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**COMPLIANCE RULING**

In the matter of the Department of Motor Vehicles  
Ruling Number 2022-5341  
January 7, 2022

The Department of Motor Vehicles (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management regarding the hearing officer’s decision to grant a continuance in Case Number 11763.

The agency has submitted email correspondence exchanged between the parties and hearing officer between December 28, 2021 and January 6, 2022. The initial issue appeared to be the unavailability of a witness for the scheduled hearing date (January 13, 2022). On December 29, the agency provided three options to address the witness’s unavailability: 1) present the witness out of order on a date prior to the scheduled hearing, 2) present an affidavit from the witness (if the grievant agreed to certain stipulations) without the witness testifying, or 3) “[t]he final alternative is a continuance until he is available.” The grievant responded on January 4, 2022, indicating a need to have the witness available for testimony (cross-examination) and requested a new hearing date accounting for counsel’s limited availability in January, providing their availability through March.<sup>1</sup> On January 5, the hearing officer communicated that it was assumed that the grievant “wish[ed] for a continuance” and indicated the hearing officer’s willingness to adjust the dates accordingly. The agency quickly responded by objecting to a continuance, proposing instead to keep the hearing scheduled and postpone the hearing decision until the witness is available to testify. The grievant then asserted the unavailability of one of their attorneys for the scheduled hearing date, the need for a new hearing date, and the desire to have all witnesses available for testimony on the same hearing date.

On January 6, the hearing officer recounted to the parties that one of the options proposed by the agency on December 29 to address the unavailability of the witness was a continuance. The hearing officer stated that the grievant “availed himself of this option.” Accordingly, the hearing officer found it was warranted to reschedule the hearing, noting the agency’s objection. The agency questioned the need for the continuance as the agency had withdrawn the witness order for the unavailable witness in the afternoon of January 5, contingent on the hearing proceeding on the

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<sup>1</sup> There also arose at this time a matter involving exchange of exhibits and witness lists. Agency counsel has indicated that there is no compliance issue being raised as to this portion of the matter. Consequently, we will not include a discussion of that topic in this ruling.

previously scheduled date. The hearing officer explained further that “in trying to accommodate [the unavailable witness], [grievant’s counsel’s] office ‘changed our planned scheduling in our office’ and ‘we cannot go back to the January 13, 2022 date’ as represented in his emails on January 5, 2022.” The agency has now requested a compliance ruling from EDR, alleging that because the agency has rescinded the need for the unavailable witness (contingent on the hearing going forward on January 13) there was no basis for the hearing officer to grant a continuance. The agency has also identified certain potential prejudicial impacts to its list of nine witnesses if the hearing date is rescheduled.

The *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* permit a hearing officer to grant extensions and continuances of hearing dates for just cause.<sup>2</sup> Such matters are within the discretion of the hearing officer. EDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including the granting or denying of continuances. A hearing officer’s decision regarding a hearing continuance will be disturbed only if (1) it appears that the hearing officer has abused their discretion or otherwise violated a grievance procedure rule, and (2) the objecting party can show prejudice.<sup>3</sup>

The hearing officer has indicated that the continuance was granted because the grievant’s attorney represented that they were unable to “go back” to the January 13 hearing date, apparently due to the unavailability of one of the attorneys in their office after the initial concern about the unavailability of the witness prompted discussion of continuing the matter. The hearing officer appears to have accepted this representation from the grievant’s attorney as reasonable. EDR has no basis to find that the hearing officer’s determination was an abuse of discretion. While the agency has presented understandable concerns of the impacts of rescheduling the hearing, EDR is not aware that those grounds were presented for the hearing officer to consider in support of the objections to the continuance. The hearing officer has the authority to weigh the competing interests of the parties seeking or objecting to a continuance and determine an appropriate outcome. However, EDR cannot find that the hearing officer has violated the grievance procedure or abused their discretion in granting the continuance. Accordingly, EDR will not further intervene on this issue.

We note that the agency has presented concerns regarding potential difficulties in securing availability of some of its witnesses for a rescheduled hearing. In scheduling a new hearing date, the hearing officer should take concerns both parties may have for the availability of their witnesses to ensure that both parties are able to present their respective witnesses.

EDR’s rulings on matters of compliance are final and nonappealable.<sup>4</sup>

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<sup>2</sup> See *Rules for Conducting Grievance Hearings* § III(B); see also Va. Code § 2.2-3005(C) (granting hearing officers the authority to “[d]ispose of procedural requests”).

<sup>3</sup> See EDR Ruling No. 2013-3450; EDR Ruling No. 2012-3067; cf. *Venable v. Venable*, 2 Va. App. 178, 181, 342 S.E.2d 646, 648 (1986) (“The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal.”) (citing *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982)).

<sup>4</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).