Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: April 7, 2008; Ruling #2008-2003; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing Officer In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2008-2003
April 7, 2008

The grievant has requested a compliance ruling in her grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency). The grievant asserts that the hearing officer should have recused himself from Case #8779, 8783, 8784. In an April 1, 2008 response, the hearing officer declined to recuse himself. Accordingly, the grievant has asked the EDR Director to remove the hearing officer from this case.

FACTS

In a letter dated March 23, 2008, the grievant requested that the hearing officer remove himself from Case #8779, 8783, 8784. Previously, the hearing officer presided over another grievance hearing in which he upheld the agency's discipline against her. The grievant disputes the findings of the prior decision and believes that the hearing officer has a conflict of interest with respect to the instant grievance because of his involvement and adverse ruling in the prior grievance.

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

[1] Va. Code § 2.2-1001.
[2] Va. Code § 2.2-1001(6).

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 her 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]

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. Therefore, the grievant's request for appointment of a new hearing officer is denied. It should be noted, however, that the grievant will have the opportunity to raise her concerns regarding bias with the hearing officer at hearing should they persist. 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 issues including, but not limited to, bias.[8] 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.[9]

Note that on April 4, 2008, the grievant requested another compliance ruling regarding this matter. In her April 4th request, the grievant challenged the hearing officer's decision to

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[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 Nos. 2007-1520 and 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). *See also* EDR Ruling #2004-934 for discussion regarding the high standard associated with recusal.

[8] *Grievance Procedure Manual* § 7.2.

[9] *Grievance Procedure Manual* § 7.3.

deny the grievant's request to postpone her hearing. By letter dated April 4th, the hearing officer stayed the grievance pending this Department's ruling on that issue. Thus, the April 4th request will be addressed in a subsequent ruling.

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Claudia T. Farr
Director