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COMPLIANCE RULING

In the matter of the University of Virginia
Ruling Number 2020-5006
November 6, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management[1] in relation to his grievance with the University of Virginia (the "University" or the "agency"). The grievant asserts that the hearing officer should recuse himself from Case Number 11439, and also objects to the date and location of the hearing.

FACTS

On or about October 2, 2019, the grievant was issued a Group III Written Notice with termination. The grievant filed a dismissal grievance challenging his termination, and a hearing officer was appointed on October 21. At a pre-hearing conference held on October 30, the hearing officer set the date of the hearing for January 14, 2020. The grievant sent an email to EDR on October 31 to "request a new hearing officer" because "the conversation between" the hearing officer and the University's advocate at the pre-hearing conference caused him to "question [the hearing officer's] neutrality." The grievant also asked for the hearing to be scheduled in November at a University location in another locality because he was prohibited from returning to the University's property where he worked prior to his termination. In response, the University has noted that the *Grievance Procedure Manual* requires the hearing to be held in the locality where the grievant was employed and confirmed that the grievant would be permitted on University property to attend the hearing.

DISCUSSION

Alleged Bias

EDR's *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that a hearing officer is responsible for

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

> [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.[2]

Section III(G) of the *Rules* provides that a hearing officer must recuse herself "in any hearing in which the [hearing officer's] impartiality might reasonably be questioned," unless the parties are advised of the basis for the potential recusal and "the parties consent to the hearing officer's continued service . . . ."[3] Grounds for recusal include situations in which the hearing officer "has a personal bias or prejudice concerning a party or a party's advocate."[4]

EDR's approach to recusal is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.[5] 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.'"[6] 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.[7] The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.[8]

In this case, neither the hearing officer nor the University's advocate disclosed a potential conflict of interest or other basis for recusal during the pre-hearing conference; the grievant's allegation is based solely on his perception of the hearing officer's conversation with the University's advocate at the pre-hearing conference. The grievant's concern, by itself, is not sufficient to establish the existence of a bias or prejudice that would require recusal here. In the absence of any evidence that the hearing officer cannot guarantee a fair and impartial hearing, EDR has no reasonable basis to question the hearing officer's impartiality in this case. Accordingly, the grievant's request that EDR appoint a new hearing officer in Case Number 11439 is denied.

Location and Date of Hearing

With regard to the grievant's objections to the date and location of the hearing, EDR also finds no error in the hearing officer's conduct. Section III(B) of the *Rules* states as follows:

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[2] *Rules for Conducting Grievance Hearings* § II.
[3] *Id.* § III(G) (alteration in original) (internal quotation marks and citation omitted).
[4] *Id.*
[5] 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.
[6] 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.").
[7] EDR Ruling No. 2012-3176.
[8] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

> Generally, the hearing should occur within 35 calendar days after the hearing officer is appointed. However, the hearing officer in his or her discretion may grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request. If a party objects to the request, the hearing officer may only grant extensions of time [f]or just cause – generally circumstances beyond a party's control.

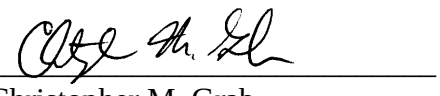
While the grievant's frustration with the delay in scheduling the hearing is understandable, there is nothing to indicate the hearing officer abused his discretion by setting the hearing for January 14, 2020. It appears instead that the hearing officer's decision was based on the parties' representations as to their availability, as well as the availability of their witnesses. These circumstances constitute just cause for scheduling the hearing more than 35 calendar days after the hearing officer's appointment in this case.

Furthermore, the grievance statutes provide that grievance hearings "*shall* be held in the locality in which the employee is employed or in any other locality agreed to by the employee, employer, and hearing officer."[9] In cases involving terminations, EDR interprets this language to mean that the hearing must be held in the locality where the employee worked prior to their termination. Relevant language in the Code of Virginia defines a "locality" as "a county, city, or town as the context may require."[10] Read together, these provisions require that grievance hearings be held in the county, city, or town where the employee is or was employed, absent an agreement otherwise between the parties and the hearing officer. Moreover, the University has indicated that it has no objection to the grievant returning to University property for the hearing and will make arrangements to reserve an appropriate location for the hearing. EDR therefore finds that the hearing officer complied with the requirements of the grievance procedure by deciding that the hearing should take place in the locality where the grievant worked prior to his termination.

CONCLUSION

For the reasons set forth above, EDR finds no basis to appoint a new hearing officer or disturb the hearing officer's decision about the date and location of the hearing for Case No. 11439.

EDR's rulings on matters of compliance are final and nonappealable.[11]



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[9] Va. Code § 2.2-3004(E) (emphasis added); *see Grievance Procedure Manual* § 5.2 ("The hearing must be held in the locality where the employee is or has been employed unless the parties and hearing officer mutually agree to another site.").
[10] Va. Code § 15.2-102.
[11] *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).