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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5363
February 23, 2022

The Virginia Department of Corrections (the "agency") has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") in relation to a dismissal grievance currently pending for an administrative hearing. The agency asserts that the hearing officer has failed to comply with the grievance procedure and that the case should be reassigned.

FACTS

On January 12, 2021, the agency issued to the grievant a Group III Written Notice with termination, based on a random drug test that returned positive results on both the initial test and a confirmatory re-test. Following the grievant's timely grievance challenging her termination, EDR designated the matter as Case Number 11656 and assigned it to a hearing officer. The parties appeared for a hearing on May 19, 2021. As the hearing began, the grievant requested a continuance on grounds that she had been seeking to have the drug-test sample analyzed for genetic matching, but the labs that conducted the testing indicated they could communicate only with the agency as the contracting party.[1] Thus, the hearing officer granted the continuance request in order to give the grievant "every opportunity to establish the nature of [her] defense"[2] and ordered the agency to discover from its contractors whether they had in fact retained the grievant's tested samples and, if so, to request that the samples be photographed and then sent to a third lab for genetic testing. As the agency attempted to comply with the order, the parties agreed to continue the hearing until January 10, 2022.[3] However, neither lab has apparently offered a conclusive answer as to whether any portion of the grievant's original testing sample can be made available for genetic analysis.

On January 6, 2022, the hearing officer held a pre-hearing conference and ultimately granted another continuance, apparently because it was still unclear whether the labs would or

[1] Agency Request for Compliance Ruling at 2; Hearing Recording at 7:00-12:30.
[2] Hearing Recording at 12:45-13:20.
[3] The continued hearing was first rescheduled for September 16, 2021 but, shortly before that date, the hearing officer granted a second continuance upon the parties' belief that at least one of the original testing labs would soon be providing the grievant's sample for genetic testing.

could make the grievant's original sample available for a genetic test.[4] However, indicating that no further continuances would be granted, the hearing officer advised the parties that his ultimate decision would take into consideration whether the labs ultimately could not or would not provide evidence the grievant sought for her defense.

The agency, having objected to any additional continuance of this matter, now requests a compliance ruling from EDR. The agency asks EDR to find that the hearing officer has abused his discretion in continuing the matter a third time and must recuse himself because his rulings and statements raise doubt whether "he will be able to conduct the hearing in a fair and impartial manner."[5]

DISCUSSION

EDR's *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that a hearing officer must recuse himself "in any hearing in which [his] 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 . . . ."[6] Grounds for recusal include situations in which the hearing officer "has a personal bias or prejudice concerning a party or a party's advocate."[7]

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.[8] 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.'"[9] 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.[10] The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.[11]

Here, the agency questions whether the hearing officer will be impartial because he has granted three continuances to allow the grievant the opportunity to have her original drug-test sample re-analyzed. The agency takes issue with statements the hearing officer made allegedly indicating skepticism of the agency's drug-testing process. In addition, the agency has expressed concern that, during the most recent pre-hearing conference, the grievant presented "impassioned pleas about wanting to clear her name" to the hearing officer, without being under oath or subject

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[4] It appears that the January 6, 2022 pre-hearing conference was not recorded, and therefore EDR will analyze the compliance issues presented by the agency based on undisputed representations by the parties. As of the date of this ruling, the hearing in this matter has been rescheduled for April 25, 2022.
[5] Agency Request at 7.
[6] *Rules for Conducting Grievance Hearings* § III(G).
[7] *Id.*
[8] 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.
[9] 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.").
[10] EDR Ruling No. 2012-3176.
[11] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

to cross-examination.[12] The agency asserts that these events demonstrate the hearing officer's "seeming indifference" to the agency's evidence of two positive drug tests.[13]

Upon full review of the parties' arguments and the record to date, EDR cannot find that the proceedings suggest a potential personal bias or prejudice that would prevent the hearing officer from fairly and impartially assessing the evidence in this case. Although the agency has expressed concern about a number of the hearing officer's comments during pre-hearing proceedings, EDR does not interpret those comments to indicate a bias against the agency's position or evidence. First, the agency points to the hearing officer's reference to a prior case during the initial continuance arguments, asserting that the hearing officer expressed skepticism of the agency's methods because of that case.[14] However, our review of the recording indicates instead that the hearing officer referenced the prior case merely in the context of evaluating how likely it would be for a drug-testing lab to have retained the grievant's tested sample after some months had passed. Because a sample had been available for retesting after several months in the prior case, the hearing officer expressed his belief that there was "a realistic chance" that the grievant's sample would still be available in the present case, justifying a continuance to allow the parties to inquire further.[15]

Second, the agency points to the hearing officer's commentary regarding chain-of-custody evidence in drug-test cases.[16] In discussing such evidence, the hearing officer observed:

> These drug tests, I'm always concerned about them because there's no video of the testing procedure; there's no person who's going to tell me, "Yeah, I handled this item." And we're really relying upon things like the chain of custody and . . . basically their business procedures. They're dealing with thousands and thousands of people; who knows what really happened?[17]

In light of the agency's burden to prove that the grievant committed misconduct, EDR does not find that these comments indicate improper bias. Had the hearing officer prematurely determined that the agency's testing procedures are suspect, such a pre-hearing determination could be grounds for recusal. Here, however, the hearing officer was specifically *not* drawing presumptions about the evidence, explaining why he found it appropriate to grant the grievant's request to access information about her individual drug test. As the agency argues, it would be improper for the hearing officer to apply "a rebuttable presumption of the unreliability of the Agency's testing procedures and/or chain of custody issues before any evidence has even been heard."[18] Although we find no indication that the hearing officer has operated under such a presumption in this matter, nothing in this ruling would prevent the agency from raising that issue as grounds for administrative review of the hearing officer's ultimate decision.

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[12] Agency Request at 6.
[13] *Id.*
[14] *Id.* at 3.
[15] Hearing Recording at 14:55-16:00.
[16] Agency Request at 3.
[17] *Id.* at 16:10-16:40.
[18] Agency Request at 7.

Third, the agency takes issue with the hearing officer's questioning at the most recent prehearing conference on January 6, 2022.[19] According to the agency, upon hearing that the labs had still not given a definitive answer as to whether a testable sample was still available, the hearing officer asked "who was at fault" for the grievant's inability to obtain the genetic test (apparently referred to as a "third test" during the call); he then stated that the issue of fault was "something that I would like to, or need to know."[20] In response to the grievant's argument that her defense required further analysis of her test sample, the hearing officer answered that when the hearing ultimately occurs, "if the lab has not done another test, you [the grievant] can argue that 'the lab wasn't willing or wasn't able to clear my name,' and that is something I would consider."[21]

Again, EDR cannot find that these comments, as reported by the agency, indicate improper bias. However, the description of this call does cause some confusion for EDR as to the pertinent issues. As of January 6, 2022, neither party had apparently been able to determine even the possibility of obtaining a genetic analysis, apparently due, in part, to poor communication from the test labs. These circumstances raised the issue of whether the grievant should have further opportunity to obtain evidence she considers crucial to her case. The hearing officer's inquiries of "fault" can be appropriate here and reflect the hearing officer's authority and responsibility to weigh and assess the credibility of the evidence presented, including what inferences are appropriately drawn from the evidence that is and is not available. The hearing officer could certainly assess the degree to which the agency is "at fault" for any failure to properly communicate with the test labs or otherwise comply with the portion of the hearing officer's orders for which the agency has control. At this time, EDR has not reviewed evidence about what control the agency has over test samples provided to the test labs or the degree to which the agency can compel the test labs to take actions or communicate. Consequently, to the extent the lack of availability of the evidence sought by the grievant is determined to be the "fault" of either of the test labs, it would be improper to draw an adverse inference against the agency without such additional evidence. Similarly, it is unclear how the test labs' ability or willingness to clear the grievant's name should appropriately inform the hearing officer's analysis, if at all. The hearing officer may address whether the agency has complied with his orders, but the test labs' failure to comply with the hearing officer's orders, directly or indirectly, would not appear to be a basis to hold the agency accountable absent some evidence indicating the agency had control or authority over the test labs and failed to take action consistent with that control or authority. EDR is not aware of authority (law or policy) or precedent that entitles the grievant to compel an external entity for the type of name-clearing evidence sought in this case under the grievance statutes, and the grievant has not cited to such authority.[22] Nevertheless, we cannot find that the statements as reported would constitute grounds for recusal.

Finally, the agency has expressed concern that the grievant had the opportunity to offer "impassioned pleas" to the hearing officer, essentially arguing her case without being under oath or subject to cross-examination.[23] Without more, we cannot conclude that the hearing officer's impartiality might have been compromised merely because he has heard the grievant's argument prior to the hearing; the record indicates that the hearing officer is aware of the agency's argument

[19] Agency Request at 5-6.
[20] *Id.*
[21] *Id.* at 6.
[22] EDR will note that this situation raises a novel concept that we have not considered before. Given that the record available is incomplete at this stage, EDR reserves judgment as to the appropriate analysis of the questions at issue.
[23] Agency Request at 6.

and commitment to its position as well. We are not persuaded by the agency's argument that "it would be extremely difficult, if not impossible for the [hearing officer] to disregard the grievant's pleas and supposition,"[24] as we presume that the agency will present the hearing officer with evidence regarding the integrity of the drug tests administered to the grievant. Similarly, we perceive no bias in the hearing officer's "willingness to grant [the g]rievant 'every opportunity to clear her name.'"[25] Indeed, it appears that the hearing officer has sought to give each party a fair opportunity to meet their respective burdens of proof, as the grievance procedure requires, and has been "indifferent" to the agency's evidence only to the extent that pre-hearing impartiality requires.

The *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* permit a hearing officer to grant extensions and continuances of hearing dates for just cause.[26] Such matters are within the discretion of the hearing officer. EDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including the granting or denying of continuances. A hearing officer's decision regarding a hearing continuance will be disturbed only if (1) it appears that the hearing officer has abused their discretion or otherwise violated a grievance procedure rule, and (2) the objecting party can show prejudice.[27] Based on the circumstances discussed in this ruling, we find no basis to conclude that the hearing officer has abused his discretion in granting a third continuance over the agency's objection.

In conclusion, while it is unfortunate that the agency's drug-testing contractors have reportedly not offered conclusive answers about the availability of evidence for these proceedings, we find no bias evident in the hearing officer's responses to the difficulties caused by this situation. It appears that the hearing is likely to proceed on the newly scheduled date, at which time we expect that the parties will each have the opportunity to present any available evidence relevant to their respective claims.

CONCLUSION

For the reasons set forth above, EDR finds no basis to appoint a new hearing officer in Case Number 11656 or to disturb the hearing officer's orders with respect to continuing the hearing or to the parties' respective duties of production.

EDR's rulings on matters of compliance are final and nonappealable.[28]

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[24] *Id.*
[25] *Id.* at 7.
[26] *See Rules for Conducting Grievance Hearings* § III(B); *see also* Va. Code § 2.2-3005(C) (granting hearing officers the authority to "[d]ispose of procedural requests").
[27] *See* EDR Ruling No. 2013-3450; EDR Ruling No. 2012-3067; *cf.* Venable v. Venable, 2 Va. App. 178, 181, 342 S.E.2d 646, 648 (1986) ("The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal.") (citing Autry v. Bryan, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982)).
[28] *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).

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