

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: May 12, 2011;
Ruling No. 2011-2976; Agency: Department of State Police; Outcome: Hearing
Officer in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of State Police
Ruling No. 2011-2976
May 12, 2011

The grievant has requested a ruling on whether the hearing officer has arbitrarily and inappropriately limited the amount of time that the grievant will have to present his case at hearing.

FACTS

The facts of this grievance, as set forth in EDR Ruling No. 2010-2599, are set forth below:

According to the agency, when undertaking equity salary adjustments in 2004, the grievant's rank was listed incorrectly, leading to a more substantial increase than was apparently appropriate. Subsequent increases and adjustments since that time additionally compounded the 2004 error by the agency. To correct its error, the agency has apparently reduced the grievant's salary and is seeking to collect the overpayments that occurred during the approximately five years in which the grievant received an inflated salary in error. The grievant has initiated the grievance to challenge these actions.¹

When EDR declined to qualify the grievance, the grievant appealed to the Circuit Court. The Court qualified the grievance, finding the EDR decision arbitrary and capricious.² A hearing officer was appointed to hear the grievance and, according to the grievant, the hearing officer made a determination that he would limit both parties to no more than three hours for each side to present their case at hearing. The grievant objects to the three hour time frame as insufficient to present his case.

¹ EDR Ruling No. 2010-2599, at 1.

² The Court did not explain why this Department's qualification decision was arbitrary. However, according to the agency, the reason was that this Department used the word "apparently" in describing the facts of the grievance. *See above*. EDR Rulings have long used such language so as not to create an impression that this Department has engaged in ultimate and binding fact-finding. Fact-finding is a role reserved exclusively for EDR hearing officers who review the facts de novo and make final factual determinations.

DISCUSSION

The hearing officer has the authority to determine the amount of time necessary to accomplish the full and fair presentation of the evidence. His or her determination will be reversed by this Department on administrative review only upon a showing of abuse of discretion by the hearing officer. EDR Ruling No. 2009-2335 is instructive here. In EDR Ruling No. 2009-2335, the grievant alleged that the hearing officer improperly curtailed his hearing, which lasted just over six hours and 17 minutes. The grievant asserted that he was prevented from adequately presenting his case. In that decision we held:

We fully acknowledge that a hearing officer's task of keeping the hearing moving at an appropriate pace is a difficult task. A hearing officer may be subject to criticism for exhibiting patience with a party who may not be presenting his or her case in the most concise manner. Yet, when he admonishes a party to keep focused, avoid repetition, and so on, he may be charged, as is the case here, with not allowing sufficient time to present the case. In addition, while the *Rules* 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." Thus, the general one day/8 hour standard is not to be applied in a rigid, absolute manner. Finally, there is no express *Rules* requirement that a hearing officer inform the parties of time constraints that will be imposed upon the parties, although it would be a sound practice for any hearing officer to adopt.³

Here, as directed in EDR Ruling No. 2009-2335, the hearing officer has given the parties fair notice of his expectations regarding the time necessary to present their respective cases. This Department is familiar with the issues and underlying apparent facts of this case and they do not appear to be unduly complex. Accordingly, this Department cannot conclude at this time that the hearing officer abused his discretion by setting a limit of six hours (three for each party) for the hearing. However, as we noted in EDR Ruling No. 2009-2335, the general one day/eight hour standard is not to be applied in a rigid, absolute manner. If more than six or even eight hours are necessary for "a full and fair presentation of the evidence by both sides," then the hearing officer must allow the parties the time necessary to accomplish the full and fair presentation of the evidence. If at hearing the grievant continues to believe that he has not been afforded sufficient time to fully and fairly present his case, he should seek additional time from the hearing officer. If the hearing officer denies the request, the grievant may renew his objection with this Department through a timely filed administrative review.

Claudia T. Farr
Director

³ EDR Ruling No. 2009-2335, at 7 (footnotes omitted).