

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: April 7, 2010;
Ruling #2010-2532; Agency: University of Virginia Health System; Outcome:
Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the University of Virginia Health System
Ruling Number 2010-2532
April 7, 2010

Both the University of Virginia Health System (the agency) and the grievant have requested compliance rulings to challenge some of the hearing officer's pre-hearing rulings regarding the appearance of witnesses and the conduct of the hearing in Case No. 9241. For the reasons discussed below, this Department has no basis to disturb the hearing officer's rulings.

FACTS

The grievance at issue in Case No. 9241 involves the grievant's alleged misconduct surrounding treatment of the Patient. The grievant seeks to use a secure agency computer to access medical records at the hearing to determine whether the agency has produced all the records requested about the Patient. The hearing officer denied the grievant's request. The hearing officer also refused to order the attendance of three additional witnesses, doctors who allegedly treated the Patient at other times, for the hearing. The grievant is appealing these rulings. In addition, the agency requests review of the hearing officer's scheduling of the hearing in this case for two days. The agency maintains that only a one-day hearing should take place.

DISCUSSION

Computer Access

The grievant has proposed to have a secured computer available at the hearing to access certain medical records of the Patient that were previously requested. The grievant appears to dispute whether the agency has produced all the documents that were requested. The grievant seeks to have this computer access available at the hearing to "corroborate" whether the agency has produced all relevant and requested documents about the Patient.

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available

upon request from a party to the grievance, by the opposing party.”¹ 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. However, granting the computer access requested would be the equivalent of allowing any grievance party to audit the opposing party’s files. There is nothing that authorizes such an investigation under the limited discovery set out in the grievance procedure. Indeed, such a review could extend into irrelevant and/or confidential materials and information a grievance party has no right to observe. For these reasons, this Department agrees with the hearing officer’s ruling to prevent the grievant from using the computer for access of medical records at the hearing.²

Witnesses

A hearing officer has the authority to order the appearance of witnesses at hearing.³ The determination of what witnesses are to be ordered to attend the hearing is within the hearing officer’s discretion. The hearing officer has the authority to exclude, for example, witnesses who will not present any relevant or material evidence,⁴ or who offer merely cumulative testimony.⁵

The grievant asked the hearing officer to issue witness orders for three doctors who allegedly treated the Patient. The agency objected that these doctors did not treat the Patient during the time period of the grievant’s alleged misconduct. The hearing officer sustained this objection and has refused to issue the three witness orders. While this Department could see, at least arguably, that other treating physicians of the Patient could have information relevant to the issues raised in this proceeding, the hearing officer’s ruling, based on the assumption that these doctors were not on duty during the actual time period of the alleged misconduct, is also understandable. Nothing in the grievant’s ruling request explains or presents evidence why the testimony of these doctors is so relevant that their attendance at the hearing as witnesses is required. As such, this Department cannot find that the hearing officer’s determination was an abuse of his discretion.⁶

Length of Hearing

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

² Nothing in this ruling prevents the grievant from presenting information and argument to the hearing officer and/or this Department about the agency’s alleged failures to produce specific documents in requesting rulings on the agency’s compliance with the grievance procedure.

³ *E.g.*, *Grievance Procedure Manual* § 5.7.

⁴ *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* *Owens-Corning Fiberglass Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) (“We have recently defined as relevant ‘every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.’” (citations omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) (“Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue.” (citations omitted)).

⁵ *See Rules for Conducting Grievance Hearings* § IV(E).

⁶ This ruling does not foreclose the grievant from presenting additional information to the hearing officer to explain the potentially relevant testimony of these doctors to request again their attendance at the hearing.

The hearing officer has scheduled the hearing in this case for two days. The agency disputes this determination, citing to section 5.4 of the *Grievance Procedure Manual*, which states: “[a] hearing is to last no more than one day, unless the hearing officer determines that the time is insufficient for a full and fair presentation of the evidence by both sides.”⁷

The general one day standard is not to be applied in a rigid, absolute manner.⁸ This Department has ruled that a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.⁹ There is no requirement that a grievance hearing be limited to only one day. Further, it appears that an enlarged period of time for the hearing in this case was scheduled, at least in part, because there are numerous potential witnesses in this case.¹⁰ If these witnesses will actually be called to testify at the hearing, there appears to be good reason to allow two days for the full and fair presentation of the proposed evidence in this case. Consequently, this Department cannot find that the hearing officer has abused his discretion in initially scheduling two days for this hearing.

This Department’s rulings on matters of compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

⁷ *Grievance Procedure Manual* § 5.4. In addition, while the *Rules for Conducting Grievance Hearings* state that: “[t]he hearing on a grievance may be divided into one or more sessions, but generally should last no longer than a total of 8 hours,” the *Rules* also state the “hearing may continue beyond 8 hours, however, if necessary to a full and fair presentation of the evidence by both sides.” *Rules for Conducting Grievance Hearings* § III(B).

⁸ EDR Ruling No. 2009-2335.

⁹ EDR Ruling No. 2010-2376.

¹⁰ As stated above, the hearing officer has the authority to exclude, for example, witnesses who will not present any relevant or material evidence, or who offer merely cumulative testimony.

¹¹ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).