

Issue: Administrative Review/claims that hearing officer abused discretion by denying grievant's request for a continuance; Ruling Date: May 23, 2005; Ruling #2005-987;  
Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer in compliance



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the Department Mental Health, Mental Retardation  
And Substance Abuse Services  
Ruling Number 2005-987  
May 23, 2005

Counsel for the grievant has requested a ruling on whether the hearing officer abused his discretion by denying the grievant's request for a continuance 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 a continuance.

**FACTS**

On November 5, 2004, the grievant received a Group III Written Notice with removal for neglect of a client at the Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS or the agency) facility in which she worked. More specifically, the grievant was terminated for failure to timely discover a client's injury (i.e., bruising around and/or under the right eye). The grievant challenged her termination by initiating a grievance.

The grievance was qualified for hearing and assigned to a hearing officer on December 13, 2004. During the December 20, 2004 pre-hearing conference between the hearing officer, the grievant's representative and the agency representative, the hearing was scheduled for January 25, 2005. On December 21, 2004, the hearing officer issued a pre-hearing order requiring all witness lists and documents the parties expected to introduce at hearing to be exchanged "at least 4 workdays before the hearing," or on or before January 19, 2005.<sup>1</sup>

At some point in mid-to-late December, the grievant's attorney had verbally requested documents related to injuries sustained by the client. Because he had not yet received any of the requested documents, the grievant's representative sent a follow-up

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<sup>1</sup> Although January 19<sup>th</sup> was the established deadline under the hearing officer's order for the exchange of documents that the parties expected to introduce at hearing, it was not the deadline for providing documents requested by the grievant pursuant to the grievance procedure's information gathering provisions. Under those provisions, all relevant documents requested by one party must be provided to the other party within five workdays of receipt of the request, absent just cause. Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

letter to the agency on Monday, January 10, 2005 requesting again all documents related to injuries sustained by the client. In response, the grievant's representative received a portion of the investigative file later that same week. On the morning of Wednesday, January 19, 2005, the grievant's representative contacted the agency's representative regarding documents not yet received. During their conversation, the grievant's representative asserts he first learned that there were photographs taken of the resident that illustrated the bruising of the right eye.

The grievant's representative asserts further that as a result of this late acquired knowledge, he immediately requested a continuance of the January 25<sup>th</sup> hearing in order to review the evidence and to obtain a medical expert's opinion on the photos. The grievant asserts that the agency had no objection to a delay of the hearing. During the teleconference regarding his request for a continuance, the grievant's representative asserts that he advised the hearing officer that he was scheduled to be in court out of town on Thursday, January 20<sup>th</sup>, out of state on Friday, January 21<sup>st</sup>, and unavailable the afternoon of Monday, January 24<sup>th</sup>, thereby making it extremely difficult to discuss the photos with the medical expert prior to hearing. The hearing officer denied the grievant's request for failure to assert just cause for the continuance. The grievant's representative ultimately received the photos and other evidence on the afternoon of January 19, 2005, the due date for the exchange of exhibits under the pre-hearing order, but apparently well beyond the five workday period within which the agency was required to have produced, under the grievance procedure's information gathering provisions, all documents related to injuries sustained by the client.

### 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>2</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>3</sup> "Just cause" in this context is defined as "circumstances beyond a party's control."<sup>4</sup> Examples of "circumstances beyond a party's control" include, but are not limited to, accident, illness, or death in the family.<sup>5</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>6</sup> and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.<sup>7</sup> Further, courts have found that the test for whether there was an abuse

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<sup>2</sup> *Grievance Procedure Manual*, § 5.1.

<sup>3</sup> See *Grievance Procedure Manual*, §§ 5.1 and 5.4 and *Rules for Conducting Grievance Hearings*, § V(C).

<sup>4</sup> *Rules for Conducting Grievance Hearings*, § III (B).

<sup>5</sup> *Id.*

<sup>6</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." *United States 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>7</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

of discretion in denying a continuance is not mechanical; it depends mainly upon the reasons presented at the time that request is denied.<sup>8</sup> While not dispositive for purposes of the grievance procedure, the standards set forth by the courts is nevertheless instructive and has been used by this Department in past rulings.<sup>9</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 calendar day timeframe.<sup>10</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 day timeframe 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.

#### *Just Cause for Extension of Hearing Date*

The grievance statute provides that “[a]bsent just cause,<sup>11</sup> all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party.”<sup>12</sup> Accordingly, upon initiation of a grievance or anytime subsequent thereto, either party may request the opposing party to provide all documents relevant to the actions grieved. A party has a duty to conduct a reasonable search to determine whether the requested documentation is available and to provide the documents, as well as any related “just cause” objections for not providing any documents, to the other party in a timely manner. Once a hearing officer has been appointed, this Department has long held that all disputes relating to the production of documents should be presented to the hearing officer for his determination. If the opposing party fails to produce the documents requested, the requesting party may seek an order from the hearing officer compelling production of the documents.<sup>13</sup>

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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 *United States 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 *United States v. LaRouche*, 896 F.2d 815, at 823-25 (4<sup>th</sup> Cir. 1990).

<sup>8</sup> See *LaRouche*, at 823.

<sup>9</sup> See e.g. Compliance Ruling of Director ## 2003-130, 2002-213, and 2001-124.

<sup>10</sup> Va. Code § 2.2-1001 (5).

<sup>11</sup> “Just cause” is defined as “a reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9. Examples of “just cause” for failure to produce documents include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.

<sup>12</sup> Va.Code § 2.2-3003 (E). This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided.

<sup>13</sup> See *Rules for Conducting Grievance Hearings*, §III (E).

In this case, the grievant asserts that given the agency's delay in producing the photos, the inability of her representative to review the photos with an expert witness prior to the scheduled hearing justified an extension. No doubt the timing of the receipt of the documents, combined with the schedules of the grievant, her representative and the medical expert made it difficult to assess and analyze the photographs prior to the January 25<sup>th</sup> hearing. However, the grievance procedure provides a process by which parties may obtain an order for the production of documents far enough in advance of hearing so as to allow enough time for review, analysis, and preparation for hearing. At no time prior to January 19<sup>th</sup> did the grievant seek an order to compel production of the requested documents, despite the agency's repeated failure to provide them. And while this Department does not condone the agency's delay in providing the documents requested by the grievant, under the circumstances of this case, this Department cannot conclude that the hearing officer erred or otherwise abused his discretion by failing to grant the grievant's request for an extension. The ability to seek an earlier order compelling the production of the requested documents was within the grievant's control.

#### 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.<sup>14</sup> 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.<sup>15</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>16</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>17</sup>

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Claudia T. Farr  
Director

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<sup>14</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>15</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>16</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 537 S.E. 2d 319 (2002).

<sup>17</sup> Va. Code § 2.2-1001 (5).