Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: January 7, 2016; Ruling No. 2016-4289; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Officer in Compliance.

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

COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2016-4289
January 7, 2016

The Department of Behavioral Health and Developmental Services (the agency) has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management address a question concerning whether the agency's chosen advocate can appear as a witness in a grievance hearing. This question is complex, is not specifically addressed by the *Grievance Procedure Manual* or *Rules for Conducting Grievance Hearings*, and has not been definitively answered in a known EDR ruling. Therefore, the following guidance is provided for application to this case, as any time this issue arises in a grievance hearing there will need to be case-by-case determinations made.

As an initial matter, the hearing officer is correct to raise concerns about a party's advocate also testifying as a witness in a grievance hearing. Numerous concerns can be created by such a situation, as represented in certain legal and ethical rules that apply to attorneys serving as witnesses in adversarial proceedings.[1] However, this ruling addresses only how the issue of non-attorney advocates testifying as witnesses in grievance hearings might be resolved and does not address issues arising with an attorney-advocate, which have even more stringent limitations that would change the analysis.

In this case, the agency intends to call and the grievant also seeks to call as a witness the agency's primary advocate.[2] The agency appears to have no objection to having its chosen advocate testify in the case. It is not clear, however, whether the grievant has an objection to this individual also serving as the advocate. Should all parties consent to the agency's advocate being a witness, especially when both parties seek to have that person testify, nothing in the grievance procedure prevents an advocate serving in both roles. However, EDR strongly urges that, to the extent possible, this individual testify as the first witness and be questioned by both

[1] *See, e.g.*, Va. Rules of Prof'l Conduct R. 3.7.
[2] In the documentation submitted, it has also been discussed that the agency's "back-up" advocate will also be a witness in this case. This ruling does not address anything regarding the "back-up" advocate. EDR presumes that this "back-up" advocate will only serve as a witness in this case and not be present in the hearing room for the duration of the hearing as an advocate or observer. If these presumptions are not accurate, there may be additional questions as to whether this individual could serve as a secondary advocate in the case and be a witness given the guidance provided below.

parties on all matters so that, hopefully, the witness will not have to be recalled at a later time.[3] The purpose of this process would be to create an artificial, though not actual, break between the time during the hearing when the individual appears to be a witness (the very beginning) and when the individual is an advocate (the rest of the hearing). This timing would also limit the prejudice to the opposing party of allowing a witness to be present for the entirety of a hearing, listen to all the witnesses, and then testify based on that knowledge.[4]

In the event that the parties do not agree, a case-by-case assessment of the factors will have to be made. Principally, the hearing officer must balance the interests of both parties, including the importance of the intended testimony of the witness to either party's case, and consider the potential prejudice to each party's case to determine the appropriate outcome. Further, the hearing officer should consider and address with the potential advocate-witness (presumably during a pre-hearing conference with both sides) whether his/her testimony will be consistent with the interests of the party he/she represents and, if not, what considerations that raises for proper service as the advocate.

The result of this balancing can end in difficult choices for the parties and the hearing officer. When possible, a party should not be denied its choice of chosen advocate. However, a party should also not be prevented from presenting the testimony or cross-examining important witnesses with knowledge of issues central to a case. Thus, for example, an agency should not be permitted to "shield" from testifying a potentially important witness with knowledge about the case by designating that person as an advocate and then objecting to the individual testifying. In that case, the agency's interests in having its chosen advocate might be overridden by the import of having a particular witness's testimony in the record, absent additional considerations.

As to the matters of this particular case, EDR has not gathered sufficient information to understand the involvement of the advocate in the matters giving rise to the grievance, the need for the individual to testify, or the parties' respective positions as to the individual serving roles as both an advocate and witness. If both parties consent, the grievance procedure would allow this individual to serve in both roles, provided, as discussed above, the hearing officer directs that the individual testify as the first witness at hearing.

If the parties cannot consent to this individual serving in both capacities, an assessment will need to be made by the hearing officer of the relative interests of the parties and potential prejudices to each in having this individual participate as a witness and/or advocate. If the individual is a particularly important witness, then for this individual to testify, the agency would potentially need to designate a new advocate unless it is determined that the potential prejudice to the grievant of having the advocate serve as a witness is less than the prejudice to the agency of losing its chosen, knowledgeable advocate and what steps would need to be taken to find a replacement. This ruling makes no definitive determinations as to the relative weight of the

[3] This ruling is not meant to say that this witness could never be recalled, but that decision would be left to the discretion of the hearing officer to determine how appropriate it would be given the hearings' proceedings, what the witness is needed for on recall, who is attempting to recall the witness, and the quality of the previous examination.
[4] Although both an agency's party representative and the grievant have this opportunity, allowing the addition of a non-sequestered advocate-witness could provide an unfair advantage to one party.

various considerations, leaving those for further consideration by the hearing officer with the parties' input.

CONCLUSION

Based on the foregoing, EDR finds that the hearing officer has correctly raised concerns with the agency's advocate potentially testifying in this case. The hearing officer is directed to address these questions with the parties in a pre-hearing conference, or other suitable means, consistent with the guidance provided in this ruling. If either party disagrees with the resulting determinations by the hearing officer, that party can request a ruling from EDR. EDR's rulings on matters of compliance are final and nonappealable.[5]

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[5] *See* Va. Code §§ 2.2-1202.1(5).