Issue: Compliance/Recusal of hearing officer; Qualification/Group II Written Notices; Ruling Date: May 19, 2003; Ruling #2003-091, 2003-092, 2003-093; Agency: Department of Minority Business Enterprise; Outcome: Grievances qualified and consolidated for hearing; hearing officer recused himself

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Minority Business Enterprise
Ruling No. 2003-091, 2003-092, & 2002-093
May 19, 2003

The Department of Minority Business Enterprise (DMBE or the agency) has requested a compliance ruling in the grievant's March 3, 2003 grievance. Due to perceived bias, the agency seeks the removal of the designated hearing officer and the appointment of a new hearing officer to this case. 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 March 3, 2003 grievance.

In addition, the grievant has requested a ruling on whether two April 11, 2003 grievances with DMBE qualify for a hearing. The grievant challenges separate Group II Written Notices in each of the two grievances. As discussed below, these two grievances qualify for a hearing, and are consolidated with the grievant's pending March 3, 2003 grievance for a single grievance hearing.

FACTS

In her March 3, 2003 grievance, the grievant claims that the agency misapplied policy when it demoted her to Program Administration Specialist I and reduced her salary by 36%. She further claims that the agency's actions constituted unwarranted discipline and retaliation based on her prior grievance activity. On April 18, 2003, EDR qualified the March 3, 2003 grievance for hearing. On April 28, 2003, a hearing officer was appointed, and two days later, he contacted the agency and the grievant simultaneously via a pre-hearing conference call to set a hearing date. The agency advised the hearing officer that it did not have the time for a pre-hearing conference that day. The hearing officer continued to pursue possible hearing dates.

In his removal request, the agency head describes the hearing officer's communications during the conference call as insulting and threatening, and stated that he did not believe that the agency could expect fair treatment from the hearing officer. The hearing officer denies those charges, stating that he conducted the pre-hearing conference in a professional manner throughout. The grievant, who was also on the

conference call, concurs that the hearing officer seemed merely to be trying to set a date for the hearing.[1]

The hearing officer has stated that he has no bias in favor of or against the agency or the grievant as a result of the April 30, 2003 conference call. Nevertheless, during the investigation for this ruling, the grievant expressed concern that in light of the agency head's strong reaction to the conference call, the hearing officer may feel pressure to de-escalate the situation, which she believes could unfairly favor the agency at hearing. The hearing officer was advised of the grievant's concern, which he viewed as reasonable under the circumstances. The hearing officer therefore concluded that it was appropriate to alleviate that concern by recusing himself from the case.[2]

During the pendency of the March 3rd grievance, the grievant received two Group II Written Notices. On March 7, 2003, the grievant was issued a Group II Written Notice for failure to report to work as scheduled. On March 12, 2003, she was issued another Group II Written Notice for being absent from the worksite without approval. On April 11, 2003, she initiated separate grievances challenging these disciplinary actions and requesting removal of the Written Notices. The agency denied the grievant's requests for relief. On April 22, 2003, the grievant advanced both grievances to the qualification phase for the agency head to determine whether the issues qualified for hearing. The agency head denied qualification, asserting that the agency's actions were consistent with written policy. The grievant has requested this Department to qualify the April 11th grievances for hearing.

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 matters of compliance with the grievance procedure.[3] 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.[4] However, EDR has long held that its power to

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[1] Under the grievance procedure, this Department has long held hearing officers accountable to a thirty-calendar day deadline for issuing their hearing decisions following their appointment to a grievance. See *Rules for Conducting Grievance Hearings*, page 2.

[2] 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).

[3] Va. Code § 2.2-1001.

[4] *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).

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.[5]

In this case, the hearing officer was no doubt attempting to schedule a future hearing date with the parties, after the agency had indicated that it had no time that day to do so. But there is no evidence of actual bias, or that the hearing officer had clearly or egregiously undermined the integrity of the grievance process in conducting the conference call. Moreover, 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.

Qualification

By statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices and those suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline) *automatically* qualify for a hearing.[6] Therefore, the grievant is entitled by statute and the grievance procedure to advance these grievances to a hearing, at which time each party may present their case. Accordingly, the April 11th grievances are qualified for hearing.

Consolidation

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required for consolidation of two or more grievances at a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.

hearing officer at a single hearing. This Department's rulings on compliance are final and nonappealable.[8]

CONCLUSION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. Additionally, please note that this qualification ruling is not a determination regarding the merits of the grievant's claims.

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Claudia T. Farr
Director

[8] Va. Code § 2.2-1001 (5).