

Issue: Compliance/grievant seeks removal of designated hearing officer due to perceived bias; Ruling Date: May 6, 2004; Ruling #2004-725; Agency: Department of Corrections; Outcome: hearing officer recused himself; EDR ruling on issue no longer necessary.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2004-725
May 6, 2004

The grievant has requested a compliance ruling in her October 21, 2003 grievances. Due to perceived bias, the grievant seeks the removal of the designated hearing officer and the appointment of a new hearing officer. Because the hearing officer has elected to recuse himself in this case, and as discussed further below, this Department (EDR) will appoint a new hearing officer to hear the October 21, 2003 grievances.

FACTS

On October 21, 2003, the grievant filed two grievances that allege misapplication of the hiring policy, discrimination against her on the basis of age and gender, and retaliation. On March 26, 2004, EDR consolidated and qualified the two October 21, 2003 grievances for hearing. Thereafter, a hearing officer was appointed and a hearing scheduled for May 10, 2004. In her removal request, the grievant describes several conversations she had with the hearing officer between the April 12, 2004 appointment and her May 5, 2004 request for removal. The grievant claims that the hearing officer's attitude and communications were adversarial, condescending and demonstrated bias in favor of the agency.

The hearing officer has stated that he has no doubt that he can render a fair and impartial decision based on the evidence. Nevertheless, he acknowledges that the grievant has reservations as to his impartiality. The hearing officer therefore concluded that it was appropriate to alleviate that concern by recusing himself from the case.¹

DISCUSSION

Recusal

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and issue final rulings on

¹ The Model Code of Judicial Conduct for State Administrative Law Judges (Model Code) and Canons of Judicial Conduct for the State of Virginia (Virginia Canons) provide guidance to hearing officers in determining whether they should remove themselves from hearing a particular case. Both the Model Code and Virginia Canons instruct that a judge (or hearing officer) "shall disqualify himself or herself in any proceeding where in which the judge's impartiality might reasonably be questioned." Virginia Canon 3(E)(1); Model Code Canon 3(C)(1).

matters of compliance with the grievance procedure.² The authority granted to this Department includes the appointment of administrative hearing officers to conduct grievance hearings. This Department'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 officer has demonstrated actual bias, or has clearly and egregiously undermined the integrity of the grievance process.⁴

In this case, the hearing officer has voluntarily recused himself in light of the grievant's concerns. Thus, there is no need to rule on removal and a new hearing officer will be appointed promptly to hear this case. EDR's rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

² Va. Code § 2.2-1001.

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).

⁴ *Compare* Welsh v. Commonwealth, 14 Va. App. 300 (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). *See, e.g.,* EDR Rulings Nos. 2001-133; 2001-219.

⁵ Va. Code § 2.2-1001(5).