

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10393; Ruling
Date: August 19, 2014; Ruling No. 2015-3947; Agency: Virginia Employment
Commission; 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 Virginia Employment Commission
Ruling Number 2015-3947
August 19, 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 10325. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by the Virginia Employment Commission (the “agency”) as a hearings officer.¹ On October 23, 2013, the grievant received an overall performance rating of Below Contributor on his 2012-2013 annual performance evaluation.² The grievant was placed on a three-month reevaluation plan.³ On January 24, 2014, the grievant was removed from employment after the agency determined he did not pass his performance plan.⁴ He timely initiated a grievance challenging his removal.⁵ On July 7, 2014, following a hearing, the hearing officer issued a decision upholding the grievant’s removal from employment.⁶ 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.”⁷ 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.⁸

¹ Decision of Hearing Officer, Case No. 10325 (“Hearing Decision”), July 7, 2014, at 2.

² *Id.* at 5.

³ *Id.*

⁴ *Id.* at 7.

⁵ *Id.* at 1.

⁶ *Id.* at 1, 10.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

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.⁹ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

2012-2013 Performance Evaluation

The grievant asserts that the hearing officer erred in finding that the grievant did not timely challenge his 2012-2013 performance evaluation through the grievance process.¹⁰ The grievant argues that he appealed his evaluation through the process set forth in DHRM Policy 1.40, *Performance Planning and Management*, and that this appeal should be considered a grievance under the state employee grievance procedure. However, Section 2.4 of the *Grievance Procedure Manual* mandates that an employee initiate a grievance on a fully completed "Grievance Form A," and EDR has previously rejected the assertion that a grievance may be submitted in another manner.¹¹ Further, EDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.¹² As such, EDR cannot find the hearing officer erred on this basis.

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"¹³ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹⁴ 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.

Based on a review of the record, there is sufficient evidence to support the hearing officer's findings that the grievant failed to meet the performance measures expected by the agency during the reevaluation period and that the agency acted in good faith in making the decision that the grievant could not be placed into another position.¹⁵ Further, with respect to the grievant's allegations regarding the agency's motivation in removing him from employment, determinations of credibility and motive lie squarely within the discretion of the hearing officer.

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Hearing Decision at 1.

¹¹ See EDR Ruling No. 2014-3887.

¹² See, e.g., EDR Ruling No. 2014-3906 (and authorities cited therein).

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ Hearing Decision at 9-10; see also Agency Exhibits 11, 14, 28.

Although the grievant clearly disagrees with the hearing officer's findings, 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, we decline to disturb the decision on this basis.

Disqualification

The grievant also asserts that the hearing officer had a conflict of interest because the hearing officer also heard the claim of another agency employee who was terminated. 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.¹⁶

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."¹⁷

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.¹⁸ 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.'"¹⁹ 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.²⁰

The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.²¹ The evidence presented by the grievant is insufficient to establish bias or any other

¹⁶ *Rules for Conducting Grievance Hearings* § II.

¹⁷ EDR Policy 2.01, *Hearing Officer Program Administration*, at 3.

¹⁸ 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.

¹⁹ *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.").

²⁰ EDR Ruling No. 2012-3176.

²¹ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

basis for disqualification. Further, EDR's review of the hearing record did not indicate any bias or prejudice on the part of the hearing officer. Accordingly, the hearing decision will not be remanded on this basis.

Witness Testimony

The grievant also challenges the hearing officer's refusal to allow him to introduce the testimony of two witnesses during the hearing. The grievant appears to argue that because the hearing officer allegedly stated that he had personal business later in the day, the hearing officer rushed to end the hearing.

EDR's review of the hearing recording does not support the grievant's argument that the hearing was inappropriately truncated by the hearing officer. The hearing lasted for approximately five hours, and the grievant had almost two hours to present his witnesses.²² Of the eight witnesses identified by the grievant on his witness list, he presented six.²³ The two remaining witnesses were deemed by the hearing officer to offer merely cumulative or irrelevant evidence, and they were excluded on this basis.²⁴ As there is no evidence that the hearing officer abused his discretion in excluding these witnesses, 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.²⁵ 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.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷



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²² Hearing Recording at 2:41:32-4:33:04.

²³ *Id.*; see also Grievant's Exhibit 1.

²⁴ Hearing Recording at 4:19:49-4:26:13.

²⁵ *Grievance Procedure Manual* § 7.2(d).

²⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁷ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).