Issue: Administrative Review of Hearing Officer's Decision in Case No. 8597; Ruling Date: September 12, 2007; Ruling #2008-1783; Agency: Department of Corrections; Outcome: Remanded - 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 Number 2008-1783
September 12, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8597. For the reasons set forth below, the grievance is remanded to the hearing officer for further proceedings in accordance with this ruling.

FACTS

This case concerns a grievance regarding a Group I Written Notice that the grievant received for failure to follow a supervisor's instructions.[1] The grievant had been instructed to conduct searches of inmates' cells.[2] However, by the end of the grievant's shift, she had not conducted any of these searches.[3] The disciplinary action was upheld in a hearing decision issued July 20, 2007, following the June 4, 2007 hearing.[4] The grievant has requested administrative review from this Department. She alleges that the agency did not assist in having one of her witnesses, an agency employee, Captain A, appear for hearing. This witness was ordered to attend the hearing by the hearing officer, but did not appear.[5] In addition, the grievant seeks to present a report and witness statements from other unnamed witnesses who she alleges were unable to come to the hearing. She also claims that Institutional Policy 441-7.1 was not followed.

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."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

[1] Decision of Hearing Officer, Case No. 8597, July 20, 2007 ("Hearing Decision"), at 1.
[2] *Id.* at 3.
[3] *Id.* at 3.
[4] *Id.* at 1, 4. The hearing officer affirmed his original decision on reconsideration. *See* Reconsideration Decision, Case No. 8597-R, Aug. 6, 2007 ("Reconsideration Decision").
[5] Reconsideration Decision at 1.
[6] Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[7]

Witness Issue & Adverse Inferences

The grievant claims that Captain A, an agency employee, did not attend the hearing even though ordered to appear by the hearing officer as a witness. Pursuant to the Rules for Conducting Grievance Hearings, it is the *agency's* responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.[8] To that end, consistent with the Rules for Conducting Grievance Hearings,[9] the hearing officer's witness order was sent to both the agency's advocate and the grievant, in addition to the witness. When a hearing officer orders an agency employee to attend a hearing, the agency must ensure that the witness appears for the hearing.

In this case, the hearing officer ordered Captain A, a member of agency management, to attend the hearing. However, he did not attend. As the agency has presented no evidence to the contrary, this Department can make no conclusion other than that the agency failed to require that Captain A appear for the hearing. Moreover, there is no other evidence in the record of other extenuating circumstances about why Captain A did not attend. Therefore, because it was the agency's responsibility to have Captain A appear for the hearing as a witness, the hearing officer had the authority to draw an adverse inference against the agency.[10] In this case, the hearing officer did not draw an adverse inference, on the basis that, as stated in the reconsideration decision, the grievant did not argue at hearing that the hearing officer should draw an adverse inference.[11]

Whether a party asserts at hearing that an adverse inference should be drawn is not determinative as to whether the hearing officer should draw an adverse inference. There is no requirement that a party request an adverse inference for it to be permissibly drawn. Indeed, it is the responsibility of the hearing officer to consider whether and to what extent an adverse inference is appropriate in a given situation irrespective of a party's request for an adverse inference. However, in this case, although the hearing officer had the necessary authority to draw an adverse inference (even absent a specific request from the grievant), there is nothing in the record describing the prospective content of Captain A's testimony, or the disputed material fact that Captain A's testimony would address. Because the hearing officer had no record basis upon which to draw an adverse inference, the grievance will not be remanded to him on this issue.

Institutional Policy

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[7] *See Grievance Procedure Manual* § 6.4(3).
[8] *Rules for Conducting Grievance Hearings* § III.E ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").
[9] *Id.* ("Orders should be issued in the name of the hearing officer and mailed by the hearing officer to the appropriate individual(s), with a copy to each party.").
[10] *Rules for Conducting Grievance Hearings* § V.B ("Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered."). In such a case, an adverse inference may be drawn "with respect to any factual conflicts resolvable by the ordered documents or witnesses." *Id.*
[11] Reconsideration Decision at 2.

The grievant also claims that the hearing decision is inconsistent with Institutional Policy 441-7.1.[12] In the reconsideration decision, the hearing officer stated that the grievant did not identify how the policy was not followed and did not express the significance of any failure to follow that policy.[13] While it is true that the grievant has provided very little detail about her argument concerning Policy 441-7.1, once the policy is reviewed, her argument should be readily apparent.

Policy 441-7.1 concerns searches of housing units at the Institution. Specifically, the policy provides for the required participants of search teams to conduct searches of inmates' cells. The grievant has argued that she did not have sufficient support to conduct the searches as ordered.[14] In the Findings of Fact portion of the hearing decision, the hearing officer found that "[t]wo security staff are needed to search a cell."[15] However, if Policy 441-7.1 applies to the searches at issue in this case, the hearing officer's finding would appear to conflict with the search team requirements of the policy. Though the precise provisions will not be listed here, by its plain language, the policy requires more than two staff members to conduct the searches.[16]

Because of the questions raised by this policy, this case must be remanded for further consideration. The hearing officer is directed to consider Institutional Policy 441-7.1.[17] The hearing officer should determine whether the policy applies to the searches at issue in this grievance and, if so, reconsider his decision in light of the requirements of the policy. If the hearing officer deems it prudent to take additional evidence on this issue, he may re-open the hearing to receive additional testimony from both sides or to have each side submit sworn written statements as to the application of the policy to the grievant's case.

New Evidence

The grievant seeks to have a report considered that was not presented at hearing. If the grievant is arguing that the report is newly discovered evidence, there is no indication that the report meets the requirements of the standard recently adopted by EDR.[18] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or

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[12] The grievant raised this concern to the hearing officer, DHRM, and this Department.
[13] Reconsideration Decision at 1.
[14] *E.g.*, Hearing Decision at 3.
[15] Hearing Decision at 2.
[16] This Department recognizes that its ruling on this issue may involve a question of policy normally reserved for consideration on administrative review by DHRM. However, DHRM has already issued its ruling in this case and did not consider this precise question raised by the grievant's arguments. Indeed, DHRM stated in its letter that the grievant identified the failure to follow Institutional Policy 441-7.1, but then did not address the issue. Because this Department sees a potential inconsistency with the policy in this case, we are forced to address this point based on a plain reading of the policy, to properly complete this administrative review and determine whether the hearing decision was consistent with the grievance procedure. The "hearing decision must be consistent with law and policy." *Grievance Procedure Manual* § 7.1.
[17] This Department is aware that this policy was not specifically raised during the hearing. However, that does not prevent a party from arguing that the hearing decision may have been inconsistent with a policy in existence at the time the conduct giving rise to the grievance occurred. As such, when the grievant identified the policy in her request for reconsideration, the hearing officer should have reviewed the issue in more depth.
[18] *See* EDR Ruling No. 2007-1490.

discovered) by the aggrieved party until after the trial ended.[19] However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[20]

The grievant has provided no information to support a contention that the report should be considered newly discovered evidence under this standard. There is no basis to re-open the hearing for consideration of this report.

The grievant also seeks to offer various statements of witnesses who were unable to attend the hearing. The grievant has not provided any information about the status of these witnesses, why they were unable to attend the hearing, or whether their reasons for not attending were unforeseen. For instance, there is no explanation as to why the grievant could not have obtained these witness statements prior to the hearing. As such, the grievant has not provided sufficient grounds to re-open the hearing for inclusion of these witness statements not offered at the hearing. Moreover, the grievant has provided no evidence that these statements would satisfy the "new evidence" standard stated above.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer must reconsider his decision and determine whether Institutional Policy 441-7.1 applies to this case and to what extent the policy affects the outcome. 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.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

Claudia T. Farr
Director

[19] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989). If the grievant is arguing that the report is newly created, i.e., not in existence at the time of the hearing, the report would not be considered newly discovered evidence warranting a reopening of the hearing.
[20] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F. 2d 255, 259 (11th Cir. 1987)).
[21] *Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[23] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).