

Issue: Compliance – Grievance Procedure (Conduct of Hearing Officer); Ruling Date: June 2, 2008; Ruling #2008-2005; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2008-2005
June 2, 2008

The grievant has requested a compliance ruling in her grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency). The grievant asserts that the hearing officer should have postponed her hearing. For the reasons set forth below, we hold that the hearing officer did not abuse his discretion by denying the grievant's request.

FACTS

The grievant was employed by the agency as a Licensed Practical Nurse (LPN). On May 1, 2007, the grievant was temporarily reassigned from working as an LPN in a direct care capacity to a non-direct care position. On July 25, 2007, the grievant initiated a grievance challenging her reassignment. Subsequently, on October 11, 2007, the agency issued the grievant two Written Notices—a Group I Written Notice for her alleged accumulation of unplanned leave and a Group II Written Notice for allegedly failing to follow her supervisor's instruction—and terminated her employment.

On October 26, 2007, the grievant initiated two grievances challenging these disciplinary actions. All three grievances were qualified for hearing and the agency requested the appointment of a hearing officer. The agency requested consolidation of the three grievances to be heard in a single hearing and on February 19, 2008, this Department consolidated the grievances.

On March 4, 2008, a hearing officer was appointed to hear this case (Case #8779, 8783, 8784). In a letter dated March 23, 2008, the grievant requested that the hearing officer remove himself from Case #8779, 8783, 8784. Previously, the hearing officer presided over another grievance hearing in which he upheld the agency's discipline against her. The grievant disputed the findings of the prior decision and asserted that the hearing officer has a conflict of interest with respect to the instant case because of his involvement and adverse ruling in the prior grievance.

In an April 1, 2008 response, the hearing officer declined to recuse himself. On April 4, 2008, the grievant asked this Department for two rulings: the first, to remove the

hearing officer from this case. Later that day, at approximately 3 p.m., the grievant requested this Department to intervene with the hearing officer's decision not to delay the hearing at her request. The grievant had asked the hearing officer to delay the hearing because she was scheduled to work the following Monday, the day that her hearing was scheduled to occur. It is this request for intervention that is the subject of this ruling.¹

DISCUSSION

The grievance procedure states that grievance hearings should be held and a written decision issued within 35 calendar days of the hearing officer's appointment.² 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."³ "Just cause" in this context is defined as "circumstances beyond a party's control."⁴ Examples of "circumstances beyond a party's control" include, but are not limited to, accident, illness, or death in the family.⁵ Case law from the Virginia Court of Appeals further supports the position that a 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;⁶ and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.⁷ In addition, 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.⁸ 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.⁹

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.¹⁰ 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

¹ In an April 7, 2008 ruling, this Department declined to remove the hearing officer. EDR Ruling 2008-2003.

² *Grievance Procedure Manual*, § 5.1.

³ See *Grievance Procedure Manual*, §§ 5.1 and *Rules for Conducting Grievance Hearings*, § III(B).

⁴ *Rules for Conducting Grievance Hearings*, § III(B).

⁵ *Id.*

⁶ "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 (4th Cir. 1991), quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

⁷ 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, 735, citing to *U.S. v. LaRouche*, 896 F.2d 815, at 823-25 (4th Cir. 1990) ("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.").

⁸ See *LaRouche*, at 823.

⁹ See e.g. Compliance Rulings of Director Nos. 2003-130, 2002-213, and 2001-124.

¹⁰ Va. Code § 2.2-1001 (5).

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 or otherwise erred by initially refusing to extend the hearing date. The hearing officer explained in the April 4th teleconference that the hearing had been scheduled for some time and the grievant offered no evidence to suggest that her work schedule had been modified at the eleventh hour. Although a recently discharged employee who has secured replacement employment may be placed in a difficult position when forced to request time off to challenge her termination of state employment, in this case it appears that the hearing date had long been established, along with the employee's work schedule. Parties have a duty to inform the hearing officer of known conflicts as soon as possible. Thus, we cannot conclude that the hearing officer erred by rejecting her last-minute request to stay the hearing process on the basis of a work-schedule conflict.

Finally, it must be noted that this Department was placed in a difficult position on Friday, April 4, 2008, when it received this ruling request, submitted at 2:59 p.m. on the Friday afternoon preceding a scheduled Monday morning hearing. There was simply insufficient time to adequately review the facts of the case and give due consideration to the issues raised prior to the scheduled hearing. Given the potential harm to the grievant of possibly losing her new job in order to challenge the discharge from her former state job, this Department felt it had little choice, under the particular facts of this case, other than to ask the hearing officer to stay the hearing, which he did.

We offer the following guidance to the parties and to the hearing officer in rescheduling the hearing in this matter. Obviously, if this Department were to routinely ask hearing officers to delay the hearing because a party has requested a last-minute intervention, parties could derail the grievance process by merely advancing last-minute requests, including those that are entirely baseless. Accordingly, in the future, last minute requests to this Department to intervene in the hearing officer's refusal to delay a scheduled hearing must be accompanied by convincing documentary evidence, at the time of the request. Without such evidence, the party's request to this Department to intervene will be promptly denied and the hearing will take place as scheduled. This Department's rulings on matters of compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

¹¹ Va. Code § 2.2-3003(G).