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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2023-5541
April 17, 2023

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") to challenge the hearing officer's prehearing ruling in Case Number 11913, which denied the grievant's request to limit or disqualify the participation of the advocate chosen by the Department of Corrections ("the agency") in this case. For the reasons discussed below, EDR agrees with the hearing officer's prehearing ruling. In addition, the grievant seeks a ruling to address the admissibility of evidence. Because the hearing officer has yet to make an initial determination on that issue, however, EDR declines to rule on the matter at this time.

PROCEDURAL BACKGROUND

The grievance at issue in Case Number 11913 challenges the grievant's receipt of a Group III Written Notice with termination of employment for allegedly sleeping during work hours. On March 7, 2023, the grievant, who is represented by a lay advocate, submitted a motion to the appointed hearing officer arguing that the agency's chosen advocate does not have authority to represent the agency in grievance hearings. The agency's advocate is an employee of the agency and also an attorney licensed to practice law in Virginia. Central to the grievant's argument is a portion of Virginia Code Section 54.1-3900, which states:

> *Nothing herein shall prohibit an employee of a state agency in the course of his employment from representing the interests of his agency in administrative hearings before any state agency, such representation to be limited to the examination of witnesses at administrative hearings relating to personnel matters and the adoption of agency standards, policies, rules and regulations.*

The agency does not assert that its advocate is representing the agency as legal counsel, but rather as a lay advocate. The grievant asserts both that the agency's advocate, as a bar-admitted attorney, cannot act as a lay advocate, and that the agency's advocate, if acting as a lay advocate, would have authority to represent the agency only through the examination of witnesses at hearing, citing to the above Code section. The apparent outcome sought by the grievant is to either disqualify the agency's advocate from serving at all or limit the agency advocate's participation in the hearings

process to examination of witnesses at the hearing. The hearing officer has determined that the agency's advocate may serve in a full capacity in this case. The grievant sought reconsideration of the hearing officer's decision, but the hearing officer has maintained his original determination. Accordingly, the grievant now seeks a compliance ruling from EDR addressing the same question for review.

In addition to the matter of the agency's advocate, the grievant's compliance ruling request seeks to limit the agency from introducing certain evidence at hearing. In short, the grievant argues that the agency must be limited to evidence identified in the due process notice in this case, citing to the Correctional Officer Procedural Guarantee Act (COPGA).[1] The information made available to EDR does not reflect that this specific argument has been addressed by the hearing officer.

DISCUSSION

Hearing Advocate Issue

EDR has reviewed the grievant's motion to disqualify or limit the representation of the agency's advocate. We agree with the hearing officer's analysis that the agency's advocate may represent the agency in grievance hearings without the limitations allegedly imposed by Virginia Code Section 54.1-3900. The hearing officer's determination is consistent with EDR's interpretation of the grievance procedure and statutes, as further explained below.

Virginia Code Section 54.1-3900 addresses who can practice law in the Commonwealth of Virginia (essentially, attorneys licensed by the Virginia State Bar) and provides certain exceptions for specific situations. One of these exceptions, cited by the grievant, allows an individual to perform services normally reserved for an attorney and not be subject to criminal charges for unauthorized practice of law, which is defined as a Class 1 misdemeanor in Virginia Code Section 54.1-3904. Section 2.2-3004(E) of the grievance statutes provides its own exception to the unauthorized practice of law provisions, which states, in pertinent part, "[t]he employee and the agency may be represented by legal counsel or a lay advocate, the provisions of § 54.1-3904 notwithstanding." EDR's interpretation of the grievance statutes is that the General Assembly intended to allow parties in grievance hearings to be represented by a lay advocate without limitations. The grievant's argument concerning Section 54.1-3900, therefore, arguably asserts a conflict between statutory provisions for EDR's consideration in this ruling.

The grievant has provided legislative history for Section 54.1-3900 indicating that the cited language was added to the Code in 1976. We presume, though the Code is unclear, that the "administrative hearings related to personnel matters" referenced in 54.1-3900 includes grievance hearings. At that time, grievance procedures for state government had only recently been established.[2] Further, the few grievance hearings existing at that time were panel hearings and were intended to be informal in nature.[3] However, the grievance procedure and statutes have evolved since 1976 to become a different process today, such as, for example, the creation of administrative

[1] Va. Code §§ 9.1-508 to -512.
[2] *See* 1970 Va. Acts Ch. 546; *see also* 1973 Va. Acts Ch. 7.
[3] *See* 1977 House Doc. 12, *A Study on Personnel Management Within the Commonwealth of Virginia*, at 84 ("Grievance procedure panel hearings are not intended to function as courts of law with rigid procedures, rules of evidence, etc. They are designed to be less rigid hearings conducted by peers to resolve individual differences between the employee and the State agency.").

hearings overseen by a hearing officer who is an attorney. The language in the grievance statutes allowing lay advocates to represent parties without the limitations listed in Section 54.1-3900 appears to have been amended to its current form in 1995.[4] The significant amendments to the grievance statutes at that time coincide with the change from panel hearings to hearings administered by a single hearing officer.[5] EDR cannot reconcile the grievant's interpretation of Section 54.1-3900, purportedly limiting agency-employee lay advocates, and the language of the grievance statutes amended by the legislature in 1995, which places no limitation on representation by lay advocates. Consequently, EDR interprets the General Assembly's intent through its latest pronouncement in 1995, in the context of the current format of grievance hearings, to allow for full representation of grievance parties by lay advocates. Section 2.2-3004(E) is also the most directly applicable to grievance proceedings in that it appears in the grievance statutes themselves (Chapter 30 of Title 2.2), rather than the provisions of Title 54.1 addressing the unauthorized practice of law in the Commonwealth more generally.

EDR's interpretation is also consistent with longstanding practices of allowing grievance parties to select their own advocates. To EDR's awareness, over the past decades, agencies have been represented by attorneys and non-attorneys, agency employees and non-employees. Under our interpretation of the grievance statutes described above, EDR has not applied special scrutiny to advocates based on their employment status, or whether they appear as "legal counsel" for the agency. Indeed, EDR's *Grievance Procedure Manual* and *Rules for Conducting Grievance Hearings* have stated clearly that both parties may be represented by a person of their choice, regardless of whether that person is an attorney, without limitations on their authority for decades, in concert with the grievance statutes.[6] Consequently, because parties have relied for many years on the ability to choose an advocate freely, the General Assembly is presumed to be cognizant of and acquiesced in EDR's application[7] of the grievance statutes, or else the numerous statutory amendments over the years could have clarified any divergent intent of the legislature.[8]

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[4] 1995 Va. Acts Chs. 770, 818. Similar language has existed in the grievance statutes since 1978. At that time, the Code was amended to state: "Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives." 1978 Va. Acts Ch. 845 (former Va. Code § 2.1-114.5:1(D)). The language was further amended in 1979 to add an exception to the unauthorized practice of law provision, resulting in the following: "Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives at the panel hearing, and such representatives may examine, cross-examine, question and present evidence [on] behalf of the grievant or respondent before the panel without being in violation of the provisions of § 54-44 of the Code of Virginia." 1979 Va. Acts Ch. 734. To the extent this language providing for what representatives may do at the panel hearing could be read as limitations on their authority, the 1995 amendments that do not include those specifications are all the more indicative of an intent to permit representation by legal counsel or lay advocate without qualification.

[5] 1995 Va. Acts Chs. 770, 818.

[6] For example, the version of the grievance procedure made effective July 1, 1995 states simply, "Each party may be represented by an individual of choice." Similar language appears in the current version of the *Grievance Procedure Manual* in Section 5.8 ("Parties may represent themselves or may be represented by an individual of choice; this advocate does not have to be an attorney . . . .").

[7] *See*, *e.g.*, Peyton v. Williams, 206 Va. 595, 599, 145 S.E.2d 147, 151 (1965) ("The elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to be given weight by the court. The legislature is presumed to be cognizant of such construction. When it has long continued without change the legislature will be presumed to have acquiesced therein."); *see also*, *e.g.*, Dan River Mills, Inc. v. Unemployment Comp. Comm'n, 195 Va. 997, 1002, 81 S.E.2d 620, 623 (1954) ("It is well settled that where the construction of a statute has been uniform for many years in the administrative practice, and has been acquiesced in by the General Assembly, such construction is entitled to great weight with the courts.").

[8] EDR will obviously adhere to the legislature's stated intent if it were to be clarified in the future.

Moreover, if we were to attempt to follow the grievant's interpretation of Section 54.1-3900, unacceptable inconsistencies appear to arise. For example, according to the grievant, when an agency chooses to have one of its employees represent the agency as a lay advocate at a grievance hearing, that advocate would be limited in their ability to represent the agency to the examination of witnesses at hearing. Other representative acts before the tribunal, such as involvement in pre-hearing matters (including scheduling, identification of witnesses and exhibits, procedural disputes, and discovery), objections and arguments during the hearing, or even appellate procedures, the grievant appears to argue, would be outside the authority of such an advocate. Yet the grievant's chosen advocate would be able to communicate the grievant's position to the tribunal at any phase. EDR would not interpret the grievance procedure to permit such unequal opportunities for the parties' chosen advocates to address the tribunal.[9] As another example, the limitations purportedly described in Section 54.1-3900 would only apply to lay advocates employed by the agency involved in the case, and not to a lay advocate that is not employed by the agency. Therefore, if the legislature's intent was to curtail the representation of agencies by lay advocates in grievance hearings, the provisions of 54.1-3900 would not accomplish that result. EDR is not aware of a rationale for treating agency-employed lay advocates differently from other lay advocates the agency might choose to have represent their interests.

In addition, the agency's advocate points out that he is in fact a bar-licensed attorney, making the concerns of unauthorized practice of law arising from Sections 54.1-3900 and 54.1-3904 inapplicable. EDR is persuaded by this argument under the facts of this case. The agency's advocate cannot be viewed as engaging in the unauthorized practice of law, making the concerns listed in Section 54.1-3900 inapplicable. Nevertheless, EDR's determination in this ruling is not reliant on the agency advocate's status as a bar-licensed attorney. Though not raised by the facts of this case, the grievant's argument could be asserted in a case in which an agency has chosen to be represented by one of its employees who is not a Virginia attorney, which happens not infrequently in grievance hearings. Based on EDR's analysis in this ruling, such lay advocates should not be limited in their representation of their employing agency.

Finally, the grievant asserts that the agency's advocate cannot shed his status as an attorney and serve as a "lay" advocate. EDR is aware of no authority that would limit the agency from selecting an individual who is a bar-licensed attorney from representing the interests of the agency as its advocate while not serving as legal counsel;[10] nor do we identify a rationale to exclude attorneys as grievance advocates only when they are employed by the agency. Nothing in the grievance statutes allowing for representation by lay advocates limits the selection of such an advocate to non-attorneys.[11] EDR interprets the grievance statutes as permitting either party to utilize a bar-licensed attorney as a "lay advocate."[12] As the grievant points out, the Code provides

[9] Hearings are to be conducted in an "orderly, fair, and equitable fashion, pursuant to the provisions of the *Grievance Procedure Manual*." *Rules for Conducting Grievance Hearings* § IV(C).

[10] In general, the question of the role of a bar-licensed advocate as to the advocate's client would be addressed by the ethical guidelines for Virginia attorneys. However, legal ethics are not at issue for purposes of EDR's determination as to who has authority to serve as an advocate in grievance hearings. Where, as here, the agency appears to be well aware of its advocate's role as a lay advocate and not its legal counsel and presumably consents to such representation, EDR is not aware of any concerns in that regard that impact our analysis in this ruling.

[11] Va. Code § 2.2-3004(E).

[12] For example, a grievant may be represented by an attorney who is not licensed in the Commonwealth of Virginia. Such a non-Virginia attorney would potentially be engaging in the unauthorized practice of law in a grievance hearing but for the exception provided in Section 2.2-3004(E). That attorney could not be viewed as legal counsel for the grievant, but rather a lay advocate who is also an attorney.

that legal counsel for agencies is generally the purview of the Office of the Attorney General ("OAG"), or special counsel chosen by that Office.[13] However, this provision would only limit the authority of the agency to employ true legal counsel, which is not how the agency's advocate is employed in this case. Further, the Code also contemplates that an agency, with the authorization of the OAG, may be represented in administrative proceedings by an agency employee "[n]otwithstanding any other provision of law."[14] The agency advocate states that the OAG is aware of his representation of the agency in grievance hearings, and EDR is aware of no objection from the OAG on this issue. To the extent applicable, Section 2.2-509 would seem to supplant any limitations expressed in Section 54.1-3900, in that it controls "notwithstanding any other provision of law" and provides for no limitations to the representation of an agency in administrative proceedings by one of its employees.

Based on the foregoing analysis, EDR finds no basis to disqualify the agency's advocate in this case or to limit his ability to represent the agency. EDR declines to disturb the hearing officer's ruling in this regard.

Admissibility of Evidence

The grievant asserts that the agency's evidence must be limited to items specifically listed on the due process notice issued in this case. According to the grievant, the notice states: "Below are the offenses you are being charged with, the Department's evidence in support of those charges, and the disciplinary actions that may result." The notice cites to a "supervisor report." The grievant appears to argue that the agency's evidence at the grievance hearing therefore must be limited to only the supervisor's report. The grievant further argues that the COPGA "exists to prevent the [agency] from gathering evidence post disciplinary action." Accordingly, the grievant asserts that the agency violates the COPGA and the grievant's due process rights by seeking to introduce "additional evidence post discipline."

As the agency points out, the hearing officer has not ruled on the grievant's objection because the grievant sought this ruling before the hearing officer ruled. Accordingly, an objection that raises a question as to the admissibility of evidence should be addressed by the hearing officer first before EDR rules.[15] As general guidance offered for efficiency's sake, EDR would observe that there is nothing in the grievance procedure that would limit an agency's introduction of evidence at the hearing to items identified at the time of due process in a disciplinary case. Further, our reading of the COPGA provides no limitation either. Rather, the COPGA appears to be consistent with the requirements of pre-disciplinary due process[16] and does not include a provision that requires an agency to produce all evidence at the time of pre-disciplinary due process.[17]

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[13] *See* Va. Code § 2.2-507.
[14] Va. Code § 2.2-509.
[15] *See Grievance Procedure Manual* § 6.4.
[16] The essence of pre-disciplinary due process is "notice" and an "opportunity to respond"; the process need not be elaborate and serve only as an "initial check against mistaken decisions." *E.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). Such pre-disciplinary procedures stand in contrast to those afforded by the full administrative post-disciplinary hearing offered in the grievance process, before which the grievant receives notice of all of the agency's evidence with the ability to present their own evidence and witnesses and cross-examine the witnesses of the agency.
[17] Virginia Code Section 9.1-509 provides that a "correctional officer shall be notified in writing of all charges, the basis therefor, and the action that may be taken." The Code does not appear to mandate the production of all of the agency's evidence at that stage.

Nevertheless, the grievant's objection is for the hearing officer to address first. To the extent either party disagrees with the hearing officer's determination, a ruling from EDR could be requested or the matter could be the subject of an administrative review request appealing the hearing officer's ultimate decision.[18]

EDR's rulings on matters of compliance are final and nonappealable.[19]

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[18] *Grievance Procedure Manual* §§ 6.4, 7.2(a).
[19] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).