Issue: Administrative Review of Hearing Officer's Decision in Case No. 10340; Ruling Date: August 7, 2014; Ruling No. 2015-3934; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2015-3934
August 7, 2014

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 10340. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On January 31, 2014, the Department of Behavioral Health and Developmental Services (the "agency") issued the grievant a Group III Written Notice for failing to address an unsafe condition which had the potential to result in harm to patients and staff.[1] He timely initiated a grievance challenging the disciplinary action.[2] On June 19, 2014, following a hearing, the hearing officer issued a decision upholding the disciplinary action.[3] The grievant has now requested administrative review by EDR.

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."[4] 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.[5]

Exchange of Evidence

The grievant asserts that the hearing officer failed to comply with Section 5.7 of the *Grievance Procedure Manual*. Specifically, the grievant argues that the hearing officer did not

[1] Decision of Hearing Officer, Case No. 10340, ("Hearing Decision"), June 19, 2014, at 4. The Written Notice asserted that at the end of his shift on January 7, 2014, the grievant "left work and did not report to administration that the heating deficiencies in Building 30 had not been corrected." *Id.*; Agency Exhibit 1.
[2] Hearing Decision at 1; Agency Exhibit 2 at 1.
[3] Hearing Decision at 1, 8.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).

order the agency "to exchange a list of witnesses and documents with the Grievant prior to the hearing," and that as a result, the grievant was unprepared to discuss evidence presented by the agency. However, EDR's review of the hearing record indicates that the hearing officer sent a scheduling order to the parties on April 29, 2014. This order directed the parties to "exchange between them and deliver to the hearing officer their proposed exhibits and the names of their proposed witnesses." The order further explained that "'exchange' as used herein means each party shall ensure that he or she delivers by hand, overnight courier, e-mail or facsimile, his or her proposed exhibits and the names of his or her proposed witnesses to the other party." In addition, our review of the recording from the hearing indicates that the grievant did not object to the admission of the agency's hearing exhibits into evidence.[6] In light of this evidence, EDR will not remand the hearing decision on this basis.

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Findings of Fact

The grievant's request for review also challenges a number of the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[10] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[11] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant asserts, in effect, that the hearing officer erred in finding that there were problems with the heating system, that the grievant could have corrected those problems, and/or

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[6] Hearing Recording at Track 1, 3:58-4:05.
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.

that he failed to act appropriately in response to any problems. Based on a review of the record, however, there is sufficient evidence to support the hearing officer's finding that the grievant failed to adequately communicate to his supervisor the state of repair of the heating system.[12] The test is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer's findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EDR declines to disturb the decision on this basis.

Violation of Section 1.9 of the Grievance Procedure Manual

The grievant further argues that the hearing officer violated the Code of Civility and Conduct set forth in Section 1.9 of the *Grievance Procedure Manual*. In support of this claim, he notes that the hearing officer described certain of the grievant's arguments as "red herrings," while characterizing the agency's witnesses as "credible, open, frank and forthright."[13] By its terms, however, Section 1.9 applies only to parties and their advocates. We will therefore consider the grievant's allegations to be a claim that the hearing officer exhibited bias against him.

EDR's *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

> [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.[14]

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."[15]

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.[16] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she

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[12] *See* Hearing Decision at 4, 6-7; *see also, e.g.*, Agency Exhibit 2 at 5-9, 12-14. The grievant provided EDR with additional evidence in connection with his administrative review request. However, as this documentation does not constitute "newly discovered evidence," it will not be considered here. *See* EDR Ruling No. 2014-3901.
[13] *See* Hearing Decision at 4, 8.
[14] *Rules for Conducting Grievance Hearings* § II.
[15] EDR Policy 2.01, *Hearing Officer Program Administration*, at 3.
[16] 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.

harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[17] 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.[18]

The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[19] The evidence presented by the grievant is insufficient to establish bias. While we do not disagree that the language used by the hearing officer indicates that he found the agency's evidence to be more compelling than that presented by the grievant, such a determination is frequently both necessary and appropriate in rendering a decision. Further, EDR's review of the hearing record did not indicate any bias on the part of the hearing officer. Accordingly, the hearing decision will not be remanded on this basis.

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.[20] 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

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[17] 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.").
[18] EDR Ruling No. 2012-3176.
[19] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[20] *Grievance Procedure Manual* § 7.2(d).
[21] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[22] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).