

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: February 19, 2014; Ruling No. 2014-3818; Agency: Old Dominion University; Outcome: Hearing Officer in Compliance.



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

COMPLIANCE RULING

In the matter of Old Dominion University
Ruling Number 2014-3818
February 19, 2014

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to the hearing officer’s denial of his request for a continuance in his upcoming grievance hearing with Old Dominion University (the “University”).

FACTS

On or about September 12, 2013, the grievant initiated a grievance with the University challenging his supervisor’s decision to require submission of daily work reports and notification of the grievant’s arrival at and departure from work each day. On the same date, the grievant submitted a request for documents. EDR later issued a compliance ruling finding that the University was not required to produce the requested documents.¹

After proceeding through the management resolution steps, the University qualified the grievance for a hearing and requested the appointment of a hearing officer. On January 9, 2014, a hearing officer was appointed to hear this case, and the hearing was scheduled for February 18, 2014. On February 7, 2014, the grievant submitted a request for documents under the grievance procedure to the University in relation to a second grievance that is currently proceeding through the management resolution steps. The request seeks essentially the same information as his previous September 12 request, though in a different format. The grievant requested a postponement of the hearing on February 10, 2014, asserting that he required additional time to receive the documents from the University.² The University objected and the hearing officer denied the grievant’s request to postpone the hearing.

On February 12, 2014, the grievant submitted another request for a continuance to the hearing officer, arguing that a compliance ruling regarding yet another request for documents submitted in relation to his second grievance was pending at EDR and that he required additional time for EDR to issue the ruling addressing whether the University was required to produce the

¹ See EDR Ruling No. 2014-3728.

² The hearing officer’s order characterizes the grievant’s request as having been submitted pursuant to the Virginia Freedom of Information Act (“FOIA”). It is unclear whether the grievant has submitted both a grievance procedure and a FOIA request for the same or similar documents.

documents. The University again objected and the hearing officer denied the grievant's request for a continuance. On February 14, 2014, the grievant requested a compliance ruling from EDR, claiming that the hearing officer's denial of his continuance request was "inconsistent with justice."

DISCUSSION

The grievance procedure states that grievance hearings should be held within thirty-five calendar days of the hearing officer's appointment.³ A hearing officer may "grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request."⁴ In cases where a party objects, "the hearing officer may only grant extensions of time [f]or just cause."⁵ 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;⁶ and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.⁷ 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.⁸ While not dispositive for purposes of the grievance procedure, the standard set forth by the courts is nevertheless instructive and has been used by EDR in past rulings.⁹

EDR 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 an extension of the thirty-five-day timeframe.¹⁰ However, in light of the rules and standards set forth above, EDR 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

³ *Rules for Conducting Grievance Hearings* § III(B).

⁴ *Id.*

⁵ *Id.*

⁶ "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)).

⁷ *Cf. Venable v. Venable*, 2 Va. App. 178, 180, 342 S.E.2d 646, 647 (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))).

⁸ *See LaRouche*, 896 F.2d at 823.

⁹ *See, e.g.*, EDR Ruling No. 2008-2005.

¹⁰ Va. Code § 2.2-1202.1(5).

scheduling issues,¹¹ and as a result we were compelled to order that the hearing be postponed to allow sufficient time to issue a ruling on the grievant's request. There is no indication that the hearing officer abused her discretion or otherwise erred in denying the grievant's requests to postpone the hearing. We will use this opportunity, however, to address further the underlying and intertwined issues related to the grievant's document requests.

It appears that the hearing officer relied at least in part on EDR Ruling No. 2014-3728, the ruling that denied the grievant's request for documents in this case during the management steps, in refusing to grant the grievant's first request for a postponement of the hearing. However, the analysis to be conducted is potentially not the same when evaluating whether a grievant should have access to documents as a means of resolving a dispute during the management resolution steps as opposed to whether such documents may be necessary to prove a claim at a grievance hearing. Thus, EDR Ruling No. 2014-3728 does not necessarily serve as a prohibition on the disclosure of the documents at this stage of the case.

At the hearing, the grievant will have the burden of proving, for example, his claims of allegedly disparate treatment by a preponderance of the evidence.¹² It is difficult to see how he would be able to do so if he is unable to review and/or use at hearing relevant information showing whether other employees have or have not been required to submit the daily work briefs and time clock reports at issue. The hearing officer noted that the one other employee that the University claims submits such reports will appear as a witness at the hearing. However, it could be unlikely that the testimony of this individual would, on its own, be sufficient to meet the grievant's burden of proof in this case. It may be, therefore, that preventing the grievant from reviewing the information he has requested would be tantamount to denying him the ability to gather evidence that could be necessary to prove his case at the hearing. In other words, it may not be consistent with a fair hearing process¹³ to have a hearing on the grieved matters without making available certain information regarding the documents sought.

We must note, however, that EDR cannot at this time directly address the issue of whether the grievant should have access to the documents he seeks as it relates to his upcoming grievance hearing. Hearing officers have the authority to issue orders for the production of documents consistent with the grievance procedure upon request from either party to a grievance.¹⁴ However, it does not appear that the grievant has requested an order for documents from the hearing officer in this case.¹⁵ Rather, he has pursued his claims related to the documents by submitting additional requests, all seeking essentially the same information but varying slightly in their particulars, directly to the University. These requests are not necessarily inappropriate because the grievant has filed a second grievance that is currently proceeding

¹¹ The hearing was initially scheduled for the Tuesday following the George Washington Day holiday. The grievant submitted his ruling request to EDR on the Friday preceding the hearing. In effect, then, the hearing was scheduled to occur on the next business day after the grievant's request for a compliance ruling was received.

¹² *Rules for Conducting Grievance Hearings* § IV(C).

¹³ See Va. Code § 2.2-3000(A); *Rules for Conducting Grievance Hearings* § IV(C).

¹⁴ *Rules for Conducting Grievance Hearings* § III(E); see *Grievance Procedure Manual* § 8.2.

¹⁵ It may be that the grievant has read EDR Ruling No. 2014-3728 as preventing him from making such a request of the hearing officer in this case.

through the management resolution steps.¹⁶ However, nothing in EDR Ruling No. 2014-3728 prevents the grievant from requesting an order from the hearing officer seeking access to sought documents now that this case is at the hearing stage.

Further, nothing in this ruling is meant to indicate that the grievant would be entitled to the entirety of the records as originally requested. If the hearing officer were to order a production of documents, the hearing officer would need to assess, for instance, an applicable time period of reasonable length, whether the content of the documents is relevant, issues of confidentiality, and, possibly, depending on the answers to the previous questions, whether some substitute for the actual records can be produced, such as a table or limited/redacted portions of the documents. If the grievant were to submit such a request to the hearing officer, and if the hearing officer were to deny the request, the grievant could appeal the hearing officer's determination to EDR.¹⁷ Only then would the issue be appropriate for more thorough consideration in a compliance ruling in this case.

For the reasons set forth above, there is no basis to conclude that the hearing officer's denial of the grievant's request for a continuance was in any way an abuse of discretion or was 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 addressing any other matters that the parties may wish to raise in advance of the hearing.

EDR's rulings on matters of compliance are final and nonappealable.¹⁸



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¹⁶ While not necessarily inappropriate, whether the documents are relevant and/or discoverable in another grievance has no bearing on this grievance.

¹⁷ See *Grievance Procedure Manual* § 6.4.

¹⁸ Va. Code § 2.2-3003(G).