

Issue: Compliance/request that hearing be reopened; Ruling Date: June 1, 2006; Ruling #2006-1358; Agency: Department of Health; Outcome: grievant in compliance - hearing shall be reopened when grievant is available to participate



*COMMONWEALTH of VIRGINIA*

*Department of Employment Dispute Resolution*  
**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Health

Ruling Number 2006-1356

June 1, 2006

The grievant seeks a compliance ruling regarding her May 11, 2006 hearing. The grievant asserts in a May 15, 2006 ruling request that the hearing was not in accordance with the grievance process because she was unable to participate in the process. While the grievant does not expressly articulate the specific grounds upon which she bases her request, this Department believes that request is reasonably read as (1) an objection that the hearing was initiated and conducted in her absence, and (2) a request that the hearing be reopened. For the reasons set forth below, at such time as the grievant submits a written release from her psychiatrist certifying that she is fully capable of participating in her grievance hearing, the hearings coordinator shall reappoint a hearing officer and the hearing officer shall reopen the hearing.

FACTS

The grievant was employed by the Department of Health (or agency) as a Health Counselor II. On August 24, 2005, the grievant was issued a Group II Written Notice for alleged failure to follow her supervisor's instructions and failure to report to work as scheduled. She challenged the August 24<sup>th</sup> Written Notice by initiating a grievance the same day. On or about September 1, 2005, the grievant was issued a Group II Written Notice with termination for purported unauthorized use/misuse of state property and abuse of state time and resources. She challenged the September 1<sup>st</sup> Written Notice in a September 30<sup>th</sup> grievance. In both grievances the grievant asserts discrimination and/or retaliation by her immediate supervisor. Both grievances were qualified for hearing by the agency head.

The grievant was instructed to submit documents and a witness list to both the hearing officer and the agency advocate, to arrive not later than May 5, 2006.<sup>1</sup> The grievant failed to submit any documents or a witness list by the May 5<sup>th</sup> deadline.<sup>2</sup> On May 10<sup>th</sup>, the grievant faxed a witness list to the hearing officer but did not send it to the agency advocate.<sup>3</sup> Also on May 10<sup>th</sup>, the grievant telephoned the hearing officer and

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<sup>1</sup> May 16, 2006 Order of the Hearing Officer.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

requested a postponement, claiming that she was incapable of representing herself and had not been able to arrange for someone else to represent her.<sup>4</sup> That same day, the grievant informed the hearing officer, for the first time, that she was under a doctor's care.<sup>5</sup> The hearing officer informed the grievant that he did not have the needed documentation reflecting any such care.<sup>6</sup> Due to the absence of medical documentation, the hearing officer denied the request for postponement and conducted the hearing as scheduled.<sup>7</sup>

The grievant failed to appear for the hearing and failed to call the hearing officer prior to the hearing.<sup>8</sup> About 15 minutes before the end of the hearing, an agency employee notified the hearing officer that the grievant had just called and said she had been on the way to the hearing but was having a "car problem."<sup>9</sup> The grievant did not say when or if she was going to come to the hearing.<sup>10</sup> When all agency evidence had been presented, grievant had still not appeared and had not called again; the hearing was concluded.<sup>11</sup> Shortly before the end of the hearing, a psychiatrist transmitted to the agency a facsimile letter dated May 10, 2006, stating that grievant was under his care and, that in his professional opinion, her appearance in court would worsen her symptoms "to where she will be unable to productively participate in Court proceedings."<sup>12</sup> He concluded by "strongly recommend[ing] that the grievance hearing be postponed until [he] release[s] her medically."<sup>13</sup>

On May 16, 2006, the hearing officer issued an order in which he stated that "[i]n view of the medical documentation submitted by grievant's physician, the hearing officer will give consideration to the possibility of reopening the hearing at a later date."<sup>14</sup> Accordingly he ordered that "the hearing request be placed in abeyance indefinitely until such time as grievant submits a written release from her psychiatrist certifying that grievant is fully capable of participating in her grievance hearing."<sup>15</sup> He concluded his order by holding that:

This hearing request is hereby removed from the Hearing Docket and is returned to the Hearing Coordinator until such time as grievant submits her psychiatrist's written certification. When the Hearing Coordinator is satisfied that grievant is able to participate fully in her grievance

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<sup>4</sup> *Id.*; EDR Interview with Hearing Officer.

<sup>5</sup> EDR interview with Hearing Officer.

<sup>6</sup> *Id.*

<sup>7</sup> May 16, 2006 Order of the Hearing Officer; EDR Interview with Hearing Officer.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> May 10, 2006 facsimile Letter of Grievant's psychiatrist.

<sup>13</sup> *Id.*

<sup>14</sup> May 16, 2006 Order of the Hearing Officer.

<sup>15</sup> *Id.*

hearing, the Coordinator may reappoint the case to this hearing officer.<sup>16</sup>

On May 17, 2006, the hearings coordinator wrote to the grievant recognizing that her physician had recommended that the hearing be postponed until she was medically ready to participate in the proceedings.<sup>17</sup> Accordingly, the hearings coordinator informed the grievant that this Department would administratively close the grievance until she provides a statement from her physician certifying that she is fully capable of participating in a grievance hearing, at which time the hearing officer would give consideration to the possibility of reopening the hearing.<sup>18</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>19</sup> The 35 day timeframe can be extended only upon a showing of “just cause.”<sup>20</sup> The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for “just cause.”<sup>21</sup> Circumstances “beyond a party’s control such as an accident, illness, or death in the family” generally constitute “just cause” for a continuance.<sup>22</sup> Further, at the hearing officer’s discretion, a hearing may proceed in the absence of one of the parties.<sup>23</sup> The EDR Director has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure including the granting or denying of continuances, but a hearing officer’s decision regarding a hearing continuance will only be disturbed 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.<sup>24</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> May 17, 2006 Letter of hearings coordinator.

<sup>18</sup> *Id.*

<sup>19</sup> *Grievance Procedure Manual*, § 5.1.

<sup>20</sup> *Grievance Procedure Manual*, §§ 5.1 and 5.4. “Just cause” is defined as “a reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual*, § 9.

<sup>21</sup> *See Grievance Procedure Manual*, § 5.2 and *Rules for Conducting Grievance Hearings*, § III(B).

<sup>22</sup> *Rules for Conducting Grievance Hearings*, § III(B).

<sup>23</sup> *See Rules for Conducting Grievance Hearings*, § IV(A).

<sup>24</sup> *See EDR Ruling No. 2002-213. 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). “Abuse of discretion” in the context of a denial of a motion for continuance has been defined as an “unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay.” *Bakker* at 735, quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). The test for whether a hearing officer has abused his discretion in denying a continuance is not

This Department finds no abuse of discretion with respect to the hearing officer's decision to proceed with the hearing in the grievant's absence. At the time that the hearing began, the hearing officer had not been presented with any documentation or other affirmation from a health care provider indicating that the grievant was incapable of participating in the grievance hearing. The hearing officer had merely been informed by the grievant the previous day that she was "under a doctor's care." Given the broad, general nature that statement alone and the lack of any specific supporting documentation or other evidence, the hearing officer acted within his discretion in determining that the hearing should proceed as scheduled.<sup>25</sup>

As to the issue of reopening of the hearing, we note that such requests are typically directed to the hearing officer. In this case, however, the hearing officer ordered that the hearing request be placed in abeyance and removed the case from the hearing docket. Because the hearing officer has "returned" the case to the hearings coordinator, it is now appropriate for this Department to address the issue of reopening the hearing.

In this case, the grievant has provided documentation from a medical provider stating that the grievant was under his care and, that in his professional opinion her appearance in court would worsen her symptoms "to where she will be unable to productively participate in Court proceedings." Because the grievant has presented sufficient evidence of "just cause" for her failure to appear at the May 11<sup>th</sup> hearing, and in order to grant the grievant a full and fair opportunity to present her case at a hearing, once the grievant submits a written release from her psychiatrist certifying that grievant is fully capable of participating in her grievance hearing, the hearings coordinator shall re-appoint the grievance to hearing and the hearing shall be reopened.

This Department's rulings on matters of compliance are final and nonappealable.<sup>26</sup>

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Claudia T. Farr  
Director

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mechanical; it depends mainly upon the reasons presented to the hearing officer at the time that request is denied. *See* LaRouche, at 823.

<sup>25</sup> This is consistent with EDR hearings practice. Previously, where a hearing officer was requested to excuse a party's failure to appear at the grievance hearing, a continuance was granted where that party subsequently provided documentation from a health care provider confirming that the grievant was, for medical reasons, unable to attend the hearing. For example, in Case Nos. 5552/5553/5559/5570/5571, the grievant was granted a continuance where he presented an affidavit stating that he had been hospitalized on the morning of the hearing and spent the next four days in the hospital, with documentation to support his affidavit in the form of hospital discharge papers.

<sup>26</sup> Va. Code § 2.2-1001(5).