

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: May 25, 2012;  
Ruling No. 2012-3359; Agency: Department of Behavioral Health and Developmental  
Services; Outcome: Hearing Officer Not in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Behavioral Health and Developmental Services  
EDR Ruling Number 2012-3359  
May 25, 2012

The agency has requested that this Department (EDR) rule on the hearing officer's decision to prohibit the presentation of a video recording at the grievance hearing in Case Number 9815. For the reasons set forth below, the hearing officer is ordered to reopen the hearing and allow the agency to present the recording, consistent with the discussion below.

FACTS

The grievant was discharged by the agency for alleged patient abuse. The grievant grieved his discharge, and on May 23, 2012, the grievance advanced to hearing. At hearing, the agency sought to show a video recording of the purported event that led to the grievant's discipline. Although the agency wanted to have the video recording viewed by the hearing officer, the agency did not want to have to turn over a copy of the recording to the grievant citing patient privacy and security concerns.

DISCUSSION

The hearing officer's apparent concern associated with allowing the agency to use the recording without giving the grievant a copy is commendable and appropriate. Obviously, one of the central tenets of due process is the ability of an employee to have access to the evidence used by the agency to support a charge of misconduct. Such access is necessary in order to give the employee the opportunity to fully defend against the charge. An agency may, however, have legitimate concerns about (i) maintaining the security of its facility—a maximum security psychiatric hospital—and (ii) preserving the privacy of its patients. In balancing these competing interests, the hearing officer must attempt to accommodate the privacy and security concerns while still allowing parties to use relevant evidence to prove or disprove charges.

In this case, the hearing officer should be able to strike a balance in accommodating all of these competing interests. He might do so by first ensuring that the agency has made available for review, well prior to hearing, any video recording that it seeks to use as evidence of abuse. The agency would presumably be able to maintain sole custody of the recording as long as the grievant and his representative were allowed adequate access to the video well in advance of the

hearing. Next, the hearing officer would need to allow the grievant to have full access to the recording at hearing and throughout the entire appeal period, even if he allows the agency to maintain sole custody of the recording. Finally, if the agency insists that it must maintain sole custody of the recording, the hearing officer should ensure through an appropriate order that the agency guarantee that all reviewers of the hearing decision, including this Department, the Department of Human Resource Management, and the circuit court (and potentially Court of Appeals) will similarly be granted full access to the recording, if needed. It will be the burden of the agency to make such access reasonable.<sup>1</sup> Failure to adequately preserve the recording could allow any reviewer to draw an adverse inference against the agency concerning any factual dispute that could have otherwise been resolved through review of the recording.<sup>2</sup>

The above may not be the only way that competing interests could be addressed by the hearing officer. Consistent with the principles outlined above, the hearing officer is free to devise any other means that effectively and fairly balances the above competing interests.<sup>3</sup>

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Claudia T. Farr  
Director

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<sup>1</sup> “Reasonable” access for any reviewer would mean, for example, that the agency will make the recording available to any reviewer at the reviewer’s normal business location and during the reviewer’s normal business hours.

<sup>2</sup> *Cf. Rules for Conducting Grievance Hearings* § V.B (“Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered.”).

<sup>3</sup> It appears as though the agency’s primary objection is in being required to provide a copy of the recording to the grievant in order to permit its use at hearing. In other words, the agency did not appear to object to providing a copy of the recording to the hearing officer for inclusion in the hearing record, presumably to be covered by an appropriate protective order. (Hearing Recording beginning at 00:04:30.) Having a copy of the recording, protected by an appropriate protective order, is strongly preferred, assuming that no law, policy, regulation, or other reason would prohibit the agency from providing a copy to the hearing officer to include in the record. Such inclusion would maximize the likelihood of the preservation of the recording, facilitate appellate review, and minimize potential controversy over the authenticity and integrity of the recording.