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COMPLIANCE RULING

In the matter of Virginia State University
Ruling Number 2023-5511
February 10, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management in relation to her grievance with Virginia State University (the “university” or the “agency”), which is currently pending for an administrative hearing. The grievant asserts that the hearing officer failed to comply with the grievance procedure by not ordering a fully remote hearing and by not recusing himself from consolidated Case Numbers 11903 and 11907. The grievant asks for EDR to appoint a different hearing officer in this matter.

FACTS

On or about October 18, 2022, the grievant filed a dismissal grievance to challenge her disciplinary separation from employment with the university. EDR consolidated the dismissal grievance with a separate, previous grievance pending with the university and appointed the matter to a hearing officer, effective November 21, 2022. Following an initial prehearing conference with the parties, the hearing officer determined that a virtual hearing would be held on March 15, 2023. However, after receiving new information regarding the appointed hearing officer’s availability to preside over the case,¹ EDR reassigned the matter to a new hearing officer, notifying the parties of the new appointment on December 22, 2022. EDR advised the parties to present requests regarding hearing logistics to the new hearing officer for resolution.

On December 27, 2022, the new hearing officer sent correspondence to the parties to arrange a new pre-hearing scheduling conference. The agency responded on January 4, 2023; it does not appear that the grievant responded. The hearing officer sent follow-up inquiries on January 5 and January 9, 2023, requesting the grievant’s response. On January 11, 2023, the hearing officer notified the parties that a pre-hearing conference would be held on January 13, 2023. It appears that the agency appeared at that conference, but the grievant did not. Following

¹ Because a hearing officer’s availability may be determined by confidential personnel or other sensitive information, it is not EDR’s general practice to provide specific reasoning for the reassignment of a grievance hearing to a new hearing officer. That said, EDR confirms that reassignment in this case was for good cause and consistent with the appointment principles articulated in EDR Policy 2.01, *Hearings Program Administration*.

the conference, the hearing officer provided his procedural determinations to the parties in writing, including a new hearing date of February 6, 2023, to be held in-person at the agency.

On January 20, 2023, the grievant sent her first correspondence to the hearing officer, objecting to the changed hearing date. She indicated that she had had “very limited access to email” during the period when correspondence was sent to her regarding the reassignment and rescheduling. She requested to maintain the original hearing date, in virtual format as a disability accommodation. Another prehearing conference was apparently held on January 24, 2023, attended by both parties. Following the conference, the hearing officer provided the following determinations in writing: (1) the hearing would be held on February 23, 2023; (2) the grievant could participate remotely as a disability accommodation, with technological facilitation by the agency; and (3) the hearing officer denied the grievant’s request that he recuse himself.

The grievant has requested a compliance ruling from EDR as to the hearing officer’s determinations, arguing that recusal is appropriate. She argues that a “hybrid” format in which the hearing officer is physically present for the agency’s case, but not the grievant’s, creates an “unfair advantage for the agency,” in part because the hearing officer appeared uncomfortable with certain technical aspects of remote proceedings. The grievant also contends that the hearing officer should not hear her grievance due to apparent bias. For these reasons, the grievant requests for her case to be reassigned back to the initial hearing officer for a virtual hearing.

DISCUSSION

Hearing Location/Format

By law, state employee grievance hearings “shall be held in the locality in which the employee is employed or in any other locality agreed to by the employee, employer, and hearing officer.”² In addition, the grievance procedure requires the agency to “arrange a place for the hearing unless the hearing officer chooses to make the arrangements.”³ The grievance procedure also allows for hearing proceedings “by audio conference, video conference, or other equivalent electronic/remote means.”⁴ In determining whether remote means are warranted, the hearing officer is required to “weigh all relevant considerations, including the opinions of the parties and the hearing officer. The hearing officer shall not select a hearing format that unfairly prejudices either party.”⁵

In this case, it appears that the parties presented conflicting preferences about hearing format to the new hearing officer: the agency requested in-person proceedings, and the grievant requested remote proceedings. Although the hearing officer reportedly expressed a personal

² Va. Code § 2.2-3004(E).

³ *Grievance Procedure Manual* § 5.2.

⁴ *Id.*

⁵ *Id.*; see also *EDR Guidance for Conducting Hearings by Remote Means*, www.dhrm.virginia.gov/employment-dispute-resolution/hearings (identifying relevant considerations to include participants’ access to equipment and reliable internet service).

preference for in-person proceedings, it appears that he attempted to satisfy both parties by allowing each to participate via their preferred format.

The grievant objects to the “hybrid” approach ordered by the hearing officer. However, upon review of the deliberations to this point, EDR cannot find that the hearing officer’s direction of a hybrid format constitutes a basis for recusal or otherwise fails to comply with the grievance procedure. We observe that the location of the hearing officer himself appears to be the only difference between the fully-remote proceedings requested by the grievant and the current hybrid approach. In fully virtual proceedings, each participant connects to the event from their respective location via an agreed-upon remote conferencing platform. In this case, similarly, the grievant and agency will presumably connect for the hearing via an agreed-upon conferencing platform. The difference is that, instead of establishing his own remote connection with the platform, the hearing officer intends to participate in person from the same location as the agency. Essentially, then, the grievant is requesting not only that she be allowed to participate virtually (which has been granted), but also that the hearing officer must do the same. We cannot agree that he is required to do so. The grievance procedure specifically provides for a hearing officer to consider their own opinions regarding format when determining that issue.⁶ Accordingly, the hearing officer’s apparent preference to preside over these proceedings in person, as contemplated by state law,⁷ is an appropriate consideration and not, in itself, a basis for recusal or a finding of noncompliance with the grievance procedure.

EDR further observes that, in providing for remote participation, the grievance procedure allows hearing officers to account for stark differences in the interests of the parties and other participants. A hybrid format may be one way to resolve such differences, and we perceive nothing that would render such an approach inherently unfair to either party. Although the grievant objects to presenting her case to the hearing officer via a different format than the agency, the grievance procedure recognizes remote platforms as an effective form of hearing participation. We do not view such platforms as necessarily inferior. We acknowledge that a hybrid format could potentially pose additional challenges to the hearing officer in his obligation to manage the hearing, including the need to ensure that each party has an equitable opportunity to present their case. However, nothing in the grievance procedure or other EDR guidance suggests that a hearing officer cannot choose this option based on appropriate considerations.

In this case, the hearing officer apparently considered the statutory standard to hold the hearing in the locality where the grievant worked, the preferences of the agency and the hearing officer to follow that standard, and the grievant’s demonstrated need to participate remotely as a reasonable accommodation. Accordingly, it appears that the hearing officer ordered a reasonable hearing format based on appropriate and relevant considerations, and as such EDR finds no failure to comply with the requirements of the grievance procedure in this regard.

⁶ Due to emergent public health recommendations associated with the COVID-19 pandemic that began in 2020, hearing officers on EDR’s active list are generally experienced as to the potential benefits and drawbacks of remote proceedings. In recognition of their first-hand experience, we affirm that such experience and opinions based on it are appropriate considerations for a hearing officer’s determination of the most appropriate hearing format for new cases.

⁷ Va. Code § 2.2-3004(E).

Alleged Bias

EDR's *Rules for Conducting Grievance Hearings* (the "Rules") provide that a hearing officer is responsible for

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing[s] Program Administration.⁸

Section III(G) of the *Rules* provides that a hearing officer must recuse herself "in any hearing in which the [hearing officer's] impartiality might reasonably be questioned," unless the parties are advised of the basis for the potential recusal and "the parties consent to the hearing officer's continued service"⁹ Grounds for recusal include situations in which the hearing officer "has a personal bias or prejudice concerning a party or a party's advocate."¹⁰

EDR's approach to recusal is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.¹¹ The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"¹² EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.¹³ The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.¹⁴

In this case, the grievant has expressed doubt whether the current hearing officer will afford her a fair hearing. In her view, fairness has been impaired by the hearing officer's preference for in-person proceedings, the prehearing scheduling conference with the hearing officer that the grievant did not attend, and allegedly improper assumptions about the grievant's medical condition, a material issue in her grievance.

As explained in the preceding section, EDR does not view the hearing officer's stated preference for in-person proceedings to be an impairment to his impartiality or availability to conduct the hearing in accordance with the grievance procedure. Despite his opinions on the matter, it does not appear that the hearing officer was or is categorically unable or unwilling to conduct a particular type of hearing – *i.e.* in-person or virtual – as the circumstances might dictate.

⁸ *Rules for Conducting Grievance Hearings* § II.

⁹ *Id.* § III(G) (alteration in original) (internal quotation marks and citation omitted).

¹⁰ *Id.*

¹¹ While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

¹² *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

¹³ EDR Ruling No. 2012-3176.

¹⁴ *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

The grievant raises concerns as to whether the hearing officer has sufficient facility with remote conferencing technology.¹⁵ Even assuming those concerns are warranted, however, we note that the hearing officer has ordered the agency to provide for the grievant's remote connection to the proceedings and to have staff on hand to address any technological difficulties that may arise, in accordance with EDR's guidance on remote proceedings.¹⁶ This directive would appear to be a reasonable way to avoid difficulties that could arise if the hearing officer elected to establish his own separate virtual connection to the proceedings.

As to the prehearing conference attended only by the agency, EDR similarly does not find that the grievant's absence from this event is a basis to question the hearing officer's impartiality. Under the *Rules for Conducting Grievance Hearings* ("*Rules*"), hearing officers must

avoid[] *ex parte* communications with the parties, unless such a communication is (i) for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, (ii) the hearing officer reasonably believes that no party will gain a procedural or tactical advantage as a result, and (iii) the hearing officer promptly notifies the other party or parties of the substance of the communication and allows an opportunity to respond.¹⁷

Here, the hearing officer sent three emails to the parties to schedule the prehearing conference, including an email notifying them of the date and time of the conference call. The conference was scheduled for 9:00 a.m. At 9:54 a.m. on the same day, the hearing officer emailed the parties regarding what had been discussed at the conference, to include dates for the hearing and the exchange of evidence and procedures for requesting witness orders. EDR finds that these events constituted a legitimate exception to the hearing officer's responsibility to avoid *ex parte* communications under the *Rules*. As we have not been given any information to suggest improper discussion at the prehearing conference, the hearing officer's actions in the grievant's absence do not provide a basis to question his impartiality.

Finally, the grievant expresses concern that the hearing officer has already "render[ed] a decision" on her need for a disability accommodation, a material issue in her grievance. As to the grievant's need for an accommodation with regard to hearing her grievance, the hearing officer found as follows:

[The grievant] has requested that she not be at an in person Hearing. On the call she said that effectively she was not available any day because of the uncertainty regarding her medical condition. Although her doctor's statement . . . indicates that there should be defined times when she could be available, in an abundance of

¹⁵ In support, the grievant claims that the hearing officer had difficulty with coordinating the prehearing conference call and misinterpreted information she provided. Without more, EDR cannot find that the errors cited by the grievant would be sufficient to disqualify the hearing officer from hearing and rendering a fair decision in this matter.

¹⁶ *EDR Guidance for Conducting Hearings by Remote Means*, at 1 ("The hearing officer may use their own technology or conferencing platform for the hearing. The technology or conferencing platform may also be provided by the agency or the grievant.").

¹⁷ *Rules for Conducting Grievance Hearings* § II.

caution for her, I find that the Hearing can take place as [a hybrid of virtual and in person.]

The grievant takes issue with the hearing officer's statement that "there should be defined times when she could be available." Upon our review of medical documentation provided by the grievant, it appears that the documented information could at least arguably be interpreted to support the hearing officer's assertion, even if not dispositively. The grievant further asserts that the hearing officer "interrogated" her "as to the details of [her] condition." Although we would emphasize the need for caution and sensitivity when eliciting personal health information from a party, we cannot say that it would have been unreasonable for the hearing officer to seek an understanding of the grievant's request for virtual proceedings before ordering the agency to facilitate that accommodation. To the extent that the grievant's need for a disability accommodation in her former employment remains a material issue for the grievant's case, she will bear the burden of proof as to that issue,¹⁸ and at this time EDR has not been provided with information that would call into doubt the hearing officer's ability to give fair and impartial consideration to her evidence.

CONCLUSION

For the reasons set forth above, EDR identifies no failure to comply with the grievance procedure and no basis to appoint a different hearing officer to conduct a hearing in Case Numbers 11903 and 11907. As such, we find no basis for the hearing not to proceed as currently scheduled.

EDR's rulings on matters of compliance are final and nonappealable.¹⁹

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¹⁸ See EDR Ruling No. 2023-5450.

¹⁹ *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).