Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: November 14, 2014; Ruling No. 2015-4038; Agency: Virginia Department of Transportation; Outcome: Hearing Officer in Compliance.

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

COMPLIANCE RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2015-4038
November 14, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) regarding his grievance with the Virginia Department of Transportation (the agency). The grievant asserts that the hearing officer should have recused himself from Case Number 10483.

FACTS

The grievance in this matter, EDR Case Number 10483, was appointed to a hearing officer effective October 20, 2014. The grievant has requested that the hearing officer recuse himself from this case. In a November 6, 2014 letter to the parties, the hearing officer declined to recuse himself. The grievant alleges that the hearing officer demonstrated prejudice during the pre-hearing conference call with the grievant, in refusing to allow the agency to provide him with requested information to assist in his hearing. Further, the grievant asserts that the hearing officer utilized "condescending and dismissive tones" during this conference call, and thus, the grievant concludes that the hearing officer is biased against him.

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 . . . ."[1] The authority granted to EDR includes the appointment of administrative hearing officers to conduct grievance hearings.[2] EDR's power to appoint necessarily encompasses the power to remove a hearing officer from the assigned hearing, should it become necessary, and to appoint a new hearing officer.[3] However, EDR has long held that its power to remove a hearing officer from a grievance should be exercised sparingly and reserved only for those cases where the hearing

[1] Va. Code §§ 2.2-1202.1(2), (3), (5).
[2] Va. Code § 2.2-1202.1(6).
[3] *See* Carlucci v. Doe, 488 U.S. 93, 99 (1988) ("absent a 'specific provision to the contrary, the power of removal from office is incident to the power of appointment'") (quoting Keim v. United States, 177 U.S. 290, 293 (1900)).

officer has demonstrated actual bias, or has clearly and egregiously undermined the integrity of the grievance process.[4]

The party moving for **removal** has the burden of proving **bias** or prejudice.[5] In this instance, the grievant has presented no evidence establishing that the hearing officer possesses or has exercised such **bias** or prejudice as to deny the grievant a fair hearing.[6] The grievant essentially challenges the hearing officer's allegedly rude behavior during the pre-hearing conference call with the parties. However, the grievant has not presented sufficient evidence that the hearing officer has demonstrated actual bias or has clearly and egregiously undermined the integrity of the grievance process. Therefore, the grievant's request for a new hearing officer is denied.

It should be noted, however, that the grievant will have the opportunity to raise his concerns regarding bias with the hearing officer at hearing should his concerns persist. In addition, following the hearing and issuance of the hearing officer's decision, parties have the opportunity to request administrative review of the decision based on issues including, but not limited to, bias.[7] Moreover, judicial review of the decision may be sought from the circuit court once all administrative reviews are complete, if any, and the hearing officer's decision is final.[8]

EDR's rulings on matters of compliance are final and nonappealable.[9]

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[4] *E.g.*, EDR Ruling No. 2004-725; *see also* Welsh v. Commonwealth*,* 14 Va. App. 300, 314-17, 416 S.E.2d 451, 459-61 (1992) (discussing the very high standard used by a reviewing court in determining whether a trial court judge should be disqualified from hearing a case on the basis of alleged bias).

[5] *E.g.,* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

[6] *See Welsh,* 14 Va. App. at 315, 416 S.E.2d at 459-460 ("In Virginia, 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,' and is a matter left to the reasonable discretion of the trial court.") (internal citations omitted). "As a constitutional matter, due process considerations mandate recusal only where the judge has 'a direct, personal, substantial, pecuniary interest' in the outcome of a case." *Id.* at 314, 416 S.E.2d at 459. We believe that a more expansive review of bias claims is appropriate and should not be limited solely to the question of whether a pecuniary interest was implicated. *See also Jackson*, 267 Va. at 229, 590 S.E.2d at 520 ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge."). Even when this case is reviewed for any actual bias, pecuniary or otherwise, none appears present.

[7] *Grievance Procedure Manual* § 7.2.

[8] *Grievance Procedure Manual* § 7.3.

[9] *See* Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).