

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10174; Ruling  
Date: December 30, 2013; Ruling No. 2014-3770; Agency: Department of Motor  
Vehicles; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Motor Vehicles  
Ruling Number 2014-3770  
December 30, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10174. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On July 18, 2013, the grievant was issued five Group II Written Notices and one Group I Written Notice and was removed from employment.<sup>1</sup> She timely initiated a grievance challenging the disciplinary actions.<sup>2</sup> On November 6, 2013, following a hearing, the hearing officer issued a decision upholding the Group II Written Notices with removal, but finding the agency had failed to bear its burden of proof with respect to the Group I Written Notice.<sup>3</sup> The grievant has requested an administrative review by EDR of the hearing officer’s decision.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions ... on all matters related to ... procedural compliance with the grievance procedure.”<sup>4</sup> If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>5</sup>

In her request for administrative review by EDR, the grievant asserts that the hearing officer was biased against her. The EDR *Rules for Conducting Grievance Hearings* (the “*Rules*”) address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for

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<sup>1</sup> Decision of Hearing Officer, Case No. 10174, (“Hearing Decision”), November 6, 2013, at 1-2.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 13.

<sup>4</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

[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>6</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>7</sup>

The EDR 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>8</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>9</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>10</sup> The party moving for recusal of a judge has the burden of proving the judge’s bias or prejudice.<sup>11</sup>

As proof of bias, the grievant alleges that the hearing officer inappropriately questioned her “after [she] requested an alternate location [for the hearing] other than the agency in which [she] worked.” She states that after she made this request on the basis of her “anxiety” and “inability to be in the agency headquarters,” the hearing officer improperly asked how she would be able to return to work if such relief were granted. She also argues that the hearing officer allowed the agency’s attorney and representative to act in an unprofessional manner and engage in inappropriate questioning and argument, and that the hearing officer became agitated by the end of the hearing.

This evidence is insufficient to establish bias. Even assuming the truth of the grievant’s statements about the questioning regarding the location of the hearing, such questioning was appropriate under the circumstances, as the primary relief generally available through a grievance hearing on dismissal is reinstatement to the employee’s former position.<sup>12</sup> Further, our review of the hearing recording does not support the grievant’s assertion that the hearing officer conducted the hearing in a manner that evidences bias or prejudice against the grievant.

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<sup>6</sup> *Rules for Conducting Grievance Hearings* § II.

<sup>7</sup> EDR Policy 2.01 *Hearing Officer Program Administration* at 3.

<sup>8</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>9</sup> *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (1992); *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>10</sup> EDR Ruling No. 2012-3176.

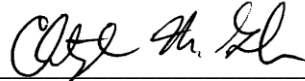
<sup>11</sup> *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

<sup>12</sup> *Grievance Procedure Manual* § 5.9(a). The grievant also requested “full reinstatement of position” as part of her requested relief in her grievance. Agency Exhibit 1, Tab 1 at 1.

The grievant also asserts that the conduct of the agency attorney and representative violated the Code of Civility and Conduct set forth in Section 1.9 of the *Grievance Procedure Manual*. In support of this claim, she argues, for example, that the agency attorney engaged in an “unnecessary outburst” and improper questioning regarding certain accidents. This claim is not supported by our review of the hearing recording. While the agency’s attorney was zealous in her representation, her conduct was within the scope of appropriate advocacy during a grievance hearing. Although the hearing was at times contentious, based on a review of the record, there is no indication that the agency’s questions and testimony were improper or violative of the Code of Civility and Conduct. For these reasons, EDR will not remand the hearing decision on the basis of bias or a violation of Section 1.9.

### CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>13</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>14</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup>



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<sup>13</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>14</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>15</sup> *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).