Issue: Compliance/agency asserts that hearing officer improperly recused himself; Ruling Date: January 12, 2005; Ruling #2004-934; Agency: Department of Corrections; Outcome: hearing officer ordered to reconsider

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-934
January 12, 2005

The Department of Corrections (DOC or the agency), through its legal counsel, has requested a compliance ruling from this Department (EDR). The agency asserts that the hearing officer improperly recused himself from Case #7923. Alternatively, the agency objects to reopening the issue of information exchange by the replacement hearing officer and requests that EDR instruct the replacement hearing officer that he may not reconsider matters already decided by the previous hearing officer.

FACTS

The original hearing officer was assigned to this case on or about November 19, 2004, and a hearing date of December 13, 2004 was agreed upon. At the December 13, 2004 hearing, following a ruling on an evidentiary manner, counsel for the grievant accused the hearing officer of bias. Discussions regarding the evidentiary issues became protracted and the hearing officer called a recess. The following day, the hearing officer recused himself from the case and informed the EDR Consultant who assigns hearing officers that another hearing officer should be assigned to the case. A new hearing officer was assigned on or about December 21, 2004.

DISCUSSION

Recusal

This is a case of first impression for this Department. EDR is not aware of another case where a party has objected to a hearing officer's recusal from a case. The EDR *Rules for Conducting Grievance Hearings (Rules)* address recusal but not in great depth. The *Rules* simply provide that a hearing officer is responsible for

> Voluntarily disqualifying himself or herself and withdrawing form any case (i) in which he or she cannot guarantee a fair and impartial hearing or

> decision, (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.[1]

For additional guidance regarding recusal, EDR has looked to 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).[2] Both the Model Code and Virginia Canons instruct that a judge [hearing officer] "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[3] Today, we expressly adopt the Virginia Canons recusal standard for application to EDR hearing officers.

This standard for the disqualification of a judge is an objective one; there must be evidence that would convince a reasonable man that bias exists.[4] In addition, it is well settled that while a judge has duty to recuse himself if his "impartiality might reasonably be questioned," he has a concomitant obligation not to recuse himself absent a valid reason for recusal.[5] The mere fact that a judge has ruled against a party is, by itself, generally insufficient to warrant recusal. [6] Likewise, a judge's consternation or impatience with legal counsel during a hearing would typically not warrant recusal.[7]

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[1] *Rules for Conducting Grievance Hearings*, Section II. EDR Policy No. 2.01, Hearing Officer Program Administration, provides that:

> A hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia. Upon notification that a hearing officer has withdrawn, EDR will notify the parties and reinitiate the process to select a new hearing officer. A request from either party to a grievance for the disqualification of a hearing officer must be in writing and will be addressed as a compliance ruling.

[2] See EDR Rulings #2003-091, -092 and -093; and #2004-725.

[3] Canon 3(E)(1); Model Code Canon 3(C)(1). The American Bar Association Model Code for Judicial Conduct has adopted the same "impartiality might reasonably be questioned" standard. This standard is virtually identical to the federal statute governing the recusal of federal adjudicators. Under 28 USCS § 455(a), a justice, judge, or magistrate "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

[4] Disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. United States v De Luna, 763 F2d 897, 907 (8th Cir. 1985), cert. denied 474 US 980 (1985).

[5] The Courts recognize that a judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified. Laird v. Tatum, 409 U.S. 824, 837 (1972). Mere conclusory allegations of an obvious predisposition and a specific dislike manifested by a judge for a party and which are not supported by any specific facts does not support a motion for disqualification or recusal under 28 USCS § 455. Hayes v National Football League, 463 F Supp 1174 (C.D. Cal. 1979). Impartiality of a federal judge need not be demonstrated beyond a reasonable doubt; instead, the trial judge must hear the case unless there is some reasonable factual basis to doubt his impartiality or fairness which is shown by some kind of probative evidence. Blizard v Frechette, 601 F2d 1217, 1221 (1st Cir. 1979). Recusal is not to be undertaken lightly, since, if one judge withdraws, another must take up the case, and a judge has a duty not to avoid cases just because they are difficult or controversial. United States v Singer, 575 F Supp 63, 68 (D. Minn 1983), affd 781 F2d 135 (8th Cir. 1986).

[6] Adverse rulings do not establish bias or prejudice, nor create a question as to judicial impartiality. Honneus v United States, 425 F Supp 164 (D. Mass. 1977). An adverse ruling on a matter at some earlier stage of

In this case, the agency claims that the hearing officer improperly removed himself after the grievant's counsel complained of alleged bias following an evidentiary ruling. It is not evident that the hearing officer had the benefit of the above cited holdings when he made his decision to remove himself from this case. Clearly, he did not have the benefit of the clarification provided by this ruling. Accordingly, within five days of receipt of this ruling, the hearing officer shall reconsider his recusal decision in light of this ruling and determine whether recusal is appropriate in this case.

The remaining issues raised by the agency, such as the reopening of the issue of information exchange by the replacement hearing officer, may be rendered moot depending on the hearing officer's reconsidered recusal. Accordingly, this Department will not rule on the remaining matters at this time. The agency is free to renew its objections if the hearing officer determines that recusal is appropriate. Either party may seek a ruling from this Department if they believe that hearing officer's reconsidered determination on recusal amounts to an abuse of discretion.

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Claudia T. Farr, Director

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proceeding is not a sufficient basis for disqualification of a judge. Potlatch Corp. v United States, 548 F Supp 155, 156 (N.D. Cal. 1982).

[7] Magistrate was not required to recuse himself because of a heated exchange with defense counsel absent any showing of bias or prejudice toward a party. In re Extradition of Singh, 123 FRD 140, 149-150 (C.D. N.J. 1988). Court's disagreement with counsel over the propriety of trial tactics, even if strongly stated, does not reflect an attitude of personal bias against the client of counsel. In re Cooper, 821 F2d 833 (1st Cir. 1987).