "was reduced" by the agency

superintendent to a Group II because the grievant's "method" was "contrary to training."[1] As a witness, the agency superintendent testified that the original Group III Written Notice was issued for "excessive force."[2] He further testified that, at the second resolution step and following further investigation, he had "mitigated" the notice to a Group II.[3] The agency superintendent was further questioned regarding what policy the grievant had violated. The agency superintendent testified that the grievant failed to follow the PRT procedure and that the procedure whereby the grievant's hand came over the shoulder of Officer E and hit the ward was "inappropriate."[4] The agency superintendent testified that he was "not sure" what policy that conduct "falls under."[5] The agency superintendent identified the Institution Operating Procedure on the "Use of Physical Force" as pertinent once brought to his attention by the agency's advocate.[6]

The hearing officer reduced the Group III written notice to a Group II offense for "failure to … comply with established written policy" and upheld the 10-day suspension. Under the Institution Operating Procedure 218-4.1(1), there are six described situations in which physical force is authorized. The hearing officer concluded that none of these six situations were present prior to the grievant's involvement in the incident on September 25, 2005. Therefore, the grievant "acted contrary to written policy thereby justifying the issuance of a Group II Written Notice."

On July 25, 2006, the grievant requested the hearing officer to reconsider his decision on the basis of bias, consideration of the evidence, and on the grounds that "I do not believe that I received adequate notice of the rule that I was accused of violating." The hearing officer issued a reconsideration decision denying the grievant's arguments.

## 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."[7] 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.[8]

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[1] Hearing Tape 1, Side 1, at Counter Nos. 45-52.
[2] Hearing Tape 1, Side 2, at Counter Nos. 373-77.
[3] *Id.* at Counter Nos. 385-400.
[4] *Id.* at Counter Nos. 408-425.
[5] *Id.* at Counter Nos. 425-26.
[6] *Id.* at Counter Nos. 426-30.
[7] Va. Code § 2.2-1001(2), (3), and (5).
[8] *See Grievance Procedure Manual* § 6.4(3).

*Due Process*

The grievant asserts that he never received clear notice of the charges against him. This objection, while not couched in terms of due process, squarely raises the issue. Due process is a legal concept appropriately addressed to the circuit court. Nevertheless, because due process is inextricably intertwined with the grievance procedure, this Department will address the issue of due process.

"The essence of due process is notice of the charges and an opportunity to be heard."[9] Moreover, the opportunity to be heard must be provided "'at a meaningful time and in a meaningful manner.'"[10] The United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[11] This represents the minimum amount of due process that the employee must receive.[12] "To satisfy procedural due process requirements, [the agency is] required, at a minimum, to give [the employee]: (1) notice of the charges against him, and (2) a meaningful opportunity to respond."[13] Therefore, a government employee must receive the requisite notice under the *Loudermill* standard for any hearing at which the employee is terminated, demoted, suspended, or otherwise disciplined to be constitutionally proper.[14]

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[9] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them.").

[10] Matthews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[11] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

> Prior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Department of Human Resource Management (DHRM) Policy 1.60 VII (E)(2). In addition, the Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[12] The *Loudermill* decision prescribes that such due process must be afforded an employee prior to the discipline or deprivation of property. However, this is the minimum amount of due process required given a later post-deprivation hearing with more protections in place (such as questioning witnesses, the presence of counsel, and the ability to present evidence). *See, e.g.*, Brock v. Roadway Express, Inc., 481 U.S. 252, 264-65 (1987); Loudermill, 470 U.S. at 545-46. The grievant's situation arises at the post-deprivation hearing step. However, there is no question that the agency must still comply with the minimum level of due process under the *Loudermill* standard at this stage, especially when the employee/grievant has not already been given the appropriate notice.

[13] Virginia Dep't of Corrections v. Compton, 47 Va. App. 202, 221, 623 S.E.2d 397, 406 (2005) (citing *Loudermill*); *see also* McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.").

[14] *See, e.g.*, Bass v. City of Albany, 968 F.2d 1067, 1069 (11th Cir. 1992); Morton v. Beyer, 822 F.2d 364, 371 (3d Cir. 1987); Miller v. City of Mission, Kansas, 705 F.2d 368, 371-72 (10th Cir. 1983); Campana v.

In this matter, the grievant was denied due process because he never received adequate notice of the charges against him or a summary of the evidence relied upon by the agency. Initially, the grievant was given a Group III Written Notice, which contained the following description of the charges and underlying facts: "On September 25, 2005, you struck a ward." However, during the process of the grievance, the charges against the grievant changed at various times in the agency's opinion. The result was that the grievant was not aware of the charges he would be defending against at the hearing. The agency appears to have contemplated three different theories of the grievant's wrongful conduct in this matter:

1) The grievant intentionally struck a ward (assault).

2) The grievant failed to follow the training techniques for how to engage in physical force (the way in which force was used).

3) The grievant failed to follow agency procedure in that none of the authorized reasons for using physical force occurred (that the grievant chose to use physical force at all).

Though the grievant was aware of the facts surrounding the Written Notice, he was not aware of why or on what theory he was being punished by the agency. The agency was required to tell the grievant what he did wrong and why it was wrong.[15] Without this notice, the grievant had no "meaningful opportunity to respond" to the charges because of the way in which the agency apparently shifted its interpretation of the grievant's conduct throughout the process.

Second Resolution Step

At the second resolution step, the agency superintendent "offered" to reduce the Written Notice to a Group II for "failure to follow proper procedure and established written policy." The grievant was also provided with some information about how his conduct may have been wrong under the second theory listed above, i.e., the agency superintendent identified various ways in which the grievant's conduct may have violated certain restraint techniques, none of which were specifically cited.

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City of Greenfield, 38 F. Supp. 2d 1043, 1054-55 (E.D. Wis. 1999); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing).

[15] *See* Loudermill, 470 U.S. at 545-546; *see also* O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) ("Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply."). This standard is complementary to the burden placed on grievants in that only those grounds asserted on a grievant's Form A will be permitted to proceed to hearing.

The information conveyed at the second resolution step was ineffective in providing any notice to the grievant of the charges against him for a number of reasons. First, the apparent misconduct cited was merely in connection with an "offer" to reduce the Written Notice to a Group II. When the grievant requested that the grievance proceed to hearing, the agency clarified this fact for the grievant. The agency stated that the Group III was still in effect and the grievant waived any offer to reduce the charge to a Group II. The grievant had every reason to believe, therefore, that the agency was proceeding under the original Group III Written Notice for striking a ward.[16] Second, the grounds for reducing the Written Notice to a Group II were that the grievant's conduct was a violation of "proper procedure and established written policy." However, in the agency's "offer" at the second step, no such "written policy" was identified. While due process and the grievance procedures will not always require the agency to list a particular policy that an employee has violated in the Written Notice, such policies should be specifically identified when the charge is for a violation of "established written policy." The grievant must have notice of the specific policy at issue to respond to the charges and participate meaningfully in a hearing.

Finally, and most importantly, the grievant was not ultimately punished for violating a written policy or procedure that specified the techniques for the way in which physical force is used.[17] The agency's case at the hearing was that the grievant violated an internal agency policy specifying when physical force could be utilized. The agency proceeded against grievant not because he had "struck a ward" or failed to follow proper procedure in the way he used force, but rather for his decision to use force at all. When the grievant requested a hearing, it appeared that he had been charged with a Group III violation for assault. Indeed, the agency also confirmed that they would be proceeding against the grievant on the Group III Written Notice as it was still "in effect." Thus, confusion over the ultimate charges was never resolved during the management resolution steps.

Hearing Stage

Certainly the agency has an opportunity to cure procedural deficiencies with the Written Notice prior to the hearing. However, such efforts must be accomplished well enough in advance of the hearing to provide the grievant with sufficient notice to prepare a defense and participate meaningfully in the hearing. In this case the agency never cured the violation of due process.

[16] It appears from the record that the parties differ, too, in their understanding of the limited language included in the Written Notice. Based on hearing testimony, the agency superintendent appears to have originally considered this a charge for using excessive force, whereas the grievant, quite reasonably, assumed it was a charge of assault. The distinction between these two theories is not important for disposition of this review. However, it is noted here to again point out the inadequacy of the Written Notice in providing notice to the grievant of the charges against him.

[17] No such written policy has been provided or was offered into evidence at hearing. Moreover, the second-step response largely focuses on improper technique rather than the grievant's decision to use any physical force.

Though the grievant requested early in the process to have the charges against him clarified, he did not receive notice that the agency was proceeding on a Group II theory until the pre-hearing conference seven days before the hearing. At that time, the agency's advocate stated that the agency would be proceeding at hearing on the basis that the grievant had committed a "violation of written policy," and that the relevant policy would be provided to the grievant during exhibit exchange. The agency never identified to the grievant the precise policy it charged him with violating or the way in which the grievant violated its terms. It is unclear when the grievant actually received this written policy in the agency's binder of exhibits.

Rather, the binder of the agency's exhibits contained different policies and training materials, any or all of which the grievant might have assumed the agency was going to argue that he violated. Therefore, simply providing this binder of exhibits did nothing to alleviate the grievant's confusion regarding the charges against him. Moreover, the particular written policy that the agency ultimately alleged the grievant had violated contains varying standards of conduct under which the grievant might be charged. The policy both prescribes situations in which physical force can be used and provides that only the minimum amount of force should be used to bring a ward under control. When the grievant read this policy, he would not have known if the agency was proceeding against him for using force in an inappropriate manner, or for using force at all. The agency is required to provide notice of why the grievant's conduct was wrongful. It is not proper for the agency to shift the burden to the grievant by providing him with materials to determine for himself that nature of the charges against him.[18]

As the hearing progressed, the grievant would not have been able to determine what policy he violated, or why the agency was arguing his conduct was wrongful. During the opening statements, the agency's advocate stated only that the grievant's conduct was "contrary to training." Indeed, one of the agency's witnesses, a training officer, discussed both the times in which force is permitted to be used, and the way in which that force should be used. The grievant could not have known what the agency's theory against him was until the agency superintendent was questioned as a witness and identified the internal agency policy on the use of force as the relevant policy at issue.[19] The agency superintendent was the agency's fourth and final witness. Therefore, the grievant was not given notice of the actual charges against him until the agency closed its case at the hearing itself. There can be no question that such a practice violates due process.

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[18] Morton v. Beyer, 822 F.2d 364, 371 n.10 (3d Cir. 1987); *see also* Otero v. Bridgeport Housing Auth., 297 F.3d 142, 152 (2d Cir. 2002) ("Mere notice of the charge, however, is not an explanation of the evidence and does not necessarily suffice to provide due process.").

[19] The agency's own confusion at the evolving charges is apparent in the agency superintendent's testimony. He began by stating that the way in which the grievant used force was inappropriate and a violation of procedure. When asked to identify a particular written policy, the agency superintendent testified that he was "not sure" what policy the conduct would "fall under."

Effect of failure to provide notice

The grievant must have notice of the charges against him to be able to participate meaningfully in the grievance process. For purposes of this hearing, the agency only provided the grievant adequate notice that he might be charged with a Group III offense for striking a ward. The issues underlying such a charge are different than those underlying the agency's theory of violating a written policy that prescribed when force was authorized to be used. Under an assault charge, the agency would have needed to show that the grievant intentionally struck the ward.[20] The grievant arrived at the hearing prepared to show, and ultimately succeed in showing, that he did not *intentionally* strike the ward. However, under the Group II theory for violation of written policy, the agency would need to show that none of the following situations occurred to permit the grievant to engage in physical force: self-defense, defense of others, prevention of escape, prevention of property damage of significant value, protection of a youth from harming himself, and prevention of the commission of a crime. Alternatively, if the agency was proceeding under the Group II theory for failing to use the appropriate technique of physical force, the agency would need to present the policy that establishes the proper techniques and show how the grievant violated them.

These theories of offenses require proof of exceedingly disparate standards of conduct. For example, to defend the Group III charge of striking a ward, the grievant's witnesses were either eye witnesses to the event or offered on the issue of the grievant's character. If the grievant had been given notice of the Group II charges ultimately brought against him at hearing, he may have offered testimony from additional witnesses regarding the use of physical force in other situations to show that he did not violate the internal policy on the use of force.[21] He might have sought additional documents from the agency regarding those similarly charged under this rule or procedures. In summary, the grievant presumably would have attempted to present evidence to show why physical force was authorized, rather than defending a charge of assault. Because the charges the grievant thought he was defending against, based on the notice he had received, were different than those the agency pursued at hearing, the grievant did not receive due process of law.

[20] While the language "struck a ward" does not necessarily indicate a charge of assault, it is apparent from the grievance record that both the grievant and the agency superintendent considered and evaluated the original Group III charge as one involving *intentional* conduct.

[21] While the grievant has not identified specific witnesses he might call, he has indicated that his questioning even of those witnesses present at the hearing might change given the different charges. Moreover, the grievant had raised his concern regarding inadequate notice multiple times during the grievance process. In addition, the grievant identified one piece of evidence he might have chosen to use, i.e., the "video tape." A recording would be much more relevant to depict the surrounding events of the incident as they occurred to determine whether the use of physical force was authorized under the internal policy. The "video tape" would be much less relevant to show the grievant's state of mind on a charge of intentional assault.

The Department recognizes that the issues raised in this appeal concern fact-specific problems. Agencies should follow the standards provided in *Loudermill*, DHRM policies, and the instructions on the written notice itself to define the appropriate level of detail necessary to provide employees with adequate notice of the charges against them. In this case, the grievant did not receive a written notice with appropriate detail, and this lack of clarity was never corrected by the agency. Moreover, the agency changed its theory of the grievant's conduct multiple times, without providing this information to the grievant, even though he requested clarification. Employees must receive adequate notice of the charges against them with sufficient time before the hearing to prepare their defense and participate meaningfully. The grievant was not afforded the notice that due process requires and was, therefore, prevented from responding meaningfully to the charges.

*Other Bases of Appeal*

Bias

The grievant also claims that the hearing officer was biased in favor of the agency. The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.[22] While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.[23] In this case, the grievant has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial or pecuniary interest" in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer showed bias in this case.

Weight of Evidence

The grievant further asserts that the hearing officer did not give enough weight to the evidence he presented in his defense. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[24] and to determine the grievance based "on the material issues and grounds in the record for those findings."[25] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[26] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

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[22] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992) (alteration in original).
[23] *See, e.g.*, EDR Ruling Nos. 2003-113 and 2004-640.
[24] Va. Code § 2.2-3005(C)(ii).
[25] *Grievance Procedure Manual* § 5.9.
[26] Va. Code § 2.2-3005(C)(5).

In the present case, the grievant claims that the hearing officer did not adequately consider the evidence he presented at hearing and that such evidence is not mentioned in the decision. He does not point to any particular evidence that was purportedly not properly considered. Determinations as to disputed facts, the weight and credibility of various witnesses and evidence, the resulting inferences drawn, the characterizations made, and the facts chosen for inclusion in the decision are entirely within the hearing officer's authority and will not be disturbed when there is evidence in the record that supports the findings set forth in the decision. Based on the evidence in the hearing record, this Department cannot conclude that the hearing officer's findings or conclusions regarding the incident are unsupported by the hearing record.

## CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

The hearing officer is ordered to reopen the hearing in accordance with the terms set forth in this decision. The grievant shall be provided sufficient time and opportunity to gather documents and witnesses before the subsequent hearing is held. At the reopened hearing, the grievant will have the opportunity to present additional evidence and testimony to counter the agency's charge of a Group II "failure to … comply with established written policy," i.e., Institution Operating Procedure 218-4.1(1), which provides:

> Physical force is authorized for self-defense, the defense of others, to prevent an escape, to prevent property damage of significant value, to protect a youth from harming himself, and to prevent the commission of a crime. Physical force should be used only when other alternatives have failed or appear unsuitable. When it is deemed necessary to use physical force to control a ward, only the minimal amount of physical force necessary is to be used.

The hearing officer found that the grievant's conduct violated this policy because he "was not authorized by policy to use physical force." Because the agency already presented its case and evidence on this Group II charge at the July 13, 2006 hearing, the agency is not permitted to offer any new evidence or testimony, except to rebut grievant's newly offered evidence and testimony.

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.[27] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction

[27] *Grievance Procedure Manual* § 7.2(d).

in which the grievance arose.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

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Claudia T. Farr
Director

[28] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.; see also* Virginia Dep't of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).