

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: April 5, 2010;
Ruling #2010-2586; Agency: Virginia Community College System; Outcome:
Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Virginia Community College System
Ruling Number 2010-2586
April 5, 2010

The grievant requests a ruling concerning Virginia Community College System's (VCCS's) choice of agency representative in Case No. 9289. For the reasons discussed below, this Department has no basis to grant the grievant's request to exclude the VCCS's chosen representative from the hearing.

FACTS

In Case No. 9289, the VCCS has apparently indicated that the Lieutenant will serve as its agency representative at the hearing. The grievant asserts that if the Lieutenant is permitted to be present during the entire hearing he will influence the testimony of witnesses whom the Lieutenant supervises. The grievant asserts that this concern is evidenced by a witness's testimony at the third resolution step, when the Lieutenant was not present, which differed from the Lieutenant's stated description of that same witness's report to the Lieutenant in the applicable internal investigation and report.¹ The grievant raised his concerns with the hearing officer during the pre-hearing conference. The hearing officer did not grant the grievant's request and the grievant has appealed to this Department.

DISCUSSION

The inappropriate influencing of witnesses is one of the most important concerns and serious allegations that can be raised in a grievance hearing. Indeed, if there was evidence that a member of management inappropriately influenced a witness such that the individual's testimony was altered, such misconduct could require the greatest sanction this Department could award against the agency.² However, Virginia law provides certain protections to ensure

¹ The grievant has also described other alleged acts by the Lieutenant in his role as a supervisor that appear to have no relation to the grievant's request.

² See Va. Code § 2.2-3003(G).

that grievance hearings can proceed without such issues occurring. Retaliation against any participant in a grievance hearing, including witnesses, is strictly prohibited by law and policy.³

Although we can understand his concern, the grievant has not presented any evidence that the Lieutenant has engaged in any conduct to inappropriately influence witnesses. Rather, the grievant is asserting through supposition and belief that such influence could happen. At this point, the grievant's allegations that undue influence could result from the Lieutenant's presence at the hearing amount to nothing more than could be said about the presence of any member of management at a grievance hearing. Such allegations are insufficient to grant the grievant's extraordinary request to exclude the VCCS's chosen representative at hearing.⁴

Based on what has been presented to this Department, it does not appear that the Lieutenant's mere presence will prevent the grievant from having a fair hearing. The witnesses will be under oath to tell the truth. To the extent there are differences in testimony, the grievant will have the ability to question these differences. The hearing officer, likewise, will have the ability to assess the credibility and forthrightness of the witnesses. As such, this Department will not grant the grievant's request to exclude the Lieutenant from the hearing.⁵

This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

³ *E.g.*, Va. Code § 2.2-3000.

⁴ If an individual's presence or actions during a hearing prevent the hearing from being a fair and impartial process, such an individual could be excluded by the hearing officer, who has the duty to ensure that the hearing is conducted in an orderly, fair, and equitable fashion. *See, e.g., Rules for Conducting Grievance Hearings* § IV(C). A hearing officer's decision regarding exclusion would be subject to this Department's compliance authority, *see, e.g.*, Va. Code § 2.2-1001(5). However, absent strong evidence of inappropriate influence or continued disruptive misconduct, each party should be able to have its chosen representative at hearing.

⁵ This ruling in no way prevents the grievant from raising this motion or a claim of noncompliance in the future if there is evidence presented of inappropriate influencing of witnesses or other acts of misconduct that violate any provision of the grievance statutes, procedure, or rules.

⁶ *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).