

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: August 31, 2009; Ruling #2010-2384; 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 Number 2010-2384
August 31, 2009

The grievant, through counsel, has requested a compliance ruling in her grievance with the Department of Corrections (the agency). The grievant asserts that the hearing officer should have recused himself from Case No. 9136. In a July 21, 2009 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 July 15, 2009, the grievant's counsel, Ms. X, requested that the hearing officer remove himself from Case No. 9136. Previously, the hearing officer presided over another hearing in which Ms. X had represented a different grievant. Ms. X asserts that the hearing officer demonstrated a bias toward the agency in the earlier hearing.

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

¹ Va. Code § 2.2-1001(2), (3) and (5).

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).

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 decision in support of her claims that the hearing officer is biased. This decision was subject to administrative review by this Department, however; and in our ruling, we concluded that the hearing officer had shown no actionable bias.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 her concerns 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

Claudia T. Farr
Director

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

⁶ *See Welsh*, 14 Va. App. at 315, 416 S.E.2d at 459-460 "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 Jackson*, 267 Va. at 229, 590 S.E.2d at 520 "In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge."

⁷ EDR Ruling No. 2009-2300.

⁸ *Grievance Procedure Manual* § 7.2.

⁹ *Grievance Procedure Manual* § 7.3.