

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10386; Ruling  
Date: August 25, 2014; Ruling No. 2015-3969; Agency: Department of Corrections;  
Outcome: No Relief- Agency Upheld.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2015-3969  
August 25, 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 10386. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by the Department of Corrections (the “agency”) as a trainer.<sup>1</sup> On October 29, 2013, the grievant and a co-worker engaged in a verbal dispute which resulted in both being counseled regarding appropriate communications in the workplace.<sup>2</sup> Subsequently, on April 3, 2014, the grievant became involved in another dispute with a co-worker.<sup>3</sup> As a result, on April 9, 2014, the grievant was issued a Group III Written Notice with suspension for engaging in “threatening/coercive behavior.”<sup>4</sup> He timely initiated a grievance challenging the disciplinary action.<sup>5</sup> Following a hearing, on July 23, 2014, the hearing officer issued a decision upholding the disciplinary action.<sup>6</sup> 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.”<sup>7</sup> If the hearing

---

<sup>1</sup> Decision of Hearing Officer, Case No. 10386 (“Hearing Decision”), July 23, 2014, at 2.

<sup>2</sup> *Id.* at 2-3; *see also* Agency Exhibit 5 at 5. The grievant asserts that the hearing officer erred in describing the events of October 2013 as an “altercation.” While the grievant may disagree with that characterization, the hearing officer’s use of the term is supported by record evidence. *See* Agency Exhibit 5 at 5.

<sup>3</sup> Hearing Decision at 3.

<sup>4</sup> *Id.* at 4-5; Agency Exhibit 1.

<sup>5</sup> Agency Exhibit 2.

<sup>6</sup> Hearing Decision at 1, 10.

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

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>8</sup>

### *Admission of Evidence*

The grievant asserts that the hearing officer erred in denying his request to introduce a letter from the co-worker involved in the October 2013 incident. The co-worker's letter noted that he and the grievant engaged in a "loud verbal disagreement" in the grievant's office; that the grievant repeatedly asked the co-worker to leave his office but the co-worker only left when escorted by another employee; and that both were counseled regarding their behavior. The basis for the hearing officer's denial was the grievant's failure to include the document in the binder of exhibits he submitted to the agency prior to the hearing.<sup>9</sup> The grievant asserts, in effect, that the hearing officer erroneously applied the more formal standards for admission of evidence applicable in a judicial proceeding, rather than the more relaxed standards that apply in a grievance hearing. The grievant also appears to argue that the hearing officer improperly relied on the agency's objection in excluding the evidence.

While EDR's review of the hearing recording suggests that the hearing officer may have applied standards for the admission of evidence more consistent with judicial proceedings than with the nature of a grievance hearing, any error made with respect to the co-worker's letter is harmless. The relevant portions of the letter are duplicative of the contents of an incident report which was admitted as an agency exhibit.<sup>10</sup> As a result, the hearing officer had before him the information which the grievant sought to introduce through the co-worker's letter. There is no basis to believe that the receipt of duplicative information would have impacted the hearing officer's decision. Accordingly, the hearing decision will not be remanded on this basis.

### *Bias*

In his request for administrative review by EDR, the grievant asserts that the hearing officer was biased against him. 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

[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>11</sup>

---

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> See Hearing Recording, Track 1 at 19:46-25:21. The hearing officer advised the grievant that he could, however, introduce the letter as rebuttal evidence if warranted. *Id.* In his request for administrative review, the grievant notes that the hearing officer failed to advise him when his opportunity to introduce rebuttal evidence arose.

<sup>10</sup> See Agency Exhibit 5 at 5.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § II.

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>12</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>13</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>14</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>15</sup>

The party moving for recusal of a judge has the burden of proving the judge’s bias or prejudice.<sup>16</sup> The evidence presented by the grievant is insufficient to establish bias or any other 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.

#### 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>17</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>18</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>19</sup>



Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

---

<sup>12</sup> EDR Policy 2.01, *Hearing Officer Program Administration*, at 3.

<sup>13</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>14</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>15</sup> EDR Ruling No. 2012-3176.

<sup>16</sup> *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

<sup>17</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>18</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>19</sup> *Id.*; *see also* Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).