

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9950; Ruling
Date: January 8, 2013; Ruling No. 2013-3497; Agency: Department of Juvenile
Justice; Outcome: Hearing Officer in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2013-3497
January 8, 2013

The Department of Juvenile Justice (the agency) has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 9950. For the reasons set forth below, EDR has no basis to disturb the decision.

FACTS

The hearing in Case Number 9950 was scheduled to commence at 9:00 a.m. on November 28, 2012.¹ A few minutes after 9:00 a.m., the agency's advocate spoke with the hearing officer and indicated that he was scheduled to appear as a witness in another grievance hearing at a nearby facility.² The agency's advocate advised the hearing officer that he was to be the first witness at the other hearing and would be approximately 30 minutes late.³ The hearing officer waited an hour, until 10:00 a.m., and, at that time, convened the hearing.⁴ The agency's advocate had yet to appear. Consequently, the hearing officer found in a decision issued the same day that the agency had not presented evidence to support the disciplinary action. Thus, the disciplinary action was reversed.⁵ The agency now appeals.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."⁶ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁷

¹ Decision of Hearing Officer, Case No. 9950, Nov. 28, 2012 ("Hearing Decision"), at 2.

² *Id.* The agency's appeal states that this conversation occurred at 8:30 a.m. Any difference in time here is immaterial to EDR's consideration of the questions at issue.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Va. Code § 2.2-1202.1(2), (3), and (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

The agency asserts that the hearing officer “abused his discretion by applying an overly rigid and arbitrary standard toward the agency in this case.” The agency argues that there was justifiable cause in this case for the hearing officer to have delayed the hearing to accommodate its advocate’s failure to appear timely. While we understand the agency’s position in this case, we respectfully disagree.

The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for “just cause.”⁸ Circumstances “beyond a party’s control such as an accident, illness, or death in the family” generally constitute “just cause” for a continuance.⁹ Further, at the hearing officer’s discretion, a hearing may proceed in the absence of one of the parties.¹⁰ 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, but a hearing officer’s decision regarding a hearing continuance will only be disturbed if (1) it appears that the hearing officer has abused his discretion; and (2) the objecting party can show undue prejudice by the refusal to grant the continuance.¹¹

That the agency’s advocate had a justifiable reason for being elsewhere on the morning of November 28, 2012 cannot be disputed. The issue here, however, is the timing of how the agency’s advocate raised the scheduling conflict. There has been no indication that the agency’s advocate discovered the need to testify at the other grievance hearing on short notice. Indeed, the agency and the advocate must have known, at a minimum, days prior to November 28, 2012 of the scheduling conflict. The agency or the advocate should have raised the issue to the hearing officer as soon as it was known. Instead, the agency and/or the advocate waited until the morning of the hearing at the time the hearing was to convene.

We are unable to find that the hearing officer abused his discretion by failing to delay the hearing further based on a request received on the morning of the hearing. Indeed, EDR is loathe to approve extensions that are requested so close to the scheduled time for an event without justification for the last minute request.¹² As stated, there have been no such exigent circumstances proffered here. Further, the hearing officer actually acceded to the advocate’s continuance request as initially made. The hearing officer received no further communication from the agency or its advocate to advise of any cause for further delay. The hearing officer

⁸ See *Grievance Procedure Manual* § 5.2; *Rules for Conducting Grievance Hearings* § III(B).

⁹ *Rules for Conducting Grievance Hearings* § III(B).

¹⁰ See *Rules for Conducting Grievance Hearings* § IV(A).

¹¹ See EDR Ruling No. 2002-213. *Cf. Venable v. Venable*, 2 Va. App. 178, 181 (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)); see also *U.S. v. Bakker*, 925 F.2d 728, 735 (4th Cir. 1991) (“[T]o 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.”) “Abuse of discretion” in the context of a denial of a motion for continuance has been defined as an “unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay.” *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)). The test for whether a hearing officer has abused his discretion in denying a continuance is not mechanical; it depends mainly upon the reasons presented to the hearing officer at the time that request is denied. *U.S. v. LaRouche*, 896 F.2d 815, 823 (4th Cir. 1990).

¹² *E.g.*, EDR Ruling No. 2012-3053.

extended a generous amount of leeway by delaying the hearing for one hour. The decision to convene the hearing under these facts was not arbitrary, but consistent with standard hearing officer practices.

Although the agency bears the brunt of the prejudice in this case, past grievants who have failed to timely arrive for hearing have similarly lost their rights to hearings.¹³ Any prejudice cannot be considered undue as the agency had the ability to have avoided this situation by a more timely resolution to the scheduling conflict. For whatever reason, the agency chose not to do so. Consequently, out of fairness to the grievant, other witnesses, and the hearing officer himself, the decision to move forward was appropriate under these circumstances.

CONCLUSION AND APPEAL RIGHTS

Based on the foregoing, EDR has no basis to disturb the hearing officer's decision in consideration of the grounds raised by the agency. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹⁴ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶



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¹³ E.g., EDR Ruling No. 2011-2996.

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).