Issue: Compliance – Grievance Procedure (other issue); Ruling Date: April 11, 2016; Ruling No. 2016-4341; Agency: Department of Veterans 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 Veterans Services
Ruling Number 2016-4341
April 11, 2016

The grievant in this case has initiated a grievance challenging a Group I Written Notice for allegedly failing to follow instructions regarding the use of the time clock for lunch breaks. The grievance has been qualified for hearing, and the hearing is scheduled to occur on April 15, 2016.

At hearing, the grievant apparently intends to show that other employees have engaged in the same or comparable conduct but have not been subjected to the same level of discipline.[1] The grievant requested that the hearing officer issue orders for the appearance at hearing of twelve other employees to appear in support of her claim of inconsistent treatment. The Department of Veterans Services (the "agency") objected to the grievant's request, arguing that having these twelve employees testify would be unnecessarily disruptive to the agency's provision of services to its clients. Following a pre-hearing conference call regarding the issue, the hearing officer ruled that the grievant would be limited to three co-worker witnesses on the issue of inconsistent treatment. The grievant has now appealed to the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management.

Under the grievance procedure, a hearing officer may mitigate disciplinary action when a grievant demonstrates that other similarly situated employees have engaged in the same or similar conduct but have been treated more favorably by the agency.[2] Although a hearing officer should be liberal in the admission of evidence at hearing, a hearing officer may exclude evidence when that evidence is repetitive.[3] If the grievant's interest in obtaining and presenting evidence conflicts with the agency's interest in the safe and efficient provision of services, the hearing officer must balance those respective rights and interests.

In this case, it appears that the hearing officer attempted to balance the competing interests by limiting the grievant to three co-worker witnesses. While EDR certainly appreciates the concerns expressed by the agency regarding the impact of the co-workers being absent from the workplace while testifying, EDR also recognizes that the grievant has a right, as a matter of

[1] The agency appears to argue that any undisciplined co-workers were not similarly situated to the grievant. Both the agency and the grievant may present argument and/or evidence on this issue in pre-hearing proceedings or at hearing, depending on what is determined necessary by the hearing officer.
[2] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[3] *Id.* at § IV(D).

due process, to present her evidence at hearing. Although limiting the number of co-workers called as witnesses to three is not in itself an unreasonable solution, that solution could be incomplete in this case, if it fails to allow the grievant an adequate opportunity to explore whether she was in fact singled out for disciplinary action.

There appear to be a number of ways this potential lack of opportunity can be resolved. According to the grievant, her purpose in questioning these witnesses is simply to establish that they were not disciplined or counseled. This information may be introduced into the hearing record in a number of ways other than having each employee present at the hearing to testify. For example, in addition to the testimony by the three co-worker witnesses, the agency could have available a member of management or human resources who can testify about the disciplinary action or counseling, if any, imposed on the co-workers the grievant sought to question with reference to the applicable time clock documents.[4] Another option, proposed by the grievant, would be for the agency to obtain witness statements stating whether or not disciplinary action or counseling occurred. Similarly, as the grievant indicates her questioning will consist of a single question—whether the witnesses were counseled in relation to the time clock—the testimony could possibly occur by telephone, which would reduce the time any witness would be away from the workplace. Lastly, the agency could agree to stipulate that for the time period sought by the grievant, no employees other than the grievant were counseled or disciplined for their conduct.[5] If the parties cannot reach a suitable agreement on their own prior to the hearing, the most suitable option to balance the parties' respective interests is a matter that should be determined by the hearing officer.

Based on the foregoing, the grievant's appeal of the hearing officer's limit to three co-worker witnesses is denied. The parties should seek to agree on the best alternative from those potential options (or others) listed in this ruling for resolving the evidentiary issues. If the parties cannot come to an agreement, they may seek the input of the hearing officer.

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

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[4] As discussed in the footnote above, the agency appears to argue that the undisciplined co-workers were not similarly situated to the grievant. This issue may have a significant impact on the hearing officer's balancing of the interests and ultimate determination as to how this evidence should be presented.

[5] The agency has indicated to EDR that it would be willing to agree to such a stipulation, though such a stipulation or its parameters has yet to be made. If such a stipulation was made by the agency, it *might* eliminate the need for the grievant to present most of the co-worker witnesses.

[6] *See* Va. Code §§ 2.2-1202.1(5).