Issues: Compliance - Grievance Procedure (Documents and Hearing); Ruling Date: February 22, 2011; Ruling No. 2011-2867, 2011-2870; Agency: University of Virginia; Outcome: Hearing Officer In Compliance (in part), Hearing Officer Not in Compliance (in part).

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of University of Virginia
Ruling No. 2011-2867, 2011-2870
February 22, 2011

The hearing officer has participated in two pre-hearing conferences and has issued four subsequent evidentiary and procedural rulings on December 22, 2010, December 30, 2010, January 5, 2011, and January 13, 2011. Now the grievant and the University of Virginia (the "agency") request compliance rulings regarding issues that arose during the pre-hearing stage. In particular, the grievant challenges the hearing officer's denial of the production of certain documents and determinations as to who can act as a witness, an agency party, and an agency representative. The grievant also seeks a public hearing and the removal of the hearing officer. The agency objects to the hearing officer's order that its ombudsman testify at the hearing and that the agency produce the ombudsman's notes and files.

FACTS

The grievant received a Group II Written Notice with termination (due to accumulation of Written Notices) for an incident that occurred on September 29, 2010, which allegedly violated the workplace violence policy. On October 20, 2010, the grievant timely filed a grievance to challenge the agency's action. On December 7, 2010, the Department of Employment Dispute Resolution ("EDR") appointed a hearing officer.

On December 18, 2010, the grievant requested the hearing officer to issue an order compelling the attendance of several witnesses at hearing, as well as requiring the agency to produce "any personnel file, personal file, notes of any conversation, meeting or contact, telephone logs, message, memos and/or written documentation that mentions the following employees and any electronic, audio or video transmissions including but not limited to tapes, emails, text messages or written or copied reproduction of the same for, on, about or mentioning" ten named employees. Additionally, the grievant requested that the hearing be open to the public.

On December 22, 2010, the hearing officer issued witness orders for all but one of the requested witnesses, but denied the grievant's document request, stating the request was overly broad. The hearing officer did not address whether the hearing could be open to the public.

After the hearing officer issued his December 22nd ruling, the grievant requested "any personnel file, personal file, notes of any conversation, meeting or contact, telephone logs, message, memos and/or any other written documentation that mentions the following employees and any electronic, audio or video transmissions including but not limited to tapes, emails, text messages or written or copied reproduction of the same for, on, about or mentioning [the supervisor], [the grievant], and any concerning the confrontations or contact" between his supervisor and three named co-workers that may be in the possession of either human resources, the grievant's supervisor's immediate supervisor, or the chief facility officer. The grievant also requested the agency's ombudsman to produce any documents "concerning alleged inappropriate conduct on the job including but not limited to racial comments, medical information of a fellow employee, arguing, taunting or any conduct that the employee deemed demeaning since [his supervisor] was employed."

On December 27, 2010, the grievant informed the hearing officer he had not received his supervisor's human resource file, nor the ombudsman's notes and files.

In a December 30, 2010 ruling, the hearing officer denied the grievant's request for his supervisor's human resource file, concluding the request was overly broad. However, the hearing officer ordered the agency to produce any notes or files that the agency's ombudsman may have about the supervisor creating an alleged hostile work environment, including any documents that involved the grievant, the supervisor, or other employees who had made complaints about the supervisor in that capacity in the past. The hearing officer also ordered the agency's ombudsman to attend the hearing as a witness.

On December 30, 2010, the grievant challenged the hearing officer's December 22nd and December 30th document production orders, alleging that the document requests were reasonable, complied with the *Grievance Procedure Manual*, and were already narrowed to the "ultimate limit." Also, the grievant challenged the hearing officer's failure to order that the hearing be open to the public.

On January 5, 2011, the hearing officer responded to the grievant's December 30th letter and further elaborated upon his December 30, 2010 ruling. In his January 5th ruling, the hearing officer stated that both of the grievant's document requests (December 18th and December 22nd) were unclear and "overly broad because they seek documents that may be unrelated to the incidents giving rise to the disciplinary action and the Grievant's claim that he has been singled out for hostile and unfair treatment." Also, the hearing officer reminded the grievant that during the pre-hearing conference, the hearing officer invited the grievant to submit an itemized list of specific documents sought that are directly related to the grievant's disciplinary action, but noted the grievant had not submitted such list.

The hearing officer's January 5th ruling also elaborated upon several other issues. First, the hearing officer stated he did not have the authority to issue a *subpoena duces tecum*. Second, the hearing officer denied the grievant's request for a public hearing on the grounds that the agency had objected. Third, the hearing officer overruled the grievant's objection to the

agency's selection of the individual who would serve in the capacity of party for the agency. Finally, the hearing officer denied the grievant's request to disqualify the agency's representative.

On January 6, 2011, the agency objected to the hearing officer's December 30th order that the agency's ombudsman appear as a witness at the hearing and produce documents, given the confidential service the ombudsman provides to the agency.

On January 9, 2011, the grievant objected to the hearing officer's invitation to provide an itemized list of specific requested documents. He asserts that he suspects certain relevant documents exist, but because he has not seen them, cannot further narrow his request to an itemized list. On January 10, 2011, the grievant requested the hearing officer to recuse himself because of the hearing officer's alleged "miscues, innuendos, fabrications, and one lie" that purportedly occurred during the pre-hearing stages.

On January 13, 2011, the hearing officer issued a fourth ruling which invited the grievant to submit an itemized list of documents requested for production by the close of business on January 20, 2011. Furthermore, the hearing officer again denied the grievant's request for a public hearing stating "[n]o sufficient reason has been offered that would justify opening the hearing to the public." The hearing officer also denied again the grievant's request to prevent the agency from designating the grievant's supervisor as the agency party. He also denied the grievant's request to issue a *subpoena duces tecum*. Finally, the hearing officer denied the grievant's request for recusal because the grievant offered no evidence of bias.

The parties' requests for compliance rulings are below.

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."[1] 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.[2]

1. Request for Documents and Witnesses

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available upon request from a party to the grievance, by the opposing party, in a timely fashion."[3] This Department's interpretation of the mandatory language "shall be made available" is that absent

[1] Va. Code § 2.2-1001(2), (3), and (5).
[2] *See Grievance Procedure Manual* § 6.4(3).
[3] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

just cause, all relevant[4] grievance-related information *must* be provided. "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."[5] For purposes of document production, examples of "just cause" include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.[6] The statute further states that "[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance."[7]

Further, under the *Rules for Conducting Grievance Hearings ("Rules")*, a hearing officer must schedule a pre-hearing conference to provide an opportunity to improve the management of the hearing through prior discussion and the resolution of the procedural and evidentiary issues.[8] Additionally, a hearing officer has the authority to rule on preliminary procedural and evidentiary requests, such as the appearance of witnesses at hearing and the production of documents.[9] When a party requests the production of documents, the hearing officer has the primary authority to determine whether the requested documents are relevant to the grieved action. If they are, but the producing party objects to the production, the hearing officer must determine whether the objection constitutes "just cause" for not producing the relevant documents.

Request for Supervisor's Human Resource Personnel File, Grievant's Supervisor's Supervisor's File, and the Chief Facility Officer's File

The grievant challenges the hearing officer's conclusion that the document request for the supervisor's human resource personnel file, the grievant's supervisor's supervisor's file, and the chief facility officer's file was "overly broad." The grievant asserts that these files are relevant to the action grieved in that they will establish the supervisor's alleged pattern of explosive behavior towards his subordinates. At first blush, it would appear that any documents related to the supervisor's purported "explosive behavior" contained in these files may be relevant and potentially material to the grievant's claims. The confrontation between the grievant and his supervisor on September 29, 2010 served as the basis for the discipline against the grievant. Thus, it is difficult to see how all such documents, including but not limited to complaints regarding grievant's supervisor's "explosive behavior," would not be relevant. Moreover, it is not plainly evident that just cause exists for not producing such documents, regardless of whether

[4] Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citations omitted)); Morris v. Commonwealth, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citations omitted)).
[5] *Grievance Procedure Manual* § 9.
[6] *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.
[7] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[8] *Rules for Conducting Grievance Hearings* § III(D).
[9] *Id.*

they are contained in the supervisor's personnel file, the supervisor's immediate supervisor's file, or the chief facility officer's file.

It is unclear from the record how the hearing officer apparently came to the conclusion that all documents in these particular files would be irrelevant. Further, this Department has no way to know the specifics of what was discussed during the pre-hearing conferences, or whether "just cause" for nondisclosure arguments were made by the agency. Accordingly, the hearing officer is directed to clarify in writing why such documents need not be produced.

By instructing the hearing officer to provide written clarification, we do not intend to second guess the hearing officer or substitute the Department's judgment for that of the hearing officer. Rather, the goal is to prevent a situation where a concluded hearing potentially needs to be reopened because of a lingering document dispute. Accordingly, in his clarification, the hearing officer is free to modify, if he deems appropriate, his prior orders on these requested documents. This ruling is not intended to imply that he should (or should not) modify his prior orders, but only to state that he may.

Request for University Ombudsman's Notes, Files, and Witness Testimony

The agency argues that just cause exists for shielding its ombudsman from producing documents and appearing at the hearing as a witness.[10] To support its position, the agency indicates in its January 6, 2011 letter to this Department that the ombudsman offers his service with a guarantee of strict confidentiality, as required by Standards of Practice of the International Ombudsman Association, of which he is a member. Indeed, we note the agency's website describes the ombudsman as "an independent, confidential resource available to assist faculty, staff, and students in resolving problems, complaints, conflicts, and other issues", stating further that the ombudsman "will not identify you or discuss your concerns with anyone without your permission." The agency argues further that the ombudsman has an obligation to uphold this guaranteed confidentiality, and therefore he cannot produce any documents, if they exist, for purposes of this grievance, nor testify at hearing, with respect to any information that could lead to the identification of any individual contacting his office, without that individual's permission. On the other hand, the grievant argues that the ombudsman is an employee of the agency's Office of Equal Opportunities Programs and "any employee who reads [the Office's] policy and procedure could not possibly expect confidentiality when you have so many people who may handle the complaint informally or formally." The grievant also asserts the agency has failed to offer any lawful exclusion to shield the ombudsman's communications.

The issue of whether to shield ombudsman communications from disclosure has not yet been addressed by this Department. Currently, with limited exception not applicable here,[11] it appears that no federal or state statute protects the confidentiality of ombudsman

[10] The agency does not appear to have contested the relevancy of the grievant's document or witness requests regarding the ombudsman.

[11] See, e.g., Va. Code § 2.2-706 (governing the confidentiality of all documents and evidence received by the Office of the State Long-Term Care Ombudsman).

communication.[12] Nor are we aware of any state or federal court in Virginia that has addressed this specific issue. Courts in other jurisdictions have recognized a common law ombudsman confidentiality privilege under certain circumstances, using the long-recognized four-part "Wigmore test" for guidance.[13] Still other courts have protected the confidentiality of ombudsman communication on the grounds of public policy,[14] state constitutional law,[15] or by applying a balancing test to see if the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information.[16] At this time, however, there does not appear to be a well established and applicable privilege shielding confidential ombudsman communications from disclosure like there is, for example, for confidential attorney-client or marital communications.

The analysis does not end here, however. Under the Commonwealth's employee grievance procedure, in determining whether "just cause" exists, and in the absence of a well established and applicable legal privilege, this Department weighs the interests expressed by the party for nondisclosure of a relevant document against the requesting party's particular interests in obtaining the document, as well as the general presumption under the grievance statutes in favor of disclosure.[17] Relevant documents must be provided unless the opposing party can demonstrate compelling reasons for nondisclosure that outweigh the general presumption of disclosure and any competing interests in favor of disclosure.[18]

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[12] See Charles L. Howard, *The Organizational Ombudsman: Origins, Roles and Operations A Legal Guide*, 189-190 (ABA Publishing 2010).

[13] Under the "Wigmore test", confidentiality will be protected if: (1) the communication is made in the belief that it will not be disclosed; (2) confidentiality is essential to the maintenance of the relationship between the parties; (3) the relationship is one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure is greater than the benefit gained in the correct disposal of litigation. In re Doe v. United States, 711 F. 2d 1187, 1193 (2nd Cir. 1983) (citing 8 J. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton, rev. 1961). *See also* Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570 (E.D. Mo. 1991)(upholding the four-part "Wigmore test" and protecting the ombudsman's communication).

[14] Federal courts first recognized a limited bar to the disclosure of ombudsman communication in the case of *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987). In that case, the court was persuaded by a public policy argument that confidentiality was critically important to the effectiveness of the ombudsman office and granted testimonial immunity as a privilege in federal court. Specifically, the court found the complaints received by the ombudsman are "privileged because such confidentiality is necessary to ensure that complaints will be made," confidentiality was needed for informal dispute resolution, and the privilege only applied to what was said to the ombudsman, but not to the underlying facts. *Shabazz*, 662 F. Supp. at 92-93.

[15] *Garstang v. Super. Ct. of Los Angeles County*, 39 Cal. App. 4th 526 (Cal. Ct. App. 1995) (holding that communications made before an ombudsman are protected by a state constitutional qualified privilege). The *Garstang* court also looked to the facts of the case to determine whether the individuals participating in the ombudsman sessions had heavily relied upon a right to privacy and the pledge of confidentiality offered by the ombudsman office. The court then balanced that reliance against the other party's need for disclosure. *Garstang*, 39 Cal. App. 4th at 534. The court determined the harm caused by destroying the confidential relationship with the ombudsman office was greater than the benefit of the disclosed information. *Id*. at 535.

[16] See *Carmen v. McDonnell Douglas Corp*., 114 F.3d 790, 794 (8th Cir. 1997)(finding no privilege under the facts of the case).

[17] Certain well established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. *See, e.g.*, EDR Ruling No. 2002-215 (discussing attorney-client privilege).

[18] *E.g*., EDR Ruling Nos. 2011-2827.

This Department respects the strong public policy interests in protecting confidential ombudsman communications from disclosure and the related emerging trend evidenced in federal and state court decisions. We find persuasive the conclusion by the federal court in *Kientzy* that "[t]he function of [an] ombudsman's office is receive communications and to remedy workplace problems, in a strictly confidential atmosphere. Without this confidentiality, the office would be just one more non-confidential opportunity for employees to air disputes. The ombudsman's office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, non-confidential grievance and complaint procedures."[19]

We also respect the need for a grievant to obtain relevant evidence that is material to his or her case, especially if that evidence may not be available from any other source. Therefore, in determining whether just cause exists for shielding ombudsman documents and testimony from disclosure, we conclude that for purposes of the state employee grievance procedure, a hearing officer must consider and weigh the following factors:

- The nature of the ombudsman program at issue, i.e., the degree to which the ombudsman program is shown to be confidential, independent and impartial. The International Ombudsman Association Standards of Practice would be persuasive in considering this factor.
- The agency's interests in protecting the confidentiality of communications within its ombudsmen program.
- The grievant's need for the requested documents and testimony; for example, the materiality[20] of the requested disclosures to the grievant's case, and the severity of any disciplinary action being challenged by the grievance.
- The availability of sources of material evidence other than the ombudsman program; for example, the availability of substantially equivalent material evidence from other witnesses or document custodians such as involved co-workers, HR, or management. If other sources of material evidence exist, the need for confidential ombudsman communications should be negligible, regardless of the materiality of the ombudsman documents and testimony to the grievant's case or the severity of any disciplinary action challenged by the grievance.

Depending on the facts of the case, other disclosure alternatives could accommodate both parties' interests. As one example only, if confidential ombudsman communications are material to the grievant's case and are unavailable from any other source, perhaps ombudsman documents or testimony could be provided without revealing (i) the identity of any individual contacting the ombudsman's office or (ii) information that could lead to the identification of any such individual.

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[19] Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570, 572 (E.D. Mo. 1991).

[20] "'Materiality' of evidence refers to pertinency of the offered evidence to the issue in dispute." *Black's Law Dictionary* 976 (6th ed. 1990).

The agency's advocate has indicated that due to the timing of pre-hearing events, she was not able to bring the agency's "just cause" arguments regarding its ombudsman to the hearing officer's attention. Also, this Department was not privy to all the facts and circumstances that were raised during the two pre-hearing conferences. It is unclear from the record how the hearing officer concluded that the ombudsman's appearance at the hearing was necessary. As he provides additional clarification and weighs the factors and interests above, the hearing officer is free to modify, if he deems appropriate, any prior orders on the requested documents and testimony. This ruling is not intended to imply that he should (or should not) modify prior orders, but only to clarify that he may, depending on his consideration of the above factors.

Hearing Officer's Authority to Subpoena Documents

A hearing officer's authority to order discovery is more limited than that of a court.[21] He or she does not have the power to issue a *subpoena duces tecum*. However, a hearing officer does have the administrative authority to issue an order for the production of documents and witnesses,[22] and in this case the hearing officer has. Moreover, the hearing officer has the authority to draw an adverse inference against a party that fails to comply with an order to produce documents or witnesses.[23]

2. Agency Party and Agency Representative

The parties to a grievance are the employee and the agency.[24] The agency must select an individual to serve in the capacity of the agency party at hearing. The fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the *entire* hearing and may testify.[25] Here, the grievant objects to the agency's selection of the grievant's supervisor to act as the agency party. Under the *Rules*, the agency has the discretion to choose an individual to serve as the agency party during the hearing. Therefore, as the individual selected to serve as the agency party, the grievant's supervisor may be present during the *entire* hearing and may be called to testify.[26] However, a non-party witness may only be present in the hearing room while testifying.[27]

Parties may serve as their own representative (advocate) at hearing, or may choose another person to represent them, such as a lawyer or any other individual of choice. A representative or party serving as his/her own representative may examine or cross-examine witnesses and present evidence. [28] The grievant has asked the hearing officer to disqualify the agency's representative on the grounds that the agency inadvertently referred to the agency "party" as the agency "representative" in a letter. In his January 5th ruling, the hearing officer

[21] *Rules for Conducting Grievance Hearings* § III(E).
[22] *Id*.
[23] *Rules* § V(B)
[24] *Id*. at § IV(A).
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.

held that the "agency is entitled to be represented by counsel" and that he "lacks the authority to remove [the agency's representative]." This Department finds no reason to disturb this finding.

3. Request for Public Hearing

The grievant claims that the hearing officer erred by failing to address the grievant's request for a public hearing. More specifically, the grievant claims the *Grievance Procedure Manual* does not mandate that a hearing be closed to the public.

The *Grievance Procedure Manual* provides that "[t]he hearing should be closed to the public."[29] Further, under the *Rules*, "[t]o protect the privacy of all concerned, grievance hearings are not public hearings."[30] A hearing officer has the ability to limit who attends a hearing. This Department finds no error by the hearing officer in ruling that the grievance hearing will be closed to the public.

4. Alleged Bias of Hearing Officer

The grievant requested the hearing officer to recuse himself because of alleged "miscues, innuendos, fabrications, and one lie." Additionally, the grievant asserts that the hearing officer should be removed on the grounds that he is biased in favor of the agency. In support of his claim, the grievant questions whether the hearing officer and the agency have worked together in the past and suggests they have had a "'a meeting of the minds' as to how they conduct these proceedings and that they have already 'decided the matter' informally as a matter of 'fait accompli'." Essentially, the grievant alleges that the hearing officer's pre-hearing determinations tend to support the agency's position in this case and that he is biased against the grievant.

EDR's *Rules* address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for:

> [v]oluntarily 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]

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[29] *See Grievance Procedure Manual* § 5.8(8).
[30] *See Rules for Conducting Grievance Hearings* § IV.
[31] *Rules* at II.
[32] EDR Policy 2.01, p. 3.

The EDR requirement of recusal when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Virginia Court of Appeals reviews recusal cases on appeal.[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] We find the Court of Appeals standard to be instructive and hold that in reviews by the EDR Director of hearing officer bias claims, 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. The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[35]

Here, the grievant offers no credible evidence of bias. The mere fact that a hearing officer's rulings align more favorably with one party than another will rarely if ever, standing alone, constitute sufficient evidence of bias.[36] Therefore, this Department finds no reason to disturb the hearing officer's decision to not recuse himself from this case.

Finally, we are compelled in this ruling to comment on the grievant's representative's allegations regarding the hearing officer's conduct. The tenor of the representative's allegations is disrespectful. The grievant's representative has alleged the hearing officer has engaged in "miscues, innuendos, fabrications, and one lie" and has called one of the hearing officer's statements about his lack of authority to issue a *subpoena duces tecum* as "infantile." Parties and party representatives shall treat all participants in the grievance process, including the hearing officer, in a civil, courteous, and respectful manner at all times and in all communications. Parties and representatives shall not engage in conduct that offends the dignity and decorum of grievance proceedings, nor shall they demoralize the authority of the administrative tribunal. The conduct of the grievant's representative violates this standard. Accordingly, the grievant's representative is instructed to show appropriate respect to the hearing officer, the opposing party, and its representative. A continued lack of appropriate respect may result in the grievant's representative being prohibited from further involvement with this matter.

CONCLUSION

This matter is remanded to the hearing officer for clarification and/or consideration of the evidentiary matter of the supervisor's human resource personnel file, the grievant's supervisor's immediate supervisor's file, and the chief facility officer's file to determine whether they may be relevant to this case. Also, this matter is remanded to the hearing officer to consider whether the ombudsman's appearance and files are protected from disclosure given the facts and

[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] Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).
[36] *C.f.,* Al-Ghani v. Commonwealth, 1999 Va. App. LEXIS 275 at 12-13 (1999)("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.")

circumstances of this case. This Department finds no other reason to disturb the hearing officer's decision.

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Claudia T. Farr
Director