

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10867; Ruling
Date: December 8, 2016; Ruling No. 2017-4447; Agency: Department of Medical
Assistance Services; Outcome: AHO's decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Medical Assistance Services
Ruling Number 2017-4447
December 8, 2016

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 10867. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10867, as found by the hearing officer, are as follows:¹

The Department of Medical Assistance Services employed Grievant as a Policy and Planning Specialist. Grievant had prior active disciplinary action. On October 13, 2015, he received a Group II Written Notice with a five workday suspension for sleeping during work hours.

On July 26, 2016 at 9:47 a.m., Grievant was in his office seated in front of his desk. He was not taking a scheduled break from work. His head was slumped forward with his face positioned downward. His eyes were closed. He was snoring and/or sleep-breathing. Grievant was asleep. He remained asleep for at least 7 or 8 minutes. He did not change positions or move during that time. Grievant did not notice that the Supervisor entered his office, stood two feet from him, and bent over to see that Grievant’s eyes were closed and hear that Grievant was snoring. Grievant did not notice that a Division Director took two pictures of him sleeping.

The Division Director notified the Deputy Director that she had observed Grievant sleeping. The Deputy Director entered Grievant’s office and positioned himself in front of Grievant to look at his eyes and hear Grievant snoring. After several moments, the Deputy Director rapped on Grievant’s desk and Grievant awoke. The Deputy Director told the Grievant that he appeared to be sleeping. Grievant grabbed a bottle on his desk and said he was drinking, not sleeping. Grievant was not drinking, he was asleep.

¹ Decision of Hearing Officer, Case No. 10867 (“Hearing Decision”), November 3, 2016, at 2-3 (citations omitted).

Grievant claimed he was checking a computer cord under his desk.
Grievant was not checking a computer cord under his desk.

On August 3, 2016, the grievant was issued a Group III Written Notice with termination for sleeping at work.² The grievant timely grieved the disciplinary action³ and a hearing was held on November 2, 2016.⁴ Though properly notified of the hearing date, the grievant did not appear at the hearing.⁵ In a decision dated November 3, 2016, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant was sleeping at work and upheld the issuance of the Group III Written Notice with termination.⁶ The grievant now appeals the hearing decision to 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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁸

Witness List and Exchange of Exhibits

In a September 29, 2016 scheduling letter, the hearing officer directed the parties to exchange their lists of witnesses and proposed exhibits no later than 5:00 p.m. on October 27, 2016. On October 28, 2016, the grievant claimed he had not received the agency’s proposed exhibits and alleged that the agency was “recruiting witnesses” that were “of one race and close friends.” The hearing officer scheduled a pre-hearing conference to discuss these issues. The grievant did not participate in the pre-hearing conference and subsequently sent EDR an email on November 1, 2016, the day before the hearing, stating that he still had not received the agency’s proposed exhibits. The grievant did not appear at the hearing on November 2, 2016.⁹

In his request for administrative review, the grievant appears to assert that the hearing officer erred in accepting the agency’s exhibits into evidence because they were not delivered to him, and that he had raised concerns with the agency’s witness list and/or that the witnesses who testified for the agency were biased. The grievant further alleges that he was not available to participate in the October 28, 2016 conference call, that the hearing officer “did not discuss the witness list issue,” and that he “was not given an opportunity to ask the necessary question [sic]” of witnesses.¹⁰

² Agency Exhibit 1.

³ Agency Exhibit 2.

⁴ See Hearing Decision at 1.

⁵ *Id.*

⁶ See *id.* at 1, 3-4.

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

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

⁹ See Hearing Decision at 1; Hearing Recording at 00:05-00:26.

¹⁰ The grievant has also asserted that the hearing officer’s statement in the decision that the grievant sent an email to EDR the day before the hearing is inaccurate. Correspondence included in the hearing file indicates that the grievant

Even accepting as true the grievant's assertion that he was unavailable for the pre-hearing conference, the grievant could have brought his concerns about the agency's list of witnesses and alleged failure to deliver its proposed exhibits to the hearing officer's attention at the hearing on November 2. The grievant had notice of the date and time of the hearing from the September 29, 2016 scheduling order. However, the grievant did not attend the hearing, and thus did not avail himself of the opportunity to raise his concerns about the agency's proposed evidence and witnesses or present a defense to the charge on the Written Notice. At the hearing, the agency's advocate produced a photograph of the grievant's residence, taken by the person who delivered the agency's proposed exhibits, to confirm delivery.¹¹ The hearing officer accepted the photograph into evidence.¹² Accordingly, EDR finds no error in the hearing officer's acceptance of the agency's exhibits into the hearing record. In addition, while the grievant asserts that the hearing was "racial [sic] based [sic]" and that he did not have an "opportunity to ask the necessary question [sic]," the grievant did not attend the hearing where he would have had ample opportunities to question witnesses and present evidence to support his allegations of bias. As a result, EDR cannot find that the hearing officer's determinations were in error.

Moreover, EDR has reviewed nothing in the hearing record to indicate that the hearing officer erred in his assessment of the agency's witnesses or exhibits. There is evidence in the record to support the hearing officer's assessment of the facts and conclusion that the grievant was sleeping at work.¹³ Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. EDR finds no basis to disturb the hearing officer's conclusion that the evidence in the record was sufficient to demonstrate that the grievant engaged in behavior that justified the issuance of the Written Notice in this case. Accordingly, EDR declines to disturb the hearing decision on this basis.

Alleged Bias

The grievant further asserts that the hearing was "racial [sic] based [sic]" and that the hearing officer "has sided with the agency" The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that a hearing officer is responsible for avoiding the appearance of bias and:

[v]oluntarily recusing himself or herself and withdrawing from any appointed 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

did indeed send an e-mail on November 1, received by EDR at 5:03 p.m. Even if this statement was false, it would have no effect on the outcome of this case. As such, this issue will not be addressed further in this ruling.

¹¹ Hearing Recording at 1:21-2:56.

¹² Agency Exhibit 18. By not appearing for the hearing, the grievant did not present evidence to contradict that submitted by the agency proving its delivery of the proposed exhibits to the grievant's residence. To the extent such contradictory evidence exists, it has not been presented by the grievant to date.

¹³ See, e.g., Agency Exhibits 7-8, 10-13.

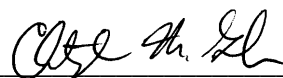
¹⁴ *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.¹⁵ 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.'"¹⁶ 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.¹⁷ The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.¹⁸

The evidence presented by the grievant here is insufficient to establish bias or any other basis for disqualification. The mere fact that a hearing officer's findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias. This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. Further, EDR's review of the hearing record did not indicate any bias or prejudice on the part of the hearing officer. Accordingly, EDR declines to disturb the hearing decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.¹⁹ Within thirty 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹



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¹⁵ 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.

¹⁶ *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.").

¹⁷ *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

¹⁸ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

¹⁹ *Grievance Procedure Manual* § 7.2(d).

²⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²¹ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).