

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: September 11, 2012; Ruling No. 2012-3433; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Officer Not in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**COMPLIANCE RULING**

In the matter of the Department of Behavioral Health & Developmental Services  
Ruling Number 2013-3433  
September 11, 2012

The Department of Behavioral Health & Developmental Services (the agency) requests a compliance ruling to challenge the hearing officer's instruction for the parties to submit a chronology of events and a statement regarding the "thrust" of each witness's testimony prior to the hearing in Case Number 9894. For the reasons discussed below, the hearing officer is directed to amend her scheduling order.

FACTS

In the hearing officer's scheduling order in Case Number 9894, the hearing officer ordered the parties, in providing witness lists and exhibits to the hearing officer and the opposing side prior to the hearing, to also provide a "Chronology of Events leading to this grievance" and "[f]or each witness listed ..., a statement regarding the thrust of that witness' testimony (that is, a brief summary of what you anticipate the witness will testify to)." In its ruling request, the agency has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management rule on the hearing officer's authority to mandate that such items be provided.

DISCUSSION

As an initial matter, prior to requesting a ruling such as this, a party who asserts that an action by the hearing officer is not in compliance with the grievance procedure must first make an objection to the hearing officer at the time the alleged noncompliance occurs.<sup>1</sup> Nothing submitted to EDR indicates such an objection was made to the hearing officer. Further, this request was sent by the agency on the afternoon of the day the required submissions were due to the hearing officer. EDR generally does not favor ruling requests made at the last minute when the issue could have been raised earlier. However, in the interest of efficiency, we will address this ruling request nevertheless.

There is nothing in the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings* that would prohibit a hearing officer from requesting that parties submit either a chronology of events or a brief summary of anticipated witness testimony. As such, providing an opportunity to the parties to provide such items is within the hearing officer's

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<sup>1</sup> *Grievance Procedure Manual* § 6.4.

discretion. However, whether a hearing officer has the authority to *require* the parties to submit the requested items, rather than simply providing both parties the *opportunity* to submit them, is a different question.

EDR holds that the items mandated by the hearing officer would not be consistent with an administrative proceeding such as a grievance hearing where court-based rules of procedure and evidence do not apply.<sup>2</sup> First, while nothing in this ruling prevents a hearing officer from ordering the production of documents,<sup>3</sup> there is no specific provision of the *Grievance Procedure Manual* or *Rules for Conducting Grievance Hearings* that permit a hearing officer to require the creation and production of a new exhibit like a chronology of events.<sup>4</sup> Second, requiring a party to summarize each witness's anticipated testimony is too onerous a requirement for these proceedings as a common practice in all cases.<sup>5</sup> Further, no party would be restricted to the content of any summary in presenting the testimony of a particular witness, making the utility of such summaries limited.<sup>6</sup>

As stated above, nothing prevents a hearing officer from requesting such items as a chronology of events or summaries of testimony from the parties. However, the request is merely an opportunity to provide the items and the failure to submit them should not penalize that party. Yet, parties would be wise to understand that any item specifically requested by a hearing officer is a significant opportunity to present cogent support for their case, which could assist in the hearing officer's understanding and consideration of the matter.

#### CONCLUSION

Based on the foregoing, the hearing officer is directed to amend her scheduling order such that parties may submit the chronology of events and/or summaries of witness testimony, but are not required to do so. EDR's rulings on matters of compliance are final and nonappealable.<sup>7</sup>



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<sup>2</sup> E.g., *Grievance Procedure Manual* § 5.8.

<sup>3</sup> *Grievance Procedure Manual* § 5.7; *Rules for Conducting Grievance Hearings* § III(E).

<sup>4</sup> See Va. Code § 2.2-3003(E) ("A party shall not be required to create a document if the document does not exist."); *Grievance Procedure Manual* § 8.2 (same).

<sup>5</sup> Nothing in this ruling prevents a hearing officer from inquiring as to the anticipated testimony of witnesses at a pre-hearing conference or during the hearing for determining such issues as, for example, relevancy and/or repetitiveness of witnesses.

<sup>6</sup> However, parties might be properly required to submit such summaries in an exceptional case where they might be particularly useful. For example, when a party proposes to present a vast number of witnesses and the parties are less than cooperative in assisting the hearing officer's determinations as to relevant and/or material witnesses, there could be a basis to require parties to submit very brief summaries. EDR is aware of no exceptional circumstances in this case.

<sup>7</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).