

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: August 1, 2017;
Ruling No. 2018-4587; Agency: Virginia Department of Transportation; Outcome:
Hearing Officer in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution¹

COMPLIANCE RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2018-4587
August 1, 2017

The agency has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) regarding a requested continuance of an upcoming grievance hearing.

FACTS

On May 18, 2017, a hearing officer was appointed to hear EEDR Case Number 11019, and a hearing was subsequently scheduled for July 20, 2017. On June 16, 2017, counsel for the agency became aware that the grievant was out on medical leave and requested confirmation that the hearing would occur as scheduled. On June 24, 2017, the hearing officer informed both parties that the hearing remained scheduled for July 20, 2017, and indicated that either party could request a continuance if desired.

On July 5, 2017, the agency, via counsel, requested that Witness 1 be allowed to testify via telephone rather than in person. Because she was aware that the grievant was on medical leave, the hearing officer allowed the grievant until July 14, 2017 to respond to this request. It does not appear that the grievant responded to the request before this deadline. On July 17, 2017, the agency requested that Witness 2 be allowed to testify via telephone rather than in person. The hearing officer allowed the grievant until July 18, 2017 to respond to this request. On July 17, 2017, the grievant responded, stating his objection to both Witness 1 and Witness 2 testifying by telephone. He further stated, “[p]erhaps it would be prudent to postpone the hearing date until both are available to appear.”

The hearing officer responded the same day, allowing Witness 1 to testify via telephone because the grievant had not timely raised an objection, but denying the request for telephonic testimony regarding Witness 2. The hearing officer indicated that she did not consider the grievant’s statement to be a formal request for a continuance, thus, the hearing on July 20, 2017 would go forward. Later that day, the grievant formally requested a continuance. In response,

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office’s name post-merger as the Office of Equal Employment and Dispute Resolution.

the agency stated that it would only agree to the continuance if the grievant agreed to both Witness 1 and Witness 2 testifying via telephone at the hearing, otherwise, the agency objected to the continuance being granted at such a late stage. The hearing officer requested that the parties participate in a pre-hearing conference call to discuss the matter, and clarify the reasons for which the grievant sought the continuance. The grievant responded, suggesting that either the venue be moved to the location where Witness 2 is employed (approximately 45 miles from the location of the hearing) or, in the alternative, continuing the matter and allowing both Witness 1 and Witness 2 to testify by telephone. Relying on this communication from the grievant, the agency's counsel contacted Witness 1 and Witness 2 to advise that their presence would not be needed on July 20, 2017.

The following morning (July 18, 2017), the grievant sent an email to the hearing officer and to the agency, indicating that he wished the hearing to proceed as planned on July 20, 2017. The agency objected to the hearing occurring on July 20, and requested a ruling from EEDR. Because EEDR was unable to adequately review the matter and address it in a ruling prior to July 20, the hearing officer was directed to continue the scheduled hearing until after such time that a ruling could be issued.

DISCUSSION

The grievance procedure states that a hearing officer, in his or her discretion, may “grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request.”² In cases where a party objects, “the hearing officer may only grant extensions of time [f]or just cause – generally circumstances beyond a party’s control.”³ Opinions of the Court of Appeals of Virginia further support the position that a hearing officer’s decision on a motion for continuance should be disturbed only if: (1) the hearing officer’s refusal to grant the extension was an abuse of discretion;⁴ and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.⁵ In addition, courts have found that the test for whether there was an abuse of discretion in denying a continuance “is not mechanical; it depends mainly upon the reasons presented . . . at the time that request is denied.”⁶ While not dispositive for purposes of the grievance procedure, the standard set forth by the courts is nevertheless instructive and has been used by EEDR in past rulings.⁷

² *Rules for Conducting Grievance Hearings* § III(B).

² *Id.*

³ *Id.*

⁴ “Abuse of discretion” in this context has been defined by the courts as an “unreasoning and arbitrary insistence or expeditiousness in the face of a justifiable request for delay.” *United States v. Bakker*, 925 F.2d 728, 735 (4th Cir. 1991) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)).

⁵ *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.” *Id.* at 181 (citing *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982)); *see also Bakker*, 925 F.2d at 735 (“To prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its ‘broad’ discretion and that he was prejudiced thereby.” (citing *United States v. LaRouche*, 896 F.2d 815, 823-25 (4th Cir. 1990))).

⁶ *See LaRouche*, 896 F.2d at 823.

⁷ *See, e.g.*, EDR Ruling No. 2008-2005.

EEDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including whether the hearing officer abused her discretion by failing to grant a party's request for a continuance.⁸ However, in light of the rules and standards set forth above, EEDR will only disturb a hearing officer's decision to deny a request for a continuance if it appears that (1) circumstances beyond the party's control existed justifying such an extension; (2) the hearing officer's refusal to grant the extension of time was an abuse of his discretion; and (3) the objecting party suffered undue prejudice.

In this case, it does not appear that any circumstances beyond the grievant's control existed such that a continuance would have been necessary. This case, however, posed unique issues, and as a result EEDR was compelled to order that the hearing be postponed to allow sufficient time to issue a ruling regarding the chain of events in this matter. There is no indication that the hearing officer abused her discretion or otherwise erred in not granting requests from either side to postpone this hearing. We will use this opportunity to further note that the hearing officer's order allowing Witness 1 to provide telephonic testimony, but denying the request for Witness 2 to provide telephonic testimony, remains in effect, unless amended by the hearing officer.

For the reasons set forth above, there is no basis to conclude that the hearing officer's orders in this matter were in any way an abuse of discretion or were otherwise made in error. The hearing officer is directed to schedule a pre-hearing conference for the purposes of setting a new hearing date and to address any other matters, such as the location of the hearing, that the parties may wish to raise in advance of the hearing.

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



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⁸ Va. Code § 2.2-1202.1(5).

⁹ *Id.* § 2.2-3003(G).