

Issue: Compliance/hearings; Ruling Date: January 18, 2007; Ruling #2007-1520;
Agency: Department of Corrections; Outcome: Hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2007-1520
January 18, 2007

The grievant has requested a compliance ruling as to grievance hearing Case Number 8497. Due to perceived bias, the grievant seeks the removal of the designated hearing officer and the appointment of a new hearing officer. Because there are insufficient grounds of bias, this Department (EDR) must deny the grievant's request.

FACTS

The grievant has a grievance hearing scheduled for January 20, 2007. In his removal request, the grievant has provided a copy of a previous grievance hearing decision by the same hearing officer appointed for the grievant's current case. In the previous case, which allegedly involves some of the same procedural and evidentiary questions as the current grievance, the hearing officer upheld the disciplinary action taken against the grievant. The grievant argues that this hearing officer is biased and subject to intimidation by "the administration." The grievant suggests that an African-American hearing officer would be more fair. The grievant has also asserted that the hearing officer received a document from the agency indicating that the grievant had been previously convicted of driving under the influence. According to the grievant, that document was inaccurate and has been corrected by the agency in some fashion.

The hearing officer was provided the opportunity to first address the grievant's concerns. In his response letter, the hearing officer stated that he decides "all cases fairly and without regard to any protected classification such as the race of a grievant" and that he has "never been intimidated by the administration of any agency." The hearing officer declined the grievant's request to recuse himself. The grievant now seeks a ruling on the issue.

DISCUSSION

Removal

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.¹ The authority granted to this Department includes the appointment of administrative hearing officers to conduct grievance hearings.² 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

The party moving for removal has the burden of proving bias or prejudice.⁵ In this instance, the grievant has presented no evidence establishing that the hearing officer possesses or has exercised such bias or prejudice as to deny the grievant a fair hearing.⁶ The grievant has pointed to a past ruling in support of his claims that the hearing officer is biased. This Department has previously noted that the mere fact that a hearing officer has ruled against a party in the past is, by itself, generally insufficient to warrant recusal.⁷

In addition, the grievant's assertion that the hearing officer has seen a document containing inaccurate information about the grievant does not appear to taint the proceeding. The inaccurate contents of that document do not appear relevant to the grievance. Moreover, the inaccuracy appears to have been acknowledged by the agency, according to the grievant, and the discrepancies could be explained easily at hearing.

In sum, the grievant's allegations of potential bias are not sufficient, even in their totality.⁸ Therefore, the grievant's request for appointment of a new hearing officer is

¹ Va. Code § 2.2-1001.

² Va. Code § 2.2-1001(6).

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'") (quoting *Keim v. United States*, 177 U.S. 290, 293 (1900)).

⁴ *E.g.*, EDR Ruling No. 2004-725; see also *Welsh v. Commonwealth*, 14 Va. App. 300, 314-17, 416 S.E.2d 451, 459-61 (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).

⁵ *E.g.*, *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

⁶ See *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459-460 (1992) "In Virginia, 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,' and is a matter left to the reasonable discretion of the trial court." (Internal citations omitted). "As a constitutional matter, due process considerations mandate recusal only where the judge has 'a direct, personal, substantial, pecuniary interest' in the outcome of a case." *Welsh*, 14 Va. App. at 314, 416 S.E.2d at 459. See also *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 See EDR Ruling No. 2006-1160. Adverse rulings do not establish bias or prejudice, nor create a question as to judicial impartiality. *Honneus v. United States*, 425 F. Supp. 164, 166 (D. Mass. 1977). An adverse ruling on a matter at some earlier stage of 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).

⁸ The grievant also suggested that the hearing officer has refused to visit the scene of the incident where the facts giving rise to the grievance occurred. The hearing officer's decision not to view the scene, if indeed it is final, does not exhibit bias such that removal would be warranted. If the grievant feels that such a visit

denied. The grievant's concerns could potentially rise to the level of bias depending on the hearing officer's conduct at the hearing and decisions as to evidentiary, procedural, and substantive issues. However, at this time, the grievant has not presented sufficient evidence that the hearing officer has demonstrated actual bias or has clearly and egregiously undermined the integrity of the grievance process. It should be noted that the grievant will have the opportunity to raise his concerns with the hearing officer if they occur at hearing. In addition, following the hearing and issuance of the hearing officer's decision, parties have the opportunity to request administrative review of the decision based on such issues as bias.⁹ Moreover, judicial review of the decision may be sought from the circuit court once all administrative reviews are complete, if any, and the hearing officer's decision is final.¹⁰

The grievant has also requested judicial review from the clerk of the circuit court. However, EDR's rulings on matters of compliance are final and nonappealable, thus judicial review is available only after a hearing decision has been rendered, and on the basis that the decision is contradictory to law.¹¹ Consequently, the grievant's request for judicial review is denied.

Claudia T. Farr
Director

is necessary to present his case and is still denied that opportunity at hearing, the grievant may seek a ruling from this Department on administrative review or compliance with the grievance procedure. *See Grievance Procedure Manual* § 7.

⁹ *Grievance Procedure Manual* § 7.2.

¹⁰ *Grievance Procedure Manual* § 7.3.

¹¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).