

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: December 21, 2010; Ruling No. 2011-2849; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2011-2849
December 21, 2010

The grievant, through her counsel, has requested a compliance ruling in her grievance with the Department of Behavioral Health and Developmental Services (the agency). The grievant asserts that the hearing officer should recuse himself from Case No. 9467. In a December 3, 2010 letter, the hearing officer has declined to recuse himself. Accordingly, the grievant's counsel has asked the EDR Director to remove the hearing officer from this case.

FACTS

The basis of the recusal request is the hearing officer's alleged inappropriate action in another case, Case B, in which the grievant's counsel was involved. More specifically, grievant's counsel alleges that the hearing officer engaged in inappropriate *ex parte* communications with an agency representative in Case B¹ and as such, his actions create at least an appearance of bias or impropriety in the present case, No. 9467. In addition, the grievant's counsel appears to allege that the hearing officer's prior "appearance of being somewhat annoyed" at the grievant's counsel in Case B, makes it likely that the grievant in the present case will not receive a fair or impartial hearing from this particular hearing officer. The hearing officer has refused to recuse himself.

DISCUSSION

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.² The authority granted to this Department includes

¹ According to grievant's counsel, the hearing officer in Case B allegedly asked grievant's counsel if she approved of the hearing officer and the agency's representative riding to the hearing together. When grievant's counsel disapproved of such action, she alleges that the hearing officer "sarcastically" asked if she minded if he and the agency's representative shared a ride from the hotel where they were both staying to the hearing. The hearing officer disagrees with the facts as set forth by grievant's counsel. More specifically, the hearing officer states that as a result of a prior incident in which a representative got lost trying to get to the hearing site, the hearing officer in Case B offered to give a ride to the agency representative or to allow the representative to follow the hearing officer to the hearing. The hearing officer denies ever discussing the case with the agency representative and states that he and the agency representative did not stay at the same motel as alleged, as he lives in the area in which the hearing was to be held. Further, the hearing officer states that he neither picked the representative up, nor did she follow him to the hearing.

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

the appointment of administrative hearing officers to conduct grievance hearings.³ 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.⁴ 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.⁵

The party moving for removal has the burden of proving bias or prejudice.⁶ As noted above, the grievant's counsel believes that the hearing officer's prior *ex parte* communications with an agency representative in Case B and his alleged "annoyance" at the grievant's counsel in that case has tainted his ability to be impartial and demonstrates bias in favor of the agency in the present case. In this instance, however, the grievant has not met the burden of establishing that the hearing officer possesses or has exercised bias or prejudice as to deny the grievant a fair hearing.⁷ Therefore, the grievant's request for appointment of a new hearing officer is denied.⁸ 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.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

Claudia T. Farr
Director

³ Va. Code § 2.2-1001(6).

⁴ 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)).

⁵ *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).

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

⁷ 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.

⁸ While the grievant has failed to meet her burden of proving bias under the facts of this case, this Department notes that the hearing officer should be mindful that certain actions, however well-intentioned, can potentially create an appearance of bias. Thus, care should be exercised to avoid such perceptions and, when they arise, any concerns raised should be addressed in a respectful manner. See *Rules for Conducting Grievance Hearings* § II.

⁹ *Grievance Procedure Manual* § 7.2.

¹⁰ *Grievance Procedure Manual* § 7.3.