

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9336; Ruling
Date: July 19, 2010; Ruling #2010-2686; Agency: Department of Corrections;
Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2010-2686
July 19, 2010

The grievant has requested that this Department (“EDR”) administratively review the hearing officer’s decision in Case Number 9336 with the Virginia Department of Corrections (“agency”). For the reasons set forth below, this Department finds no reason to disturb the hearing officer’s decision in this case.

FACTS

The procedural facts of this case, as set forth in the Hearing Decision in Case Number 9336, are as follows:

The Grievant was issued a Group III [sic] Written Notice on February 24, 2010 for:

Failure to follow supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy. You did not follow the inclement weather policy which requires essential staff to report to work during inclement weather. You did not attempt to come to work on January 30 and 31, 2010. You did attempt to come on February 1, 2010 but you were able to make it.

Pursuant to the Group II Written Notice, the Grievant was terminated on February 24, 2010. On March 12, 2010, the Grievant timely filed a grievance to challenge the Agency’s actions. On May 17, 2010, the Department of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On June 16, 2010, a hearing was held at the Agency’s location.¹

The Findings of Fact of this case, as set forth in the Hearing Decision in Case Number 9336, are as follows:

¹ Decision of the Hearing Officer in Re: Case 9336, issued June 16, 2010 (“Hearing Decision”) at 1.

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant did not appear for this hearing and the Grievant did not file any documentary evidence with the Hearing Officer.

The totality of the Agency's Exhibit 1 clearly established that the Grievant did not comply with the Inclement Weather Policy for this Agency in that she did not report to work when essential staff had to report to work. On January 20, 2010, the Grievant did not report as scheduled for her yearly qualification on the firing range. Further, on January 30, 2010, the Grievant called the Agency and stated that she could not come to work due to weather conditions. On January 31, 2010, the Grievant did not report to work and stated that she was taking a personal day. On February 1, 2010, the Grievant did not report to work.

Prior to the Written Notice before this Hearing Officer, the Grievant had three (3) other Written Notices that were still active. On September 15, 2009, the Grievant received two (2) separate Group II Written Notices for failure to report to work without notice. On January 15, 2009, the Grievant received a Group I Written Notice for absences and excessive tardiness.

The Agency has borne its burden of proof in this matter and, coupled with the three (3) prior active Written Notices, the Agency was justified in terminating the Grievant's employment.²

When the grievant was questioned by this Department about her delay in arriving at the facility the grievant provided the following information:

The grievant asserts that she believes that she left for the hearing at approximately 6:45 a.m. She asserts that at approximately halfway through her trip, she encountered a strong rain storm which delayed her traveling. She asserts that on three occasions she tried to call the main number at the facility where the hearing was to take place. The grievant asserts that the phone rang but no one ever answered. She further asserts that she encountered significant static. When she arrived at the facility at approximately 9:25 a.m., the skies were sunny and the hearing officer had already left.

² *Id.* at 2-3.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure.”³ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁴

The grievant essentially asserts that the hearing officer erred by conducting a hearing in her absence. She appears to seek a new hearing or to have the hearing reopened. For the reasons below, we find that the hearing officer did not abuse his discretion by moving forward with the hearing without the grievant and we find the justifications advanced by the grievant insufficient to warrant a new or reopened hearing.

The grievance procedure requires that grievance hearings “should be held and a written decision issued within 35 calendar days of the hearing officer’s appointment.”⁵ The 35 day timeframe can be extended only upon a showing of “just cause.”⁶ The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for “just cause.”⁷ Circumstances “beyond a party’s control such as an accident, illness, or death in the family” generally constitute “just cause” for a continuance.⁸ Further, at the hearing officer’s discretion, a hearing may proceed in the absence of one of the parties.⁹ 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.¹⁰

³ Va. Code § 2.2-1001(2), (3), and (5).

⁴ *Grievance Procedure Manual* § 6.4.

⁵ *Grievance Procedure Manual*, § 5.5.

⁶ *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.

⁷ See *Grievance Procedure Manual*, § 5.2 and *Rules for Conducting Grievance Hearings*, § III(B).

⁸ *Rules for Conducting Grievance Hearings*, § III(B).

⁹ See *Rules for Conducting Grievance Hearings*, § IV(A).

¹⁰ 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 *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). See also *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991) “[t]o 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 (4th 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 mechanical; it depends mainly upon the reasons presented to the hearing officer at the time that request is denied. See *LaRouche*, at 823.

Conducting the Hearing without the Grievant Present

Based on the particular facts of this case, 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. From the time that the hearing began, approximately twenty minutes after it was originally scheduled to commence, through its conclusion, the hearing officer was never presented with any information regarding the grievant's failure to appear. According to a review of the hearing tape, the hearing officer observed that the Warden had made several inquiries as to the grievant's whereabouts with no success. No one at the hearing had received a call from the grievant indicating where she was or that she was delayed. Accordingly, we find no error with proceeding with the hearing under the particular facts of this case.

Reopening the Hearing

A request to reopen the hearing is made to the hearing officer.¹¹ The grievant did not make a request to the hearing officer but only to this Department. This Department has given parties who have timely sent their appeals to the wrong reviewer an opportunity to present their appeal to the correct reviewer, in this case the hearing officer.¹² Here, however, there is no reason to allow the grievant to forward this appeal to the hearing officer because reopening the hearing, under the particular facts of this case, would amount to an abuse of discretion by the hearing officer.

The grievant asserts that she was delayed by inclement weather. She further asserts that she tried to make three phone calls to inform the facility where the hearing was to take place that she was running late but was unsuccessful. We cannot conclude that the foregoing reasons advanced by the grievant warrant "just cause" justifying a new hearing.

Parties to a grievance hearing have an obligation to arrive timely at the hearing and to provide notice to the hearing officer if an emergency arises that precludes them from doing so. In this case, the grievant did neither. While this Department is cognizant that weather (and other circumstances such as heavy traffic) can prolong travel times, parties have a duty to allow for sufficient travel time, reasonably taking into account delays that may be unplanned but not necessarily unforeseeable. Furthermore, when unforeseeable circumstances prevent a party from timely arriving at the hearing, the party has a duty to find some means of successfully contacting the hearing officer to inform him of the situation.

¹¹ *Grievance Procedure Manual*, § 7.2(a).

¹² This Department has long held that a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period. EDR Ruling Nos. 2010-2552, 2010-2567; 2008-1811; 2007-1635. *See also*, Virginia Department of Taxation vs. Brailley, No. 0972-07-2, 2008 Va. App. LEXIS 19 at *6-7 (January 15, 2008). (Court affirmed EDR's determination that an appeal based on inconsistency with policy which should have been raised with the Department of Human Resource Management (DHRM) but was raised with EDR within 15 calendar days of the original decision, was timely appealed to DHRM.)

As noted, this did not happen here. The grievant states that she tried to call the facility where the hearing was to occur but her calls did not go through. Several attempts to call, three in this case, does not relieve the grievant of her obligation to inform the hearing officer that she has been delayed. Even if the connectivity problem was related to poor cellular reception, the grievant's route passed through at least three towns after she encountered the rain where she could have attempted to find a land-line phone to contact the facility or hearing officer. As to the grievant's assertion that the facility's phone rang but no one picked up, the facility has an automated phone service that automatically answers all calls then provides a menu of options for directing calls. If one were to assume that the facility's system was inoperative that morning, the grievant had been provided on May 17, 2010 and May 19, 2010, correspondences from the hearing officer that listed his office phone number. The grievant should have tried contacting the hearing officer's office to request that his office forward the message of the weather delay. In sum, under the particular facts here, we find that the grievant has not provided sufficient evidence of any just cause warranting a new or reopened hearing.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.¹³ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁵

Claudia T. Farr
Director

¹³ *Grievance Procedure Manual* § 7.2(d).

¹⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁵ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).