

Issue: Compliance/Hearing Decision; Ruling Date: March 18, 2003; Ruling #2002-229;
Agency: Department for the Blind and Vision Impaired; Outcome: Hearing officer in
compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of for the Blind and Vision Impaired
Ruling Number 2002-229
March 18, 2003

The grievant has requested a ruling on whether the hearing officer's refusal to allow the testimony of certain witnesses was in error.¹ For the reasons set forth below, this Department concludes that the hearing officer did not abuse his discretion by refusing to allow the witnesses to testify.

FACTS

On June 26, 2002, the grievant was issued a Group I Written Notice for unsatisfactory job performance between March 15, 2001 and May 22, 2002. Alleged problems included difficulty with paperwork, less-than-thorough service plans, failure to accurately complete narrative reports, communication difficulties with staff, and failure to follow her supervisor's instruction to broaden her instructional approach.² On July 23, 2002, the grievant challenged the Written Notice by initiating a grievance, and on November 12, 2002, a grievance hearing was held. During the hearing, the grievant requested that ten of her customer witnesses be contacted by phone. The hearing officer denied this request, and issued his final decision on November 14, 2002.

DISCUSSION

¹ Although the grievant listed three issues in her appeal to this Department, only the issue regarding the witness testimony is genuinely a potential grievance compliance issue. The request for "all information previously compressed by DBVI Human Resources" is not a compliance matter. Rather, it appears to be a document request appropriately addressed to the agency. Likewise, the request that a "different hearing officer review the entire information," does not state any alleged grievance compliance error. Moreover, such a request is not the sort of appeal contemplated by the grievance procedure and will not be granted by this Department.

² See June 26, 2002 Written Notice, Attachment. The hearing officer noted in his opinion that the grievant's failure to follow her supervisor's instructions "constitutes a Group II offense," but management elected to issue the grievant only a Group I Notice.

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions in all matters related to procedural compliance with the grievance procedure.”³ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁴

As an initial matter, the *Grievance Procedure Manual* provides that “all requests for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision.”⁵ In this case, this Department received the grievant’s request for administrative review on November 26, 2002, two days beyond the 10 calendar days that followed the issuance of the original decision. The grievant, however, has presented evidence of a “just cause”⁶ for the delay—she was traveling out of the state during a portion of the 10-day appeal period. Accordingly, the grievant’s request for administrative review by this Department is considered timely.

As to the merits of the grievant’s appeal, this Department finds that the hearing officer did not err by refusing to allow testimony by the witnesses designated by the grievant. The hearing decision explains that “the grievant proposed to call ten customers by telephone to testify that they had been satisfied with the services grievant provided to them.”⁷ The decision further explains that “[t]he agency stipulated that the ten customers would probably testify favorably and therefore the witnesses were not called.”⁸

By statute, hearing officers have the duty to *receive probative evidence* and to *exclude irrelevant*, immaterial, insubstantial, privileged, or repetitive proofs.”⁹ In this case, the hearing officer did not contact the designated customer witnesses because, according to the hearing officer, they could not provide relevant testimony to the issues in dispute. The record shows that the written notice was *not* based on any dissatisfaction that the grievant’s customers may have had with the services that she provided to them. Rather, the grievance was based on the grievant’s failure to follow her supervisor’s instructions, communications issues with staff, deficiencies in the accuracy of her reporting, and so on. In other words, the issues for which the grievant was disciplined were *not* those for which her customer witnesses could provide relevant information. As such the hearing officer did not err by refusing to allow the customer witnesses to testify.

³ Va. Code § 2.2-1001(2), (3), and (5).

⁴ See *Grievance Procedure Manual* § 6.4(3), page 18.

⁵ See *Grievance Procedure Manual* § 7.2 (a), page 18 (emphasis in original).

⁶ “Just cause” is defined as a “reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9, page 24.

⁷ See Decision of Hearing Officer, Case No: 5554, Procedural Issue.

⁸ *Id.*

⁹ Va. Code § 2.2-3005(C)(5), (emphasis added). Probative evidence is that which “affects the probability that a fact is as a party claims it to be.” Edward W. Cleary, *McCormick on Evidence* § 16, page 52 (1984).

APPEAL RIGHTS AND OTHER INFORMATION:

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.¹⁰ 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.¹¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹² This Department's rulings on matters of procedural compliance are final and nonappealable.¹³

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¹⁰ *Grievance Procedure Manual*, § 7.2(d), page 20.

¹¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

¹² *Id.*

¹³ Va. Code § 2.2-1001 (5).