

Issue: Compliance - Grievance Procedure (Hearings); Ruling Date: June 5, 2014;  
Ruling No. 2014-3904; Agency: Christopher Newport University; Outcome: Hearing  
Officer in Compliance.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***  
***Office of Employment Dispute Resolution***

**COMPLIANCE RULING**

In the matter of Christopher Newport University  
Ruling Number 2014-3904  
June 5, 2014

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to his grievance with Christopher Newport University (the “University”). The grievant asserts that the hearing officer should recuse herself from Case Number 10353 on the basis of an alleged conflict of interest. For the reasons discussed below, EDR will not remove the hearing officer.

FACTS

On or about March 27, 2014, the grievant was issued a Group III Written Notice with termination. The grievant filed a dismissal grievance challenging his termination, and a hearing officer was appointed on April 25, 2014. At the beginning of a pre-hearing conference held May 23, 2014, the hearing officer disclosed that she had a prior professional relationship with the University advocate when they were co-workers from 1989 to 1990. At the pre-hearing conference, the grievant indicated that he “did not have an objection to going forward with his grievance before the Hearing Officer.” Also during the pre-hearing conference, the grievant informed the hearing officer that “he could not hear or understand a statement” made by the University advocate. The hearing officer “repeated what had been stated” by the University advocate and the grievant expressed no further concern during the pre-hearing conference that he was unable to hear or understand the University advocate.

In the evening of May 23, the grievant emailed the hearing officer and the University advocate, alleging that the hearing officer’s “prior work relationship” with the University advocate constituted “a conflict of interest and a bias towards [his] case.” Further, he argues that his inability to “hear or understand anything [the University advocate] was saying or presented” placed him at a disadvantage. The hearing officer issued an order declining to recuse herself from the grievant’s case on June 3, 2014. The grievant requested a ruling from EDR on June 4, 2014, reiterating his argument that the hearing officer’s “[p]ast working relationship” with the University advocate and his difficulty hearing the University advocate’s statements during the pre-hearing conference require recusal of the hearing officer.

DISCUSSION

The grievant asserts that the hearing officer should recuse herself from his case because of her “[p]ast working relationship with [the University advocate] that occurred in 1989-90” and

because “[he] was unable to hearing [the University advocate’s] responses” during a pre-hearing conference call. 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 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 Officer Program Administration*.<sup>1</sup>

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 be 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 . . . .”<sup>2</sup> Grounds for recusal include situations in which the hearing officer “has a personal bias or prejudice concerning a party or a party’s advocate.”<sup>3</sup> Similarly, EDR Policy 2.01 states that a “hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia.”<sup>4</sup>

EDR’s requirement of recusal when the hearing officer “cannot guarantee a fair and impartial hearing” is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.<sup>5</sup> 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.’”<sup>6</sup> 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.<sup>7</sup> The party moving for recusal of a judge has the burden of proving the judge’s bias or prejudice.<sup>8</sup>

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<sup>1</sup> *Rules for Conducting Grievance Hearings* § II.

<sup>2</sup> *Id.* § III(G) (alteration in original) (internal quotation marks and citation omitted).

<sup>3</sup> *Id.*

<sup>4</sup> EDR Policy 2.01, *Hearing Officer Program Administration*, at 3. The Supreme Court of Virginia’s reference book for administrative hearing officers contains additional guidance regarding recusal in the case of a conflict of interest or “[b]ias toward or against one of the parties involved.” *Hearing Officer Deskbook* § V(H), <http://www.courts.state.va.us/programs/ho/deskbook.pdf>. The examples of conflicts of interest identified in the reference book consist of situations in which the hearing officer or a member of the hearing officer’s family has a financial interest of some sort in the outcome of the case. *See id.* The grievant has not alleged that the hearing officer has a financial interest in the outcome of his grievance hearing, nor is there any evidence to suggest that may be the case.

<sup>5</sup> 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.

<sup>6</sup> *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.”).

<sup>7</sup> EDR Ruling No. 2012-3176.

<sup>8</sup> *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

The grievant's assertion that the hearing officer's prior work relationship with the University advocate is a conflict of interest is insufficient to establish the existence of a bias or prejudice that would require recusal. Although the grievant claims that "no one knows the extent of" the current relationship between the hearing officer and the University advocate, the hearing officer explained that she "has had no contact with" the University advocate since their work relationship ended in 1990 and affirmed that "she remains impartial." The University advocate confirmed that she and the hearing officer "did not in anyway [sic] continue their association or professional relationship" after 1990. The grievant has presented no information that would cast doubt on these representations, other than his general claim that there is a conflict of interest.

In the absence of any indication that the hearing officer "cannot guarantee a fair and impartial hearing" based on her prior work relationship with the University advocate, we must conclude that there is no reasonable basis to question the hearing officer's impartiality in this case. While the grievant's concern about a prior working relationship between the hearing officer and the University advocate is understandable, that relationship ended over twenty years ago and there is no indication that the hearing officer and the University advocate have had any contact since that time. While, in certain cases, recusal might be appropriate based on a professional relationship between the hearing officer and a party or advocate to a grievance, such is not the case here.

The grievant further asserts that, at the pre-hearing conference, he was "unable to hear [the University advocate's] responses" to any of the questions asked.<sup>9</sup> The hearing officer noted in her order declining recusal that, upon being advised of the grievant's inability to hear the University advocate, she "repeated what had been stated" for the grievant. The grievant did not raise any further concern about this issue during the pre-hearing conference. EDR is unable to determine how the grievant's difficulty hearing the University advocate implicates a question of bias, prejudice, or conflict or interest. Indeed, it appears that the hearing officer resolved the issue when it arose to the grievant's satisfaction. Most importantly, there is no indication that the action or inaction of the hearing officer is somehow an indication that she "cannot guarantee a fair and impartial hearing."

For the reasons set forth above, the grievant's request that EDR remove the hearing officer in Case Number 10353 is denied.

EDR's rulings on matters of compliance are final and nonappealable.<sup>10</sup>



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<sup>9</sup> It is unclear whether the responses were to questions posed by the grievant, the hearing officer, or both.

<sup>10</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).