Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: July 19, 2016; Ruling No. 2017-4399; Agency: Department of Social Services; Outcome: Hearing Officer Not in Compliance.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Social Services
Ruling Number 2017-4399
July 19, 2016

The Department of Social Services (the agency) and the Office of the Attorney General (OAG) have requested a compliance ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management to challenge the hearing officer's issuance of a witness order to an attorney at the OAG (OAG Attorney) to testify in Case Number 10823. The agency additionally argues the OAG Attorney should not be a witness and any testimony potentially sought in this case should be inadmissible. For the reasons discussed below, EDR finds that the hearing officer's order requiring the attendance of the OAG Attorney must be rescinded and the OAG Attorney need not attend the hearing to testify.[1]

In this case, the grievant has sought the testimony of the OAG Attorney because of his involvement in representing the agency in an investigation by the federal government.[2] While it is a hearing officer's decision to issue witness orders and/or admit and exclude evidence, EDR has final authority on matters of compliance with the grievance procedure.[3] There are no formal evidentiary rules applicable to grievance hearings and there are few specific exclusions from evidence provided by the Virginia Code in such cases. The limited discovery available under the grievance procedure as well as the standard for the admission of evidence is ultimately determined by the question of "just cause" in each particular case.[4] In analyzing complex evidentiary issues under this standard, EDR has typically used a balancing test to weigh the various interests involved to determine the outcome.[5]

The agency and the OAG have expressed strong arguments as to why testimony from the OAG Attorney should not be heard. Much of an OAG attorney's potential testimony could be covered by the attorney-client privilege, and those portions that might not be, could additionally be information to which the OAG Attorney owes a duty of confidentiality to the agency.[6] Even

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[1] This ruling is also being issued one day after it was requested and within hours of receiving the grievant's response so as not to disrupt the previously scheduled hearing date. To the extent the analysis in this ruling is brief, it is due to the amount of available time.
[2] EDR is unaware of much about the details of this investigation or whether there are other investigating agencies. For purposes of this ruling, it is being discussed as an investigation by a single federal agency.
[3] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).
[4] *See* Va. Code § 2.2-3003(E); *Rules for Conducting Grievance Hearings* § IV(D).
[5] *See*, *e.g.*, EDR Ruling No. 2016-4289.
[6] *See*, *e.g.*, Va. Rules of Professional Conduct, Rule 1.6.

if there is a plausible way around the privilege and confidentiality issues that would allow the OAG Attorney to testify ethically as to limited points, there is a substantial impact to the OAG and the agency as it could result in the OAG Attorney, and potentially other members of the OAG in other cases, being disqualified as counsel in whole or in part in current or future matters.[7] It is EDR's determination that it would have to be an extraordinary case with a demonstrated significant need for the evidence for an attorney from the OAG to be a witness in a grievance hearing. In addition, some of the potential testimony being sought relates to the agency's purported attempts to settle or conclude an investigation by the federal government. While not on all fours, the general principles underlying Virginia Rule of Evidence 2:408, concerning conduct or statements during "compromise" negotiations, would suggest that there are policy considerations for not invading into this content through the testimony of the agency's counsel.

On the other side, the grievant appears to desire to use the testimony of the OAG Attorney to demonstrate that the grievant was a "scapegoat" offered to the federal government as part of the investigation in an effort to bolster the appearance of the agency's handling of the matter. The grievant seeks to use this evidence to show that 1) he was improperly singled out for selective discipline, 2) the disciplinary actions were out of proportion to the conduct at issue, and 3) the agency had a motive unrelated to the alleged misconduct (presumably using the grievant as a "scapegoat") in issuing the disciplinary actions. Although none of these arguments are entirely irrelevant to the grievant's case, there are questions as to whether the OAG Attorney's potential testimony are truly material to these issues or would be the best evidence for those arguments.

While the consistency and proportionality of a disciplinary action are appropriate considerations, it is unclear how the potential testimony of the OAG Attorney provides any material evidence on these points. Both of these issues relate to how other employees who engaged in similar misconduct were treated by the agency. The proposed testimony of the OAG Attorney does not appear to address these issues, nor is it clear how the OAG Attorney would be the best source of that information. Rather, it would appear that agency managers and/or human resource professionals would be far more knowledgeable of the conduct of its employees and how that conduct was or was not addressed.

The final issue relates to the agency's alleged motive in disciplining the grievant. While potential evidence as to what the OAG Attorney told the federal government investigators (if the above privilege, confidentiality, and policy considerations could be ameliorated) might at least offer some evidence as to whether the grievant and his disciplinary situation was discussed at all in those negotiations,[8] the real question is whether the agency actually acted on the alleged

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[7] *See id.*, Rule 3.7.

[8] Though this potential testimony could theoretically offer evidence on this point, the agency's submission would appear to contradict the grievant's theory. The agency's submission includes the following statement: "without waiving the privileges and objections raised herein, [the OAG Attorney] as an attorney and member of the Virginia State Bar affirmatively asserts that under no circumstances was [the grievant's] termination in any way directly or indirectly used as a condition of settlement or otherwise used for negotiating purposes in the matter involving the [Federal Agency] or any other federal agency."

motive, to the extent it may have an impact on the outcome of the case. It would appear that information learned by the OAG Attorney in his service as counsel for the agency (beyond anything specifically conveyed to the federal government investigators) is inadmissible, as testimony from the OAG Attorney, as it would likely be privileged and/or confidential. Further, a "scapegoating" motive would not be the same as an unlawful motive, such as discrimination or retaliation, effectively invalidating a disciplinary action, but is rather considered more an issue of mitigation on the question of whether the grievant was treated the same as similarly situated employees, an issue that has been addressed above.

Taking the above analysis into account, there are significant reasons why the potential testimony of the OAG Attorney should not be heard at this grievance hearing. On the other hand, the grievant has demonstrated relatively weak interests in having the OAG Attorney testify at hearing. For the reasons discussed above, any limited evidence that might be admitted into the record from the OAG Attorney's testimony would have little if any materiality to the issues of the case and is likely available, if it exists, through other sources. In balancing these interests, EDR concludes that there is just cause to exclude this testimony. Due to the time constraints of the currently scheduled hearing, EDR finds that the witness order issued to the OAG Attorney is rescinded by this ruling. The OAG Attorney will not be required to be a witness in this hearing.

EDR's rulings on matters of compliance are final and nonappealable.[9]

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[9] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).