

Issue: Compliance/Conduct of Hearing; Ruling Date: November 8, 2002; Ruling #2002-213; Agency: Department of Corrections; Outcome: hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2002-213
November 8, 2002

Counsel for the grievant has requested a ruling on whether the hearing officer erred by not granting a hearing continuance in this matter. For the reasons set forth below, this Department concludes that based on the representations made by the grievant's counsel when he requested a continuance, the hearing officer did not err by refusing to reschedule the hearing.

FACTS

On August 19, 2002, the grievant was issued a Group III Written Notice with termination for allegedly destroying state property. On September 18, 2002, the grievant challenged the Written Notice and termination by initiating a grievance. The grievance was qualified for hearing on October 17, 2002, and a hearing officer appointed on October 28, 2002.

On November 5, 2002, the same day that the prehearing conference had been scheduled, the grievant retained counsel. Counsel for the grievant appeared telephonically at the prehearing conference and requested a continuance in order to have additional time to prepare for hearing. While there was no mention of any scheduling conflict at the prehearing conference, counsel for the grievant asserted in his ruling request to this Department that he had preexisting court appearances scheduled on the November 20th grievance hearing date.

DISCUSSION

Counsel for the grievant objects to the hearing officer's refusal to postpone the scheduled November 20th hearing. The grievance procedure requires that grievance hearings "must be held and a written decision issued within 30 calendar days of the

hearing officer's appointment."¹ The 30 day timeframe can be extended only upon a showing of "just cause."² The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for "just cause."³

The EDR Director has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure.⁴ However, the EDR Director will only disturb a hearing officer's decision regarding a hearing continuance 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.⁵ "Abuse of discretion" in the context of a denial of a motion for continuance has been defined as "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay."⁶ 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.⁷

In this case, the grievant was terminated on August 19, 2002 by means of a Group III Written Notice which expressly informed him that he was entitled to appeal the disciplinary action via the grievance procedure. The grievance procedure, in turn, explicitly states that disciplinary actions automatically qualify for hearing. Thus, the grievant knew or should have known for at least two months before he finally retained an attorney that his grievance would be advancing to hearing. While there is certainly no requirement that a grievant hire an attorney the instant that he is terminated, if the grievant waits until the last minute to retain counsel, then the grievant cannot prevail with a continuance objection based on inadequate time to prepare for the hearing. Therefore, because the *only* objection advanced by grievant's counsel at the prehearing conference was based on an inadequate amount of time to prepare, which was caused by the grievant's decision to postpone hiring an attorney, this Department cannot conclude that the hearing officer abused his discretion by not granting a continuance. Accordingly, under present circumstances, this Department will not disturb the decision of the hearing officer in this matter.

¹ *The Grievance Procedure Manual*, § 5.1, p. 13.

² *The Grievance Procedure Manual*, §§ 5.1 and 5.4, p. 13. "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *The Grievance Procedure Manual*, § 9, p. 24.

³ *The Grievance Procedure Manual*, § 5.2, p. 13.

⁴ Va. Code § 2.1-1001 (5).

⁵ Cf. *Venable v. Venable*, 2 Va. App. 178 (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." *Venable* at 181, citing to *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). See also *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991) "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." *Bakker* at 735 citing to *U.S. v. LaRouche*, 896 F.2d 815, at 823-25 (4th Cir. 1990).

⁶ *Bakker* at 735, quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

⁷ See *LaRouche*, at 823.

As noted above, counsel for the grievant did not mention his scheduling conflict at the prehearing conference. During the investigation for this ruling, grievant's counsel represented to this Department that he has a general district court date and a juvenile court date, both scheduled for November 20th. Grievant's counsel is free to renew his request to the hearing officer based on the scheduling conflict. The hearing officer is advised to carefully consider any such request and should determine whether a further denial of a continuance will result in undue prejudice to the parties. Furthermore, the hearing officer has the discretion to require counsel to produce evidence of a pre-existing scheduling conflict. Should counsel renew his request and either party desire a ruling regarding the hearing officer's subsequent decision, a ruling request should be promptly initiated with this Department. This decision is final and nonappealable.⁸

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Director

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⁸ Va. Code § 2.2-1001(5).