

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: September 15, 2011; Ruling No. 2012-3067; Agency: Virginia Department of Transportation; Outcome: Hearing Officer in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Transportation  
Ruling Number 2012-3067  
September 15, 2011

The grievant seeks a compliance ruling regarding his August 17, 2011 hearing. The grievant asserts in an August 16, 2011 compliance ruling request that the hearing was not in accordance with the grievance process because the grievant could not attend and the hearing officer denied the grievant's request for a continuance. For the reasons discussed below, this Department has no basis to disturb the hearing officer's decision.

FACTS

On July 12, 2011, this Department's Division of Hearings mailed the grievant a letter with information about his upcoming grievance hearing. The letter specifically informed the grievant that "[d]uring the scheduled conference call, the hearing officer will provide instructions regarding witnesses, exhibits and scheduling, etc."<sup>1</sup> On July 28, 2011, a prehearing conference call with the hearing officer was scheduled with the grievant and the agency for July 29, 2011 at noon. The grievant alleges that he was unable to participate in the scheduled prehearing conference call at the last minute because he was required to work. In addition, he states that he was unaware that the purpose of the prehearing conference call was to set a date with both parties for the hearing, and he admits he did not follow-up with the hearing officer or the agency after the prehearing conference call occurred. On August 3, 2011, the hearing officer sent a letter to both parties, indicating the hearing had been set for August 17, 2011 at 9:00 a.m. The grievant admits he did not check his mailbox for several weeks and states he did not receive the August 3<sup>rd</sup> letter. He further asserts that he first learned on August 16, 2011 at 3:30 p.m. that his hearing had been scheduled for the next day, at which time he contacted the hearing officer to request a continuance. The grievant alleged that he could not attend the hearing because he did not have enough time to prepare for the hearing and he was scheduled to work the following day. The hearing officer denied the grievant's request, stating that he did not find just cause for a continuance because the grievant should have checked his mailbox sooner. On August 16, 2011 at 9:20 p.m., the grievant sent an email to this Department seeking a compliance ruling regarding the hearing officer's continuance denial. This

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<sup>1</sup> Emphasis added.

Department did not receive the grievant's email until 8:06 a.m. on August 17, 2011. Meanwhile, the grievant failed to appear for the August 17<sup>th</sup> hearing, and the hearing was conducted in the grievant's absence.

### DISCUSSION

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."<sup>2</sup> The 35 day timeframe can be extended only upon a showing of "just cause."<sup>3</sup> The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for "just cause."<sup>4</sup> Circumstances "beyond a party's control such as an accident, illness, or death in the family" generally constitute "just cause" for a continuance.<sup>5</sup> Further, at the hearing officer's discretion, a hearing may proceed in the absence of one of the parties.<sup>6</sup> 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.<sup>7</sup>

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. First, the grievant did not follow-up with this Department after he missed the scheduled prehearing conference call, even though he had been informed by this Department that the purpose of that call was to schedule the hearing. Second, the grievant admits he had not checked his mailbox for several weeks even though he had received prior mailed correspondence from this Department in July. Third, at the time that the hearing began, the grievant was fully aware

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<sup>2</sup> *Grievance Procedure Manual*, § 5.1.

<sup>3</sup> *Grievance Procedure Manual*, § 5.1. "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual*, § 9.

<sup>4</sup> See *Grievance Procedure Manual*, § 5.2 and *Rules for Conducting Grievance Hearings*, § III(B).

<sup>5</sup> *Rules for Conducting Grievance Hearings*, § III(B).

<sup>6</sup> See *Rules for Conducting Grievance Hearings*, § IV(A).

<sup>7</sup> 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 to *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). See also *U.S. v. Bakker*, 925 F.2d 728 (4<sup>th</sup> Cir. 1991) "to 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 (4<sup>th</sup> 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.

that his hearing had been scheduled to start at 9:00 a.m. on August 17, 2011, as the hearing officer had denied the grievant's request for a continuance on August 16, 2011, and had informed the grievant that he planned to proceed with the hearing the following morning. In sum, this Department finds the hearing officer acted within his discretion in determining that the hearing should proceed as scheduled.

This Department's rulings on matters of compliance are final and nonappealable.<sup>8</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> Va. Code § 2.2-1001(5).