

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: December 9, 2010; Ruling No. 2011-2848; Agency: Department of Veterans Services; Outcome: Hearing Officer in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Veterans Services  
Ruling Number 2011-2848  
December 9, 2010

The grievant, through her representative, has requested a compliance ruling in her grievance with the Department of Veterans Services (the agency). The grievant asserts that the hearing officer should have recused himself from Case Nos. 9446 and 9465. In a December 8, 2010 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 December 7, 2010, the grievant's representative requested that the hearing officer remove himself from Case Nos. 9446 and 9465. The basis of the recusal request is the hearing officer conducted a pre-hearing conference with the agency's representative only, and at the request of the agency's representative, denied the grievant's request to have a "technical advisor" present in the hearing.<sup>1</sup> As a result of these actions by the hearing officer, the grievant apparently believes that the hearing officer is biased in favor of the agency.

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.<sup>2</sup> The authority granted to this Department includes the appointment of administrative hearing officers to conduct grievance hearings.<sup>3</sup> This Department's power to appoint necessarily encompasses the power to remove

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<sup>1</sup> In her request for recusal, the grievant appears to also point to alleged inappropriate actions by the agency's representative. However, the actions of the agency representative in this case are immaterial to this Department's decision regarding whether the hearing officer should have recused himself. Such issues of inappropriate conduct by the agency representative, to the extent such issues exist, can be raised with the hearing officer prior to or during the hearing and also may be raised during the administrative review process.

<sup>2</sup> Va. Code § 2.2-1001(2), (3) and (5).

<sup>3</sup> Va. Code § 2.2-1001(6).

a hearing officer from the assigned hearing, should it become necessary, and to appoint a new hearing officer.<sup>4</sup> 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.<sup>5</sup>

The party moving for removal has the burden of proving bias or prejudice.<sup>6</sup> 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.<sup>7</sup> As noted above, the grievant believes that the hearing officer's prior communications with the agency representative in the absence of the grievant's representative during a pre-hearing conference have created a bias in favor of the agency. However, as noted by the hearing officer, he conducted the pre-hearing conference without the grievant or her representative as a result of not having a valid contact number for the grievant and because he was unaware that the grievant had a representative. More importantly, the hearing officer asserts that the only issue discussed during this pre-hearing conference between the agency's representative and himself was a date for the hearing at the agency facility. Moreover, the hearing officer's denial of the grievant's request to have a "technical advisor" present during the hearing was consistent with the *Rules for Conducting Grievance Hearings* and as such, his decision in this regard does not appear to have been motivated by any bias in favor of the agency.<sup>8</sup>

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

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<sup>4</sup> 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)).

<sup>5</sup> 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).

<sup>6</sup> E.g., *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

<sup>7</sup> 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." *Id.* at 314, 416 S.E.2d at 459. We believe that a more expansive review of bias claims is appropriate and should not be limited solely to the question of whether a pecuniary interest was implicated. 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."). Even when this case is reviewed for any actual bias, pecuniary or otherwise, none appears present.

<sup>8</sup> *Rules for Conducting Grievance Hearings*, § IV (A) ("[A]t the request of one or both of the parties, the hearing should be closed to all persons who are not direct participants in the hearing.")

limited to, bias.<sup>9</sup> 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.<sup>10</sup>

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Claudia T. Farr  
Director

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<sup>9</sup> *Grievance Procedure Manual* § 7.2.  
<sup>10</sup> *Grievance Procedure Manual* § 7.3.