BASIC SKILLS
FOR
PRESENTING YOUR CASE
AT
HEARING

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Introduction

The following is a detailed resource for grievance hearing participants to assist their preparation for and increase their familiarity with the hearing process. Consultants are also available to answer general questions about the hearing process and the grievance procedure from 8:30 a.m. to 4:30 p.m., Monday through Friday, by calling toll-free to the Adviceline: 1-888-23ADVICE (232-3842). Calls to the AdviceLine are confidential.

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BEFORE THE HEARING

I. ORGANIZING YOUR CASE

A. Develop a Theme

The first step in preparing for a hearing is to think about the central theme (or themes) of your case. One way of developing a theme is to try to reduce your argument into one or two simple sentences. In a discipline case, a grievant's theme might be that the discipline she received was too harsh compared to that received by other employees for like conduct. Similarly, an agency's theme in the same case might be that the grievant admitted having committed the misconduct and that other employees who had committed the same misconduct had all received the same discipline.

One of the benefits of developing a theme is that it enables you to distinguish what information is critical to your case and what information is irrelevant. This, in turn, allows you to focus your presentation on the necessary evidence, and to present your case clearly and succinctly.

B. Decide What Facts You Must Establish

Next, determine what facts you need to establish. To do this, you need to understand what you will need to prove at hearing. In claims involving disciplinary actions and dismissals for unsatisfactory performance, the agency must show by a preponderance of the evidence[1] that its action was warranted and appropriate under the circumstances. To decide if the agency has met its burden in a disciplinary case, the hearing officer will consider whether:

1. the grievant engaged in the behavior described in the written notice;
2. the behavior constituted misconduct;
3. the agency's discipline was consistent with law and policy; and, if the answer to 1, 2, and 3 is "yes,"
4. there were mitigating circumstances justifying a reduction or removal of the disciplinary action and if so, whether aggravating circumstances exist that would overcome any mitigating circumstances.

[1] A "preponderance of the evidence" means evidence which shows that what is intended to be proved is more likely than not.

In all other types of claims, the grievant must prove his or her claim (for example, that the agency misapplied a policy or applied it unfairly, gave the grievant an arbitrary and capricious performance evaluation, or discriminated or retaliated against the grievant) by a preponderance of the evidence.

C. Identify the Order in Which You Will Present Your Facts

Once you decide what facts you need to establish, you should outline the order in which you plan to present those facts. You should also identify which witnesses and exhibits you will use to establish the facts.

D. Analyze the Other Side's Case

You should also think about the other side's case. Outline what facts the other party will need to prove and how they are likely to prove those facts. Then determine how you will rebut, discredit or minimize those facts.

E. Make an Objective Assessment of Your Case

In organizing your case, you should also objectively assess the case's strengths and weaknesses. If you conclude that the case's weaknesses outweigh its strengths, you may want to consider settlement.

II. PREHEARING CONFERENCE

A. Scheduling

The prehearing conference is scheduled by the hearing officer assigned to the case. Prehearing conferences are conducted by telephone.

B. Subjects Covered

At the prehearing conference, the hearing officer will establish the date, time and location of the hearing. In addition, he or she may explain the hearing process; identify with the parties what factual matters are in dispute and whether the parties can agree in advance on certain facts (such agreements are referred to as "stipulations"); and advise the parties of the deadline for exchanging witness lists and copies of exhibits (in most cases, this deadline will be four workdays prior to the hearing). The hearing officer may

also rule on any preliminary procedural and evidentiary requests, and, if necessary, identify and clarify which issues have been qualified for hearing (in a multi-issue case) and what policy or law is applicable to the grievant's claim.

C. Orders For Production Of Documents And Witnesses

A party may ask that the hearing officer issue orders for the production of documents from the other party and for the appearance of witnesses at the hearing. It is important to understand, however, that the hearing officer cannot compel a witness to testify.

You may have witnesses who are willing to appear without a hearing officer's order. Even in these situations, you should consider asking the hearing officer for an order. If a willing witness cannot appear at the last minute, the hearing officer will be more likely to postpone or reschedule the hearing if you have asked for an order than if you have not: if you have not previously asked for an order that a witness appear, the hearing officer may wonder whether the witness is actually critical to your ability to present your side.

If you are seeking documents from the other side, you should make every effort to obtain those documents well in advance of hearing. If the other side refuses or fails to produce documents to you in a timely manner, you should ask the hearing officer to take appropriate action.

D. Hearing Officer Noncompliance

If you believe the hearing officer's conduct or decision or not in compliance with the Grievance Procedure Manual, you may make a challenge of hearing officer noncompliance.

You should first raise a claim of noncompliance to the hearing officer when you become aware of the grounds for the claim. You must also make a written request for a noncompliance ruling. This request must be made to the EDR Director and be received by EDR no later than 15 calendar days from the date of the hearing decision.

In cases of hearing officer noncompliance, EDR will not award a decision in favor of a party. The sole remedy is an order by EDR that the hearing officer correct the non-compliance.

III. HEARING PREPARATION

A. Prepare Your Witnesses

1. *Talk with Your Witnesses: Find Out What They Know*

As soon as possible after the grievance is qualified for hearing, you should speak with your witnesses and find out what information they have and how they can help you. When you speak with them, you shouldn't tell them what to say, but you should let them know what you understand their testimony would establish at hearing.

2. *Develop a Question Outline and Practice with Your Witnesses*

Once you have listened to the witnesses tell their stories in their own words, you should develop a question outline for each witness. After you have prepared the outline, go over the questions with the witness. Advise witnesses to listen carefully to your questions and answer ONLY what you ask – they need to focus their testimony on relevant facts. You should also make sure your witnesses know that they can ask for questions to be repeated or rephrased if they don't understand the question as initially asked.

Formulating questions

The way you formulate your questions will depend on the strengths and weaknesses of your witnesses. You will want to maintain more control over witnesses who are not comfortable public speakers or who tend to give excessively long or unfocused answers, so you will ask them narrow or closed questions to guide them along. Narrow questions define the subject of the response with more precision: "What did the park look like at the July 4th picnic?" Closed questions call for a specific response: "What color was the picnic blanket?"

You should ask more open-ended questions of witnesses who are able to testify effectively without much prompting. Open-ended questions are those that call for a narrative response: "What did you see on July 4, 2004?" As a general rule, the less

prompting a witness needs, the more credible his or her testimony will be considered by the hearing officer.

Leading questions are permitted only on cross-examination. Leading questions suggest a particular response—"The picnic blanket was blue, wasn't it?"

3. *Make Sure Your Witnesses Are Ready*

There are a number of other things that you should review with your witnesses to prepare them for the hearing. First, make sure your witnesses are familiar with any exhibits that they will be asked to identify at the hearing. Also make sure your witnesses know the date, time and location of the hearing, and give them directions to the hearing site if necessary.

4. *Prepare and Submit Your Witness List*

Once you determine which witnesses you want to testify, you should prepare a list of witness names. The hearing officer will establish a date by which the list of witnesses should be received by the hearing officer and the opposing party.

5. *Be Prepared for the Unexpected*

Sometimes witnesses will change their stories or deny statements previously made. If this happens, you should be prepared to reassess your case.

B. <u>Prepare Your Exhibits</u>

1. *Identify All Necessary Exhibits*

As part of your earlier preparation, you should have identified the exhibits you will need to use at hearing and the general order in which you plan to introduce the exhibits. The agency's exhibits must include, at a minimum, the Grievance Form A, completed through the third resolution step, and all attachments and resolution step responses, as well as copies of any relevant state or agency policies. In a case involving disciplinary action, the agency must also include the Written Notice, with attachments, and the Standards of Conduct.

The grievant is not required to include these items, as they are being provided by the agency. Both the agency and the grievant must include copies of any other relevant documents they intend to use at hearing.

2. *Submit Your Exhibits to the Hearing Officer and Opposing Party*

You will need to submit a copy of each of your exhibits to the hearing officer and to the opposing party. If your exhibits exceed forty pages, you will need to submit these copies to the hearing officer and the opposing party in a loose-leaf notebook binder, with each exhibit separated by a numbered tab divider. The exhibits should be ordered in the same order you expect to use them at hearing. You may indicate in the lower right corner of each copy whether it is an "agency exhibit" or a "grievant exhibit," but you should not put exhibit numbers on the documents themselves.

The hearing officer will establish a date by which the exhibit packages should be received by the hearing officer and the opposing party.

3. *Prepare a Set of Exhibits for Your Use at Hearing*

In addition to preparing the exhibit packages for the hearing officer and the opposing party, you should also prepare a set of exhibits for your own use at the hearing. One of the simplest ways to organize exhibits for hearing is to create your own notebook binder of exhibits, with each exhibit separated by a numbered tab divider in the order in which you expect to use the exhibits.

While you may certainly use your own original documents at hearing, you may find it useful to use copies of documents in your exhibit notebook, so that you can highlight relevant portions of documents and make notes on the documents themselves of important issues or questions.

C. Use the Best Evidence Available

In deciding what witnesses and exhibits to use, you should be guided by the principle of presenting the best evidence available. Although the rules of evidence do not apply in grievance hearings and all relevant evidence should be considered by the hearing

officer, evidence which is more reliable will be given greater weight by the hearing officer.

For example, it is best to provide evidence through the testimony of an eyewitness, rather than providing second-hand accounts or reports of the incident. A second-hand account of events seen or heard by other people is known as "HEARSAY." Hearsay is admissible in a grievance hearing, but the testimony of an eyewitness is considered more reliable and given more weight. This is because facts can be distorted as information is passed from person to person.

Similarly, where the content of a document is at issue, it is always better to use the document itself than to have someone testify about the document's contents.

THE GRIEVANCE HEARING

I. HEARING CHRONOLOGY

A. Who Goes First?

In cases that involve disciplinary actions, the agency goes first. In all other cases the grievant goes first. The hearing will begin with first one side, and then the other side, making an opening statement. Both sides will then take turns presenting evidence to support their positions. Finally, each side will have a chance to make a closing statement.

For example, in a case where a Group II notice is being challenged, the agency would goes first in presenting its opening statement. Then the grievant would present his or her opening statement. After opening statements, the hearing would proceed as follows (in other types of grievances the order would simply be reversed and the grievant would go first):

1. *The Agency's Case*

a. Agency's First Witness

i. The agency asks the witness questions (this is referred to as "direct examination").

ii. The grievant asks the witness questions (this is referred to as “cross examination”).
iii. The agency asks the witness additional questions to clarify any matters covered during “cross examination” (this is referred to as “redirect examination”).
iv. The hearing officer may also ask questions of witnesses at any time.

b. Agency’s Subsequent Witnesses

The process used for the agency’s first witness is repeated for the agency’s subsequent witnesses.

2. *The Grievant’s Case*

a. The Grievant’s First Witness

i. The grievant asks the witness questions.
ii. The agency asks the witness questions.
iii. The grievant asks the witness additional questions to clarify matters covered during “cross examination.”

b. The Grievant’s Subsequent Witnesses

The same process is repeated for the grievant’s subsequent witnesses.

3. *The Agency’s Rebuttal*

After the grievant completes his or her case, the agency may present any additional witnesses who need to testify because of new information that the grievant presented through his or her witnesses (these are referred to as “rebuttal witnesses”).

The order of rebuttal testimony is as follows:

a. The agency asks the witness questions.
b. The grievant asks the witness questions.
c. The agency asks the witness additional questions to clarify any matters covered during “cross examination.”

4. *Closing Statements*

After both sides have finished presenting their evidence, the hearing officer will give each side an opportunity to make closing statements. In this example, because the agency has the burden of proof, it goes first in making its closing statement. After the agency finishes its statement, the grievant will have an opportunity to make his or her closing statement.

II. OPENING STATEMENT

A. Purpose

The opening statement is your first opportunity to persuade the hearing officer to believe your "theory of the case"—in other words, your theme. The opening statement is your chance to tell what happened from your perspective. It is also your opportunity to tell the hearing officer what evidence he or she will hear (or in some cases will *not* hear) and to put these pieces of evidence together into the picture you want the hearing officer to see. You may waive making an opening statement.

B. Elements

You should begin your opening statement by identifying yourself and the issue or issues qualified for hearing.

After you have gone through these "formalities," you should begin to create a picture for the hearing officer by describing the kind of work you do and the place in which you do it.

After you have laid this foundation, summarize the facts that are relevant to your case, the evidence you will present to prove those facts, and any relevant policies. Then explain your position, making reference to specific facts. In explaining your position to the hearing officer, remember to use your theme.

It is important to "take the sting out" of weaknesses in your case. Acknowledge weaknesses, and use your opening statement to present those weaknesses in the best possible light. If you do not address and confront these matters it will look like you are trying to hide something.

You should conclude your opening statement by telling the hearing officer how he or she should rule. You should also specify the remedy you seek.

An opening statement is not evidence. You need to prove all the factual assertions you make during your opening statement through the testimony of your witnesses or the exhibits you present at the hearing.

C. Presentation Style

You should be clear and assertive (but not aggressive or antagonistic). Use positive statements, such as "the evidence will show," and "you will hear testimony that…" Be careful not to make assertions you cannot prove, and you should not be argumentative or state personal opinions.

As you give your opening statement, you should maintain eye contact with the hearing officer. Avoid reading your opening statement. To do this, you need to practice repeatedly what you want to say.

D. Length

An effective and efficient opening statement should not exceed five minutes.

III. DIRECT EXAMINATION

A. What Is Direct Examination?

Direct examination is when a party asks its own witnesses questions to support or prove its case. The purpose of direct examination is to tell your side of the story—the who, what, where, when, how, and why; to advance your theme of the case; and to educate the hearing officer about your case and the demands and requirements of working in your facility.

B. Order of Witnesses

In deciding the order in which to present your witnesses, you should consider two factors—the information about which the witness will testify, and the strength of the witness's testimony and presentation. You want the hearing officer to be able to understand the story, so your first witness should generally be the witness whose testimony will tell the hearing officer the most about the who, what, when, how, and why of what happened. Witnesses with more limited testimony should come later, so that the hearing officer can

understand the relevance of the testimony. You should also consider, however, the strength of your witnesses' testimony and presentation in deciding witness order. Stronger witnesses should come first or last, as they will be most memorable: Place weak witnesses in the middle.

Prior to the hearing, you should prepare an outline of the questions you want to ask your witnesses. (See the section on preparing witnesses above). At the hearing, you should take a moment to review your outline before you finish questioning your witness to make sure you covered all the testimony you wanted the witness to give.

Once a witness finishes with his or her testimony, the hearing officer may ask you if the witness may be released. At this point you should tell the hearing officer whether you expect to recall the witness to testify at a later time. If you agree to allow the witness to be released and do not indicate that you plan to recall the witness, you will likely be unable to ask the witness to testify again during the hearing.

The grievant may testify as a witness on his or her own behalf at the hearing.

B. Handling Objections

Although the Grievance Procedure Manual specifically states that the formal rules of evidence do not apply in hearings, this does not mean that you will never be faced with an opposing representative who will object that certain testimony or evidence is inadmissible.

If the other party objects to a question you ask a witness, the witness should not answer the question until the hearing officer decides whether or not the question may be answered. The hearing officer will probably give you an opportunity to respond to the objection before ruling on whether or not to allow the witness to answer. In your response, remind the hearing officer that:

1. The rules of evidence do not apply in grievance hearings;
2. You are not an attorney (if applicable) and you cannot be expected to respond to a technical objection; and
3. By statute, the hearing officer is directed to receive probative evidence (evidence that tends to prove or disprove a fact at issue in the case) and is only authorized to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive (Va. Code §2.2-3005(C)(5)).

You should also explain to the hearing officer why the testimony is relevant to the grievance and should be allowed.

If the objection is "overruled," the witness may answer the question. If the objection is "sustained," the witness is not allowed to answer the question.

If the hearing officer does not allow the witness to testify or limits the scope of the witness's testimony, you may ask to summarize what the witness would have said to preserve it on the record should you choose to challenge the hearing officer's decision or ask for reconsideration. This referred to as "proffering" testimony for the record.

IV. CROSS EXAMINATION

A. What Is Cross Examination?

Cross examination is when you ask questions to the opposing party's witness either to develop or discredit the prior testimony of the witness. The purpose of cross examination is to discredit an adverse witness by raising doubt about the witness's credibility, perception or memory, or by showing the absence of facts to support your opponent's case. Questions are generally limited to matters the witness testified about on direct examination, although hearing officers do not apply this rule strictly.

B. General Principles

You should not feel compelled to cross-examine every witness that testifies for the opposing party. Before deciding to conduct a cross examination, you should consider the importance of the witness, whether the witness damaged your case, and whether you will be able to raise doubts about the witness's credibility or perception.

Use short, simple, "leading" questions during cross examination. Be clear and assertive, but do not berate or belittle the witness. Never ask a question if you do not already know the answer: if you do, you may end up hurting, rather than helping, your case.

Do not ask the witness to repeat prior testimony that damages your case—this will only reinforce what the witness has already said.

Listen carefully to the witness's responses and ask questions accordingly. If you only ask questions from a prepared outline, and do not pay attention to what the witness is saying, you may lose opportunities to discredit the witness's perception or recollection.

Finally, do not ask the "one question too many." Once the other party's witness has stated a fact favorable to your case, do not ask the witness to state an opinion or draw a conclusion from that fact: the witness may not interpret the events in the same way as you would, and you may lose the benefit of the previous favorable testimony.

V. REDIRECT EXAMINATION

Redirect examination is your opportunity to ask additional questions of your own witness after the opposing party cross-examines your witness. Redirect examination is only necessary if you need to ask your witness additional questions to clarify or explain any points made during cross-examination.

VI. EVIDENCE

A. What Is Evidence?

Evidence consists of the witness testimony, records, documents, exhibits, tangible objects, etc., that you use to prove your case.

B. Standard of Proof

The party with the burden of proof (the party going first in the hearing) must prove his or her case by a "preponderance of the evidence." A "preponderance of the evidence" means that the evidence presented at the hearing shows that what is sought to be proved is more probable than not—in other words, evidence which is more convincing than the other side's evidence, even if only by a slight amount.

C. Types of Evidence

1. *Real Evidence*

Tangible items, such as a key or a glove, are real evidence.

2. *Documentary Evidence*

Written documents, such as a departmental policy, Written Notice, Grievance Form A, are documentary evidence.

3 *Testimonial Evidence*

Testimonial evidence is witness testimony.

4. *Judicial Notice*

The hearing officer may take judicial notice of certain commonly known or easily ascertainable facts, such as that a certain date was on a weekend.

5. *Recorded Evidence*

Tape recordings and videotape are forms of recorded evidence.

D. Methods of Proof

a. Direct Evidence

Direct evidence tends to prove a fact without the aid of an inference or presumption. Examples of direct evidence include testimony by an eyewitness to a disputed event, a video recording or photograph of a disputed event, and a signed admission statement by an individual who committed an offense.

2. *Circumstantial Evidence*

Circumstantial evidence tends to prove a fact only indirectly—that is, by proving other facts from which an inference or presumption may arise. For example: There are no eyewitnesses, but coworkers testify that every time Nurse Jones works, there are narcotics missing at the end of her shift; only Nurse Jones has the keys to the narcotics cabinet during her shift; patients complain of pain and/or state that they did not receive narcotics which were signed out for them by Nurse Jones; Nurse Jones appears disoriented or exhibits slurred speech. The co-workers' testimony is circumstantial evidence from which the hearing officer can reasonably infer that Nurse Jones stole the narcotics.

E. Presenting Exhibits

A hearing officer may only base his or her decision on facts contained "in the record." You should make sure that your exhibits are properly "marked" and identified "for the record" so that they can and will be considered by the hearing officer.

Objections to exhibits can be handled in the same manner as objections to the testimony of witnesses. If the other party raises an objection, the hearing officer may decide to receive the exhibit, subject to your being able to establish its relevance through witness testimony.

If the hearing officer refuses to admit a document, you can proffer the exhibit for the record. That is, you may ask the hearing officer to allow you to state for the record what your evidence would have shown, to preserve the issue should you choose to challenge the hearing officer's decision.

VII. REBUTTAL

Rebuttal is your opportunity to contradict evidence presented by the other party. You may present evidence (witnesses or exhibits) in rebuttal to disprove or rebut new evidence presented by the other side.

Rebuttal should be used sparingly. It should be limited to addressing new matters raised by the other side during the presentation of their case.

Parties should make every effort to be fully prepared for the hearing. This includes anticipating what the other party will use as defenses. If you are surprised by the other side's evidence, you may ask the hearing officer to adjourn the hearing to allow you time to investigate the new evidence. However, the hearing officer will generally only grant such a request where you could not reasonably have anticipated the need for the missing evidence.

VIII. CLOSING STATEMENTS

A. Purpose

The purpose of the closing statement is to bring all of the necessary elements of your case together in a simple, understandable way that shows why your position should be

accepted by the hearing officer. It is a summary of your case that applies the relevant policy to the proven facts.

B. Order

The same party who made the first opening statement makes the first closing statement.

C. Structure and Content

Prepare a sketch outline of your closing statement prior to the hearing, but be prepared to deviate from the outline to adapt to evidence presented at the hearing.

Limit your remarks to commenting on the evidence admitted during the hearing, and making inferences that can reasonably be drawn from that evidence. Emphasize the positive points in your case, and challenge the weaknesses in the other party's case. If the credibility of witnesses is an issue (for example, if witnesses give conflicting testimony), explain why your witness should be believed, but do not personally vouch for the credibility of your witnesses or state your personal opinion. Do not be abusive or show any personal animosity towards the other party, the other party's attorney, or the witnesses.

A closing statement should be no more than five minutes in length.

HEARING CHALLENGES

I. ADMINISTRATIVE REVIEWS

Requests for administrative review of a hearing decision must be in writing and ***received by*** EDR within 15 calendar days of the date of the original hearing decision. ***Received by*** means delivered to, not merely postmarked or placed in the hands of a delivery service. If the 15th calendar day by which a request for administrative review must be filed falls on a Saturday, Sunday, or legal holiday or on any day or part of a day on which the state office where the request for administrative review is to be filed is closed during normal business hours, the appeal may be filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state office is closed.

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A. Consistency with State or Agency Policy

You may challenge a hearing officer's decision on the basis that the decision is inconsistent with state or agency policy. The challenge must cite the particular policy mandate at issue. EDR's authority is limited to directing the hearing officer to revise decision to conform to written policy.

B. Compliance with the Grievance Procedure

You may also challenge the hearing officer's decision on the basis that the decision is not in compliance with the Grievance Procedure Manual or the Rules for Conducting Grievance Hearings. Such a request should refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

A hearing officer's original decision becomes a final hearing decision, with no possibility of administrative review, when the 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or, when all timely requests have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

If a grievant substantially prevails on the merits of a grievance challenging a dismissal, the grievant is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award of fees unjust.

II. JUDICIAL REVIEW

Once a hearing decision becomes final, either party may seek review by the circuit court on the ground that the final decision is contradictory to law. Grievants do not need EDR's approval before filing a notice of appeal. However, by statute, an agency that wishes to appeal must obtain approval from EDR within 10 calendar days of when the decision becomes final.

A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. A copy of the notice of appeal must be provided to the other party and the EDR Director. The court may award reasonable attorneys' fees and costs to the grievant if he or she substantially prevails on the merits of the appeal.

III. IMPLEMENTATION OF THE HEARING OFFICER'S DECISION

The hearing officer's decision is final and binding if it is consistent with policy and law. The decision is effective from the date issued and must be implemented immediately unless circumstances beyond the control of the agency delay such implementation. Implementation may be stayed if a challenge is made to the decision.

If a party does not take the appropriate actions to implement the hearing officer's decision, the other party may file a petition in the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the hearing officer's final decision. The court may award reasonable attorneys' fees and costs to the grievant if the grievant substantially prevails on the merits of the implementation.