

Issue: Compliance/hearing officer conduct; Ruling Date: May 16, 2005; Ruling #2005-1037; Agency: Virginia Community College System; Outcome: hearing officer did not abuse discretion



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Virginia Community College System  
Ruling Number 2005-1037  
May 16, 2005

The grievant has requested a ruling on whether the hearing officer abused his discretion by denying the grievant's request to extend the hearing date in this matter. For the reasons set forth below, this Department concludes that the hearing officer did not abuse his discretion in denying the grievant's request for an extension.

FACTS

On November 10, 2004, the grievant received a Group I Written Notice for failure to follow her supervisor's instructions and insubordination. The grievant challenged the Written Notice by initiating a grievance on December 9, 2004.

The grievance was qualified for hearing and assigned to a hearing officer on April 26, 2005. During the May 5, 2005 pre-hearing conference between the hearing officer, the grievant's representative and the agency representative, the grievant's representative informed the hearing officer that because of a previously scheduled business trip he would not be available for hearing from May 7<sup>th</sup> through May 31<sup>st</sup>. The agency's representative informed the hearing officer that he was scheduled to be on vacation from Monday, June 6<sup>th</sup> through Monday, June 20<sup>th</sup>. In an effort to accommodate the schedule of the grievant's representative, the hearing officer inquired as to whether the grievant and her representative would be available on Wednesday, June 1<sup>st</sup> for hearing, the day after his return from his business trip. The representative informed the hearing officer that he would be unavailable for hearing prior to June 15<sup>th</sup>.

DISCUSSION

The grievance procedure requires that grievance hearings "must be held and a written decision issued within 35 calendar days of the hearing officer's appointment."<sup>1</sup> The *Rules for Conducting Grievance Hearings* (the *Rules*) and the grievance procedure permit a hearing officer to extend the 35-day timeframe upon a showing of "just cause."<sup>2</sup>

<sup>1</sup> *Grievance Procedure Manual*, § 5.1.

<sup>2</sup> *See Grievance Procedure Manual*, §§ 5.1 and *Rules for Conducting Grievance Hearings*, § V(C).

“Just cause” in this context is defined as “circumstances beyond a party’s control.”<sup>3</sup> Examples of “circumstances beyond a party’s control” include, but are not limited to, accident, illness, or death in the family.<sup>4</sup> The Virginia Court of Appeals has further indicated that the 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;<sup>5</sup> and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.<sup>6</sup> Further, 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.<sup>7</sup> While not dispositive for purposes of the grievance procedure, the standard set forth by the courts is nevertheless instructive and has been used by this Department in past rulings.<sup>8</sup>

The EDR Director 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 his discretion by failing to grant a party’s request for an extension of the 35-day timeframe.<sup>9</sup> However, in light of the rules and standards set forth above, the EDR Director will only disturb a hearing officer’s decision to deny a request for an extension of the 35 calendar days 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, this Department cannot conclude the hearing officer abused his discretion by refusing to extend the hearing date. The hearing officer attempted to accommodate the grievant’s selected representative by inquiring as to the possibility of scheduling the hearing for June 1<sup>st</sup>, the day following the grievant’s representative’s return from his business trip.<sup>10</sup> However, the grievant and her representative rejected the hearing officer’s attempts at accommodation, insisting instead that they would not be prepared for hearing for at least two weeks following the representative’s return on May 31<sup>st</sup>—at which point the agency’s representative would be on vacation. The insistence on

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<sup>3</sup> *Rules for Conducting Grievance Hearings*, § V(C).

<sup>4</sup> *Id.*

<sup>5</sup> “Abuse of discretion” in this context has been defined by the courts as “an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.” *U.S. v. Bakker*, 925 F.2d 728, 735 (4<sup>th</sup> Cir. 1991), quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

<sup>6</sup> *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 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1990).

<sup>7</sup> *See LaRouche*, at 823.

<sup>8</sup> *See e.g. Compliance Rulings of Director No.s 2003-130, 2002-213, and 2001-124.*

<sup>9</sup> Va. Code § 2.2-1001 (5).

<sup>10</sup> June 1<sup>st</sup> would have been the 36<sup>th</sup> day following the appointment of the hearing officer, one day beyond the prescribed 35-day timeframe.

the additional two week delay not only precluded June 1<sup>st</sup> as a hearing date, but also effectively precluded any consideration of Thursday, June 2<sup>nd</sup> or Friday, June 3<sup>rd</sup> as potential hearing dates. Further, given the grievant's assertion that her representative of choice is familiar with her case, it is not evident why more than two weeks of hearing preparation time was required, or that the grievant would be unduly prejudiced by more limited preparation time.

In light of the above, this Department cannot conclude that the hearing officer erred or otherwise abused his discretion by failing to grant the grievant's request to extend the hearing date.

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Claudia T. Farr  
Director