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COMPLIANCE RULING

In the matter of the University of Virginia
Ruling Number 2024-5618
October 3, 2023

This ruling addresses two grievances filed by the grievant against the University of Virginia (the “university” or “agency”), which have been consolidated for a single hearing. The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) issue a ruling that the appointed hearing officer has failed to comply with the grievance procedure and should be removed from the case. For the reasons articulated below, EDR has no basis to conclude that the hearing officer has not complied with the grievance procedure and, accordingly, there is no basis to remove the hearing officer from the case.

FACTS

This matter involves two grievances challenging three written notices issued to the grievant by the university. Following EDR’s consolidation of these grievances for hearing, EDR appointed the consolidated matter to a hearing officer effective July 3, 2023.¹ Pursuant to the hearing officer’s scheduling order, a hearing was held on September 7, 2023, but it was not concluded. On September 8, 2023, consistent with discussion during the September 7 proceeding, the hearing officer ordered that the continued hearing would proceed on October 17, 2023. The hearing officer specified that the grievant would have two hours during the continued proceeding to present evidence and argument, “provided he complies with DHRM’s *Rules for Conducting Grievance Hearings* and *Grievance Procedure Manual* and [the hearing officer’s] *Principles of Professionalism*.”

On September 9, 2023, the grievant requested that the hearing officer “either recuse yourself from my ongoing case or extend to me the same level of fairness and impartiality that you appear to afford the University” To support his request for recusal, the grievant asserted that, during the September 7 proceedings, the hearing officer took a more critical and “hostile tone” toward the grievant than toward the university, frequently intervened during the grievant’s questioning of witnesses, suggested objections to be made by the university, allowed a witness to interact with the university’s party representative while testifying, and admitted irrelevant

¹ This appointment reflected a reassignment of this matter from the initial hearing officer, who became unavailable while the hearing was pending.

evidence. To remedy these claims, the grievant requested that the hearing officer either recuse himself or grant the grievant six additional hours to present his evidence and admit all of his proffered exhibits. On September 12, 2023, the hearing officer denied the grievant's requests by written decision. Additionally, the hearing officer advised the parties that "[f]urther unrestrained, inappropriate outbursts, further profanity or further *ad hominem* attacks on opposing advocate, witnesses or the tribunal . . . will result in summary termination of the evidentiary hearing and grievant will have to submit any brief on the extant record."

The grievant maintains that the hearing officer has failed to comply with the grievance procedure and has requested that EDR issue a ruling finding the same.

DISCUSSION

Hearing officers appointed to grievance hearings are generally required to conduct the proceedings in an equitable and orderly fashion, avoid the appearance of bias, and voluntarily recuse themselves as appropriate.² EDR's *Rules for Conducting Grievance Hearings* (the "Rules") provide that hearing officer must recuse themselves "in any hearing in which [their] 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"³ Grounds for recusal include situations in which the hearing officer "has a personal bias or prejudice concerning a party or a party's advocate."⁴ At the same time, a hearing officer has an "obligation not to recuse himself or herself absent a valid reason for recusal."⁵

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.⁶ 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.'"⁷ EDR finds the Court of Appeals' standard instructive and accordingly 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.⁸ The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.⁹

In his request for review, the grievant asserts that the hearing officer demonstrated bias against him during the September 7 proceedings by adopting a critical and/or hostile tone toward

² *Rules for Conducting Grievance Hearings* § II.

³ *Id.* § III(G) (internal quotation omitted).

⁴ *Id.*

⁵ *Id.*

⁶ 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.

⁷ *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.").

⁸ EDR Ruling No. 2012-3176.

⁹ *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

the grievant in contrast to the “cordial and informal tone” with which he addressed the university’s representatives. The grievant further asserts that the hearing officer appeared to have “a lack of trust” in his claims, invited the university to pose objections during his case, and otherwise intervened frequently in the grievant’s questioning of witnesses.

EDR has reviewed the entirety of the record in this matter to date, including the audio recording of the September 7 proceedings, which were held by remote video conference. Our review of the audio indicates that the hearing proceeding became extraordinarily contentious when the grievant began to present his case – largely due to confusion regarding the grievant’s proffered documentary exhibits, which apparently were not numbered, tabbed, or otherwise organized for reference.¹⁰ The hearing officer then determined that he had not received the same documents from the grievant as the university had, and his copy of the grievant’s evidence did not include all of the documents the grievant sought to introduce.¹¹ Although the hearing officer nevertheless attempted to admit the grievant’s documents in an orderly fashion, none of these attempts proved to be feasible.¹² During discussion about how to approach this issue, the grievant responded to the university’s statements with exclamations such as “f*** this s***!” and “holy f***ing s***!”¹³

Ultimately, the hearing officer ruled that not all of the documents referenced by the grievant could be admitted because the participants could not identify and reference them during the hearing. After continuing to argue the issue at length, the grievant eventually called his first witness, one of his former managers at the university. During the manager’s testimony, the hearing officer counseled the grievant at various points to rephrase questions to elicit relevant information, to let the witness finish answering, and not to mischaracterize the witness’s testimony. EDR has reviewed the manager’s testimony in its entirety and the hearing officer’s admonitions, and we find nothing to indicate that the hearing officer abused his discretion to exclude irrelevant evidence and generally manage the proceedings.¹⁴ The grievant did not accept the hearing officer’s rulings at these junctures and expressed increasing frustration to the hearing officer, at one point commenting: “Just because UVA is paying you doesn’t mean you have to take their side.”¹⁵ The grievant then continued the same line of inquiry, disregarding the hearing officer’s admonition to move on from questioning that mischaracterized the witness’s testimony.¹⁶ At that point, the

¹⁰ Hearing Recording Pt. I at 6:40-10:32; *id.* Pt. IV at 24:15-24:25, 28:00-28:25.

¹¹ *Id.* Pt. IV at 41:05-46:05.

¹² One such attempt was to suggest that the university send the hearing officer an electronic copy of their version of the grievant’s exhibits, as it appeared to be more complete. Far from showing bias against the grievant, as he argues, our review suggests that the hearing officer was merely exploring fair methods to admit the grievant’s evidence as it had been proffered to the other party – rather than having to exclude it altogether.

¹³ Hearing Recording Pt. IV at 14:40-15:00, 26:30-27:30.

¹⁴ Primarily, the grievant’s questioning was aimed at eliciting whether the manager thought that one of his employees – who was in the room as party representative – was a better supervisor than another. Although the hearing officer suggested some rephrasing of questions, he generally allowed the grievant to pursue this line of inquiry and directed the witness to answer. However, EDR would observe that this line of questioning would not appear to present information that was material to the case and unnecessarily implicated the privacy interests of at least one third party. If anything, then, and contrary to the grievant’s arguments, his line of questioning should have been halted much sooner.

¹⁵ Hearing Record Pt. VI at 45:30-45:40.

¹⁶ *Id.* at 45:40-46:50.

hearing officer interjected to the university's advocate: "Are you not objecting to the argumentative nature of this?" The advocate then asserted: "He's badgering the witness." The hearing officer responded: "I know, but you have to object."¹⁷ The grievant then spent several minutes asserting his disapproval of the hearing officer's overall administration of the hearing, despite the hearing officer's attempts to move the proceedings forward.¹⁸

Upon a thorough review of the audio record, we identify no instance in which the hearing officer exceeded his authority to conduct the hearing in an orderly, fair, and equitable fashion; to admit relevant exhibits and exclude proffered evidence for good cause; and to create a complete grievance record. Moreover, we find nothing in the hearing officer's administration of the proceedings that suggests he harbors such a bias as to deny the grievant a fair hearing or that he should recuse himself for any reason. Although the hearing officer's tone of interaction with the grievant was increasingly critical and stern, our review of the audio recording leads us to conclude that this tone was wholly in response to the grievant's refusal to comply with the hearing officer's rulings, his abusive approach toward multiple hearing participants, and his general disregard for the hearing officer's authority to maintain order in the proceedings.

As part of hearing officers' duty to conduct an orderly proceeding pursuant to the provisions of the *Grievance Procedure Manual*, hearing officers are responsible for enforcing the grievance procedure's code of conduct and civility, including the following provisions:

Parties and party advocates shall treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications.

Parties and advocates shall not engage in conduct that offends the dignity and decorum of grievance proceedings

Parties and advocates shall not engage in conduct that undermines the integrity of the grievance process including, but not limited to, behavior that unnecessarily delays the process

Parties and advocates shall comply with all rulings and orders issued by . . . hearing officers, unless a formal objection is raised and sustained.¹⁹

Our review of the audio recording indicates that the grievant violated these provisions at various times during the hearing. For example, as the hearing officer attempted to mitigate confusion caused by the grievant's failure to follow prehearing evidentiary procedures, the grievant directed profanity at the university's advocate at multiple points. In his various subsequent arguments, the grievant misrepresented prehearing disputes, the hearing officer's prior orders, the university's positions, and witness testimony. When the hearing officer made rulings against him, he continued

¹⁷ *Id.* at 46:50-47:05.

¹⁸ *Id.* at 47:10-1:05:55.

¹⁹ *Grievance Procedure Manual* § 1.9.

to argue the issues at length and accused the hearing officer of bias. These interactions substantially delayed the proceedings on September 7.

In light of the grievant's behavior, the hearing officer could have halted or ended the hearing proceedings in response to several instances of the grievant's disrespectful conduct, such as when the grievant responded with expletives to the university's statements, or when the grievant rejected the hearing officer's reminder to maintain civility and professionalism during the hearing proceedings. Rather than taking that approach, however, the hearing officer has scheduled a second day of proceedings so that the grievant has the opportunity to present additional testimony. We confirm the hearing officer's duty to enforce section 1.9 of the *Grievance Procedure Manual* during the hearing. If anything, the hearing officer may not have done enough on September 7 to enforce the grievance procedure's civility requirements, although we recognize and approve his attempts to give the grievant every fair opportunity to present his evidence. In the continued proceedings during this matter, the hearing officer has authority to intervene *sua sponte* to prevent unprofessional conduct toward any hearing participant. If he judges that the grievant is unwilling to comply with his orders and present the remainder of his evidence in a civil and respectful manner, the hearing officer ultimately has authority to end the hearing and close the evidentiary record.

In sum, EDR finds nothing in the hearing officer's administration of this matter thus far that constitutes a basis for recusal or that otherwise fails to comply with the requirements of the grievance procedure. It appears that the hearing officer has risen to the challenge of presiding over the extremely contentious proceedings in this matter, which included several instances of overt disrespect directed toward the hearing officer himself. Although he was not required to do so, he has granted the grievant more time to present his case. That the grievant's conduct required the hearing officer to admonish him at multiple points during the September 7 hearing does not create a bias or inability to decide the case fairly on the merits going forward. Accordingly, we will disturb neither the procedural posture of this matter, as continued until October 17, 2023, nor any of the hearing officer's associated instructions to the parties.

EDR's rulings on compliance are final and nonappealable.²⁰

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²⁰ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).