



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5800
December 13, 2024

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management in relation to alleged noncompliance by the hearing officer in Case Number 12194. The agency alleges that the hearing officer’s order denying the agency’s request to have a witness testify by phone is noncompliant with the grievance procedure.

The agency requested to have a witness testify by phone, which is the preference of the witness. This witness is currently retired and traveling across the United States camping. Thus, the witness may be in remote areas. The grievant objected to the agency’s request. The hearing officer denied the agency’s request but would allow the agency to present the witness by video conference so that the witness will be visible while remote. The basis of the hearing officer’s determination appears to be that it will be difficult to determine the witness’s credibility if they testify by phone or whether the witness is using documents. The hearing officer also states that telephonic testimony “will not afford Grievant an opportunity to confront the witness.”

Before addressing the particulars of this case, EDR would remind the participants that the grievance process is an administrative proceeding, one that is meant to be less rigid and onerous than a court proceeding. Furthermore, EDR strongly favors flexibility in its processes. EDR has long supported testimony by remote means to accommodate the demands and limitations of witnesses. While it is reasonable to prefer to have witnesses testify in person (or near as possible), it is unreasonable to expect every witness to be able to do so. Accordingly, a hearing officer can certainly address concerns they may have with a planned method of presentation, but parties should be able to present the witnesses they wish to present in whatever format they are able to do so. As long as both parties are given the same opportunity to examine the witness using the same method, there should not be a reason to prevent that witness from testifying.

Turning to the issues of this particular case, the hearing officer’s determination is inconsistent with EDR’s interpretation of the grievance procedure. While we do not disagree that it may be more difficult to assess a witness’s credibility over the phone than in person in some situations, EDR strongly favors providing all parties the opportunity to have witnesses testify by phone if they choose, especially if that is the only method available to have a live witness testify

An Equal Opportunity Employer

versus submitting a written statement that cannot be cross-examined. Thus, phone testimony does not render a witness's testimony inherently unreliable in our view and should not be a basis to exclude a witness from testifying or to automatically discount that witness's testimony. Accordingly, it would be improper for the hearing officer to exclude the agency's ability to have this witness testify simply because the hearing officer predicts it would be too difficult to assess their credibility.¹

The hearing officer also states that the telephonic testimony will not afford the grievant the opportunity to confront the witness. We do not agree. EDR is not aware of any provision of the Code or other precedent that supports the hearing officer's determination. For instance, the Code simply states that the parties "may call witnesses to present testimony and be cross-examined."² If the witness were to testify by phone, both parties will presumably have the same opportunity to question or cross-examine the witness. Given EDR's preference for flexibility and support for remote testimony, the hearing officer's determination would effectively deny the ability to present witnesses by phone. We do not interpret the grievance procedure in this manner. Accordingly, we do not find the hearing officer's requirement to confront the witness visually as consistent with the grievance procedure.

Lastly, even if we did not find the hearing officer's assessment inconsistent with the grievance procedure for the reasons described above, EDR also finds that the hearing officer's determination is an abuse of discretion. The agency's proposed witness is a retiree over whom the agency has no authority to direct how they participate. If the witness is making themselves available by phone, then the agency has no choice but to accede to that witness's preferences. There may be appropriate times for the hearing officer to question a party on the planned method of presentation of their witnesses and perhaps ask whether adjustments are possible. In making any assessments as to what the proper method should be, the hearing officer must assess the relevant factors reasonably in light of EDR's preference for flexibility described above. Thus, for example, where travel to an in-person hearing would be difficult given the distance of travel and/or other surrounding circumstances, EDR would expect a hearing officer to make determinations that allow for witnesses to participate in the hearing and for the hearing to commence efficiently.³ Here, where a party does not have control over the witness, it is not reasonable to impose burdens on that party in relation to their witness. If the party chooses to have the witness testify by phone and doing so does not unduly prejudice the other party, which there is no evidence of at this time, or burden the proceedings, they should be able to do so under these facts.

¹ Similarly, the hearing officer expresses a concern about not being able to determine whether a witness by phone is using documents. Such a question can be posed to a witness and the hearing officer can provide direction to the extent appropriate. Therefore, we do not view this as a proper basis to exclude testimony by phone.

² Va. Code § 2.2-3004(E).

³ The agency has indicated its intent to seek to have another witness testify remotely, by video, due to the location of this witness at the time of the hearing. To the extent the agency is seeking EDR's approval of this request, we would agree that it would be premature for EDR to rule on the request as the hearing officer has yet to assess the circumstances and make a determination. However, in the hope that we can avoid further arguments and ruling requests on this issue, EDR advises the hearing officer to consider the interpretations of the grievance procedure provided in this ruling.

For the foregoing reasons, EDR directs the hearing officer to allow the agency to have its proposed witness testify (and be cross-examined) by phone. EDR's rulings on matters of compliance are final and nonappealable.⁴

Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁴ *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).