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COMPLIANCE RULING

In the matter of the University of Virginia Medical Center
Ruling Number 2022-5373
March 7, 2022

The University of Virginia Medical Center (the “agency” or “University”) 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 issuance of a witness order in Case Number 11784. For the reasons discussed below, EDR has no basis to disturb the hearing officer’s actions at this time. EDR does recommend further actions by the agency and, following those actions, further conference with the hearing officer to re-evaluate the pertinent issue.

FACTS

This case concerns the grievant’s termination from employment for failure to comply with the agency’s COVID-19 vaccination requirement. At issue is also the grievant’s request for religious accommodation (or exemption) concerning this requirement, which the agency did not grant. During the pre-hearing phase of this case, the grievant requested witness orders to which the agency provided objections. Following a pre-hearing conference, the hearing officer declined to issue witness orders for two witnesses, but did issue an order for the appearance of a third witness, the agency Chief Executive Officer (CEO). The hearing officer provided the following rationale for issuing this witness order:

[The grievant] alleged [the CEO] made verbal statements regarding how the religious exemption should be implemented but other employees did not follow those statements. The University relies on policies including Policy 105 which was signed by the CEO of the UVA Medical Center in 2015. [The CEO] ... likely would have knowledge about how the University should apply Policy 105. The University did not disclose to Grievant the identity of the persons involved in applying University policies to deny his religious exemption request and, thus, a person knowledgeable regarding how University policies should be applied is even more significant to Grievant’s case.

The agency has sought this compliance ruling to continue objections to the CEO being ordered to appear as a witness. In support of this position, the agency asserts that it will identify

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another agency employee with relevant knowledge about the agency's religious exemption request process and the review and denial of the grievant's religious exemption request. As of the date of this ruling, no such alternative witness has been identified. The agency represents that the CEO had no direct involvement in the grievant's exemption request. The agency states that the grievant is asserting that the CEO made statements during a large employee meeting about the exemption request process including a "back-and-forth" that the grievant argues he did not receive.

The agency also challenges the CEO witness order as an undue burden that "subverts the Grievance Procedure's objective to ensure a 'speedy and efficient' hearing." The agency argues that the CEO's attendance as a witness is not required for the grievant to receive procedural due process. Lastly, the agency asserts that "requiring [the CEO] to prepare for and appear at this Grievance hearing will distract from the management of thousands of current employees and patients that require her leadership in these difficult times."

In response, the grievant indicates he is only requesting the following: 1) the identity of the individual who considered his exemption request prior to the witness identification deadline in this case, 2) "the opportunity to receive and review all documentation and work product used to evaluate [his exemption] requests,"¹ and 3) copies of video recordings of the large employee meetings in which statements by high level agency managers addressed the religious exemption review process. The grievant further explains his purpose for requesting the CEO to testify at the grievance hearing "to her own words and the communication of the exemption review process."

DISCUSSION

A hearing officer has the authority to issue witness orders.² As long as a hearing officer's orders are consistent with this authority and witness testimony provisions of the grievance procedure, the determination of which witnesses are ordered to appear at the hearing is within the hearing officer's discretion.³ For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.⁴ EDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including the issuance of witness orders. A hearing officer's decision on such a matter will be disturbed only if it appears that the hearing officer has abused their discretion or otherwise violated a grievance procedure rule.

As an initial observation, EDR does not see a compelling need for the CEO herself to be a witness in this grievance hearing. However, the hearing officer has identified potentially relevant evidence that could come from the testimony of the CEO: 1) statements made during employee meetings about the religious exemption process, 2) information about the relevant agency policy and its application, and 3) information about how the grievant's particular exemption request was

¹ The grievant's requests for documentation are the subject of other objections currently pending with the hearing officer.

² Va. Code § 2.2-3005(C)(3); *Rules for Conducting Grievance Hearings* § III(E).

³ *See, e.g.*, EDR Ruling Nos. 2021-5285, -5286.

⁴ *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue.'" (citation and internal quotation marks omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citation omitted)).

reviewed and assessed. The agency reasonably questions whether the CEO is necessary to provide testimony on these topics, but, to date, has not identified any alternate witnesses. In the absence of such witnesses, EDR cannot find that the hearing officer's decision to issue this witness order is an abuse of discretion when inquiry into such matters is clearly relevant.

EDR observes that there may be better and more efficient alternatives to having the CEO testify on the above issues. For example, the first topic of statements made during employee meeting would appear to be addressed by the agency producing recordings of these meetings to establish what was said.⁵ As to testimony about the policy and the handling of the grievant's particular exemption request, we acknowledge that the CEO would not necessarily be the best witness for such questions. Although the agency expresses the potential burden on the agency and the CEO, those burdens as articulated to date by the agency would be outweighed by the need for witness testimony on the above-identified relevant matters. If the agency were to identify other more knowledgeable witnesses, the appropriate analysis may change as to which witnesses the hearing officer should order to appear. If the CEO is not the only identified potential witness with relevant information on these topics, then the burdens expressed by the agency may outweigh the need for the CEO to testify, as other witnesses would be able to provide more relevant testimony with less burden on the agency.

Where, as here, the agency has not produced records relevant to these matters or identified an alternate witness for the issues in question, EDR has no basis to find that the hearing officer has abused his discretion. Nevertheless, EDR is hopeful that by focusing on the information the grievant is seeking, the agency may be able to take steps (such as producing recordings and identifying alternate knowledgeable witnesses) to make the CEO's testimony unnecessary for this hearing. EDR recommends that the hearing officer reassess this witness order in light of the agency's objections when/if the agency provides further information and other witnesses are identified, hopefully in the very near future.

EDR's rulings on matters of compliance are final and nonappealable.⁶

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⁵ If these recordings have been provided to the grievant, EDR has not been made aware of that fact.

⁶ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).