Issue: Administrative Review of Hearing Officer's Decision in Case No. 9411; Ruling Date: February 24, 2011; Ruling No. 2011-2863; Agency: Virginia Department of Transportation; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2011-2863
February 24, 2011

The Department of Transportation (the "agency") has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9411. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts as set forth in Case Number 9411 are summarized as follows:

The grievant worked for the Department of Transportation in various jobs for approximately twenty-four years. At the time she was terminated, she was employed as a Construction Manager with the agency.[1]

Prior to the grievant's termination, the grievant experienced several episodes of unconsciousness. The first episode occurred on April 26, 2010, at the grievant's home. The grievant heard a loud roaring sound in her ears and then lost consciousness. Once the grievant regained consciousness, she realized she had fallen, had experienced memory loss, and was disorientated. The next day the grievant was treated at the emergency room where it was determined she had broken her ankle when she fell during her unconscious state. The grievant's ankle was put into a hard cast and the grievant returned to work with minimum restrictions. The grievant reported the incident to her supervisor, including the fact she lost consciousness prior to falling, and disclosed that she had experienced memory loss and disorientation afterwards.[2]

In May, the grievant experienced two additional episodes of unconsciousness. The first occurred on May 8, 2010, while the grievant was at home. The grievant avoided injury this time because she recognized the roaring sound in her ears as a precursor to unconsciousness and she immediately sat on the floor to avoid falling.[3] After this second episode, the grievant called her neurologist and took the first available appointment which was not until June 2010.[4]

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[1] See Decision of Hearing Officer, Case No. 9411, issued December 7, 2010 ("Hearing Decision") at 3. We note that some dates in the hearing decision appear to be internally inconsistent. Any such inconsistencies, however, are harmless error as they are immaterial to the hearing officer's dispositive findings of fact; nor did the agency object to any date inconsistencies in its request for administrative review.
[2] *Id*.
[3] *Id*.
[4] *Id*.

On May 14, 2010, the grievant experienced her third blackout while the grievant was pulling out of a parking lot in her assigned agency truck. Once again, the grievant heard the roaring sound in her ears and her immediate reaction was to try to stop the truck before it hit other vehicles. The grievant managed to stop the truck and then lost consciousness. When the grievant regained consciousness, she was sitting in the truck with the driver's door wide open. The grievant admits she remembers getting out of the truck, walking down the driver's side towards the back of the truck, and then getting back into the truck to drive around the parking lot a couple of times before heading back to the agency's parking lot.[5]

Unknown to the grievant, the grievant had hit a car in the parking lot during her moment of unconsciousness on May 14, 2010. The accident had been witnessed by two people and was reported to the police. One of the witnesses identified the grievant as the driver of the truck in question. According to the witnesses, after the accident the grievant got out of the truck, walked around it, examined the damage to the other vehicle, got back in her truck, drove around the parking lot twice, and then left.[6] The police informed the agency about the accident and eventually issued a warrant for grievant's arrest for leaving the scene of an accident.[7]

Once the agency was notified by the police of the May 14th accident, the agency safety manager inspected the agency truck on May 15, 2010. The safety manager observed damage on the passenger side of the truck and took pictures. His conclusion was the damage occurred as the grievant was pulling out of a parking space and turned to the right too soon. The safety manager informed the grievant's supervisor of his conclusion.[8]

On May 16, 2010, the grievant came into the office to prepare a meeting agenda for the following day. After the grievant drafted an agenda and emailed it to her supervisor for approval, the grievant decided to get a cup of coffee at a gas station while she waited for her supervisor's response. The grievant drove the agency truck to the gas station and parked the truck in the back of the building. Upon leaving the gas station, the grievant pulled out of her parking spot just as the driver of a car parked next to her was pulling out of his spot; the two vehicles collided. The grievant followed procedure by calling the state police to report the incident.[9] Meanwhile, the grievant states the driver of the other vehicle left the scene of the accident. The grievant claims this was the first time she noticed the damage to the passenger side of the truck and she assumed the damage was caused by this accident. Later that day, the grievant reported the accident to her supervisor and to the agency's safety officer the following day. All of the accident reports filed by the grievant stated the damage to the truck was caused by the May 16, 2010, accident. [10]

The agency's safety officer re-inspected the grievant's truck on May 17, 2010. He did not find additional damage and concluded the grievant fabricated the May 16th accident. The safety officer reported his conclusions to the grievant's supervisor and to the state trooper that was investigating the May 16th accident. Once the state trooper learned about the May 14th

[5] *Id*. at 4.
[6] *Id*.
[7] *Id*. at 5.
[8] *Id*.
[9] *Id*.
[10] *Id*. at 6.

accident and the facts surrounding the May 16th accident, he filed charges for filing a false report.[11]

As a result, the grievant was placed on administrative leave with pay on May 17, 2010, and on June 16, 2010, the agency issued a Group III Written Notice with termination for falsifying records and failure to follow policy.[12]

On June 17, 2010, the day after the grievant was terminated, the grievant was diagnosed by a board-certified neurologist as suffering from a form of epilepsy that was causing her blackouts and memory loss. The neurologist stated that "[p]ersons who experience a complex partial seizure are typically amnestic in the aftermath of the seizure. This amnesia can, in some cases, last for many hours after the seizure." The neurologist also stated, "[p]ersons who experience a complex partial seizure typically have no recollection of how long their seizure lasted, and may have a skewed and inaccurate sense of the passage of time in the aftermath of the seizure." The grievant was prescribed epilepsy medication and testified she has not had a seizure since she has been on the medication.[13]

Both of the criminal charges were *nolle prosequi* on the prosecution's motion in July and August 2010. According to the grievant, the Commonwealth's attorney declined to prosecute the case based upon the grievant's excellent driving record, medical diagnosis of epileptic seizures, and evidence that her doctor had stopped her from driving.[14]

On June 21, 2010, the grievant timely filed a grievance to challenge the agency's action. On August 31, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this appeal to a hearing officer. On October 5, 2010, a hearing was held at the agency's location.[15] In a December 7, 2010 hearing decision, the hearing officer reversed the agency's issuance of a Group III Written Notice and directed the agency to reinstate the grievant to the same or similar job to the one she held prior to her termination, pay her back pay less interim earnings, and restore her full benefits.[16]

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[17] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[18]

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[11] *Id*.
[12] *Id*.
[13] *Id*. at 7.
[14] *Id*. at 6.
[15] *Id*. at 1.
[16] *Id*. at 11.
[17] Va. Code § 2.2-1001(2), (3), and (5).
[18] *See Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Consideration of the Evidence

The agency's request for administrative review primarily challenges the hearing officer's consideration of the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[20] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[21] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[22] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the agency contests: (1) the hearing officer's consideration of evidence that was unavailable to the agency at the time the Group III Written Notice was issued; (2) his alleged failure to consider the agency's evidence about the grievant's driving and work performance records; and (3) the weight given by the hearing officer to the grievant's medical documentation.

1. Admission of Evidence Unavailable to the Agency When Discipline was Issued

The agency alleges that the hearing officer improperly considered medical evidence that was unavailable to the agency at the time the Group III Written Notice was issued. Under the grievance procedure, however, hearing officers are <u>not</u> limited to admitting only the evidence available to the agency when it took the disciplinary action. Rather, hearing officers may consider *de novo* all evidence proffered by parties that relates to the issue qualified for hearing.[23] In deciding a disciplinary grievance, it is entirely appropriate for the hearing officer to accept and consider all evidence he or she determines is relevant to the question of whether the agency's discipline was warranted and appropriate. Here, the hearing officer found unrebutted medical evidence to be persuasive in determining that the agency failed to prove that its discipline was warranted and appropriate. It was not improper for the hearing officer in this case to admit and consider such evidence, even though the evidence was not available to the agency when it made the decision to terminate the grievant's employment.

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[19] Va. Code § 2.2-3005.1(C).
[20] *Grievance Procedure Manual* § 5.9.
[21] *Rules for Conducting Grievance Hearings* § VI(B).
[22] *Grievance Procedure Manual* § 5.8.
[23] In Detweiler v. Commonwealth of Virginia Department of Rehabilitative Services, 705 F.2d 557 (4th Cir. 1983), the Fourth Circuit Court of Appeals noted in its discussion of due process that:

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 58 L. Ed. 1363, 34 S. Ct. 779 (1914). The procedure approved in *Arnett* provided a "full evidentiary hearing." Its purpose was to "minimize the risk of error in the <u>initial removal decision</u>." 416 U.S. at 170 (Powell, J., concurring).

Detweiler at 561 (emphasis added). Thus, to achieve the goal of minimizing the risk of error in the <u>initial</u> decision, it would appear imperative that the full evidentiary hearing be one that allows for consideration of all evidence relating to the decision and underlying facts, not merely that evidence available when the initial decision was made.

2. Alleged Failure to Consider Evidence Contrary to His Conclusions

The agency alleges the hearing officer, whose decision described the grievant's 30-year driving record as exemplary, and work performance as satisfactory with no prior disciplinary actions, failed to consider the agency's evidence to the contrary. We disagree. Throughout the hearing, both parties introduced evidence in support of their positions concerning the grievant's driving record and work performance record. For example, the grievant stated she had two prior driving charges, but argued at hearing that they had happened over ten years ago and were not relevant to the accidents that precipitated her termination.[24] Likewise, the grievant's supervisor testified that other than one Notice of Improvement, the grievant never had a disciplinary action in her twenty-four years of service with the agency.[25] The hearing officer specifically questioned the grievant's supervisor whether the grievant had ever received a prior "Written Notice" and the grievant's supervisor once again testified she had not.[26] We cannot conclude that the hearing officer exceeded his authority to weigh the evidence or that his findings had no basis in the record evidence.

3. Weight Given to Medical Documentation

The agency disputes the weight given by the hearing officer to the grievant's proffered medical documentation, specifically, an October 8, 2010 written declaration signed by Dr. C, stating that he had not examined the grievant or her medical tests, but describing certain symptoms typical for persons with the same diagnosis as the grievant. The grievant's treating neurologist provided virtually identical statements about those typical symptoms, as well as other probative medical information specifically regarding the grievant.[27] In light of the evidence provided by the grievant's treating neurologist, we cannot conclude that the hearing officer erred as argued by the agency.

In sum, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Here, the hearing officer apparently found it more likely than not that the grievant did not report the May 14th accident because she had been suffering from an as yet undiagnosed epileptic seizure and a type of amnesia that typically follows such episodes.[28] Additionally, the hearing officer determined that "[t]o sustain a falsification charge, the [a]gency must prove by preponderant evidence that [g]rievant knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency."[29] Hence, the hearing officer held that even though the information provided by the grievant about the May 16th accident was incorrect, the grievant did not give it in a defrauding, deceptive, or misleading way since the grievant provided a "plausible, medically supported reason for her lack of memory," a reason that was supported by unrebutted medical evidence.[30] Since a seizure was found to have more likely than not caused the grievant's behavior, we cannot conclude that the hearing officer

[24] *See* Hearing Recording at Tape 5, Tape Counter 373 and 543 (testimony of grievant).
[25] *See* Hearing Recording at Tape 3, Tape Counter 75 (testimony of grievant's supervisor).
[26] *Id*.
[27] Grievant's Exhibit 1 (October 1, 2010 Declaration) and Second Declaration (October 8, 2010).
[28] Hearing Decision at 9-10.
[29] *Id*. at 10.
[30] *Id*. at 10-11.

erred by determining that the agency failed to meet its burden of proof with regard to the disciplinary action taken. Accordingly, this Department has no reason to remand the decision.

Failure of the Hearing Officer to Voluntarily Disqualify Himself

The agency argues that the hearing officer should have disclosed his former supervisory role with the agency representative prior to hearing. The agency states that its human resources department was not aware of "this potential conflict of interest" because neither the hearing officer nor the agency representative disclosed it during the pre-hearing conference call. The agency asserts that had one of its human resource representatives known of this potential conflict, the agency would have requested the hearing officer to disqualify himself. The agency apparently argues that the hearing officer could not have guaranteed a fair and impartial hearing due to his prior supervision of its hearing representative.

The *Rules for Conducting Grievance Hearings (Rules)* provide that a hearing officer is responsible for:

> voluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[31]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[32]

The agency has not identified any applicable rules or requirements to support its position, nor are we aware of any. As to the EDR requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," the applicable standard is generally consistent with the manner in which the Virginia Court of Appeals reviews recusal cases.[33] The Court of Appeals has indicated that "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.'"[34] EDR has found the Court of Appeals standard instructive and has held that in compliance reviews by the EDR Director on the issue of a hearing officer's failure to recuse (disqualify) himself, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[35] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[36]

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[31] *Rules* at II.
[32] EDR Policy 2.01, p. 3.
[33] While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.
[34] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992). ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." *See* Commonwealth of Va. v. Jackson, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).
[35] *See, e.g.*, EDR Ruling No. 2011-2807.
[36] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

In this particular case, there is no such evidence. Moreover, the hearing officer disclosed to the parties at the beginning of the hearing that he had supervised the work of the agency's representative in 1998.[37] Furthermore, the hearing officer gave both parties an opportunity to object on the basis of any potential conflict of interest.[38] Neither the agency nor the grievant made an objection to the potential conflict of interest, and neither party requested the hearing officer to consider disqualification.[39] The mere fact that a hearing officer's findings align more favorably with one party than another will rarely if ever standing alone constitute sufficient evidence of bias.[40] This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. This Department finds no reason to disturb the hearing officer's decision not to disqualify himself from this case.

CONCLUSION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[41] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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Claudia T. Farr
Director

[37] *See* Hearing Recording at Tape 1, Tape Counter 29 (hearing officer's disclosure). The agency claims that after the hearing began, the hearing officer also stated that "he already had an idea of how the grievance hearing would play out." We were unable to locate such a statement in the hearing tapes. Even assuming the statement was made, it is insufficient to evince actual bias or prejudice.
[38] *Id*.
[39] *Id*.
[40] *C.f.*, Al-Ghani v. Commonwealth No. 0264-98-4, 1999 Va. App. LEXIS 275 at * 12-13 (May 18, 1999)("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.")
[41] *Grievance Procedure Manual* § 7.2(d).
[42] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[43] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).