Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: March 16, 2010; Ruling #2010-2569; Agency: Virginia Department of Transportation; Outcome: Hearing Officer Not in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2010-2569
March 16, 2010

The Department of Transportation (the agency) requests a compliance ruling to challenge the hearing officer's instruction for the parties to submit legal briefs after the hearing in Case Numbers 9065 and 9210. For the reasons discussed below, the hearing officer is directed to restructure her briefing instructions.

FACTS

The grievances in this consolidated matter concern the grievant's challenge to two disciplinary actions.[1] Following the conclusion of the hearing in Case Numbers 9065 and 9210, the hearing officer sent a letter requesting that both parties submit briefs to argue their respective positions. Although the letter is not specifically limited as such, it appears that the hearing officer was requesting the parties' arguments as to the application of the Americans with Disabilities Act (ADA). The hearing officer directed the agency to submit a brief within 21 days, and the grievant within 21 days of receipt of the agency's brief. The agency has objected to the hearing officer's request, in part, because its advocate is not an attorney and is unable to submit a brief with "reference to state and federal statute and state (as well as EDR) cases," as requested by the hearing officer.

DISCUSSION

As an initial matter, there is nothing in the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings* that would prohibit a hearing officer from requesting briefs following the hearing. As such, providing an opportunity to the parties to provide written submissions after hearing is within the hearing officer's discretion. There does not appear to be any abuse of discretion by the hearing officer simply requesting the submissions in this case.[2] However, the particular instructions by the hearing officer in this case require further examination.

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[1] *See* EDR Ruling Nos. 2009-2329, 2009-2330.
[2] *See* EDR Ruling No. 2010-2551. Indeed, it is understandable when hearings involve complicated and potentially case-determinative legal questions for the parties to be invited and/or permitted to submit briefs.

First, whether or not briefs are required, the failure to submit a brief should not penalize that party. For instance, if the grievant submits a brief on a particular question, the agency's failure to do so does not result in a default decision in favor of the grievant's position. Rather, as always, it is the hearing officer's duty, not the parties', to assess the record evidence and make conclusions of law and policy to resolve the material issues in the case.[3]

A post-hearing brief is a significant opportunity for a party to present a cogently explained rationale, with cited support, for the hearing officer's consideration, especially when the matters at issue are complex. Certainly, ADA claims can be complex and necessarily require the hearing officer to apply legal principles.[4] Guidance from the parties in the form of legal arguments can assist in the hearing officer's consideration of the matter. However, as already stated, failing to submit a brief when requested by the hearing officer will not lead to a finding by default against that party. This ensures that parties who are unable or choose not to utilize legal representation are not penalized. As the agency correctly points out, there is no requirement that either party have an attorney to proceed with the grievance process.

An additional point must be made about the briefing schedule. The hearing officer required that the agency submit its brief first, with the grievant to respond thereafter. However, given that these briefs appear to be intended to address primarily the ADA claims,[5] it would not appear that it should be the agency that is to submit the first brief. In analogous cases, this Department has held that when a disciplined employee asserts that the discipline was issued for an improper reason, such as in violation of the FMLA, the employee is deemed to be raising an affirmative defense and it is the employee's burden to prove the affirmative defense. The agency has no burden to disprove the affirmative defense.[6] Consequently, because the grievant carries the burden of proof on the ADA claim in this case, it must be the grievant who makes the opening brief, with the agency to respond.[7]

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[3] *See, e.g., Rules for Conducting Grievance Hearings* § V(C). Thus, the submission of briefs does not obviate the hearing officer's duty to determine questions of law and policy based on his/her own research and analysis.

[4] While questions under the ADA can be complex and require extensive legal analysis, there are also significant ADA issues that can be accurately and adequately assessed by knowledgeable non-lawyer personnel with applicable human resources training and/or experience. Presumably, the agency had already assessed whether its actions were compliant with the ADA or other laws prior to issuing the disciplinary actions in this case.

[5] While there may be some cases in which briefs on all the issues raised in a grievance would make sense, this does not necessarily appear to be one of those cases. The parties had extensive opportunities during the hearing to present their cases on the material issues, especially the underlying disciplinary actions. It would not seem to make sense to require the parties to rehash their hearing presentations as to the basis for the disciplinary actions here. However, it would be understandable to give the parties the opportunity to present argument, applying the facts presented at hearing to the law, of how and whether the ADA applies in this case. Grievance hearings do not often provide significant opportunities to present such legal arguments except during the limited periods of opening and closing statements. As such, post-hearing briefing can be sensibly utilized for such presentations. Therefore, this Department is assuming that the purpose for the post-hearing briefs in this case was to address the legal issues implicated by the grievant's assertion of an affirmative defense under the ADA. However, this determination is left to the hearing officer's discretion and the parties' determination of what issues to brief.

[6] *See* EDR Ruling No. 2009-2300.

[7] Both parties could also be invited to submit briefs at the same time. Alternatively, if, in a disciplinary case, the parties were invited to submit briefs on all aspects of a case, not simply an affirmative defense, the agency would be the first party to submit a brief as it bears the burden of proof and presents its case first. However, the agency's brief

CONCLUSION

The hearing officer is directed to restructure her briefing schedule consistent with this ruling. This Department's rulings on matters of compliance are final and nonappealable.[8]

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Claudia T. Farr
Director

would not need to address any affirmative defenses at issue. Only after the grievant submits a brief, presumably raising any affirmative defenses, the agency would then have the opportunity to respond to such issues in a reply brief. This appears to be the order chosen by the hearing officer. However, because the agency would not need to make the first argument on an ADA affirmative defense and given the discussion above in footnote 6, the hearing officer must revisit the briefing schedule here.

[8] *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).