

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: February 23, 2011; Ruling No. 2011-2907; Agency: Department of Social Services; Outcome: Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Social Services
Ruling No. 2011-2907
February 23, 2011

The grievant seeks the removal of the hearing officer on the basis of alleged bias. For the reasons set forth below this Department will not remove the hearing officer.

FACTS

The pertinent facts of this case are as follows. The grievant had requested that the hearing officer recuse himself from hearing her November 29, 2010 grievance in case No. 9516. On February 18, 2011, the hearing officer refused to do so. Accordingly, that same day, the grievant asked this Department to remove the hearing officer, again asserting that he is biased. This ruling addresses the grievant's February 18th request for removal.

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

Alleged Bias of the Hearing Officer

The grievant requested the hearing officer to recuse himself because of alleged bias. In her request to this Department to remove the hearing officer the grievant reiterates the charge of purported bias, specifically citing his failure to hold a true conference call and his striking of witnesses from her witness list.

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

² See *Grievance Procedure Manual* § 6.4(3).

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.³

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."⁴

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.⁵ 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.'"⁶ 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.⁷

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.⁸ The failure to connect the grievant immediately with the conference call was due to an administrative error in coordinating the call, not because of any intent of the hearing officer to exclude the grievant. Moreover, the fact that the hearing officer limited the grievant's witnesses, without more, does not serve as evidence of bias.

In sum, based upon the evidence before this Department at this particular time, the grievant has not shown that the hearing officer has (1) demonstrated actual bias, or (2) 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

³ *Rules* at II.

⁴ EDR Policy 2.01, p. 3.

⁵ 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.

⁶ *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)).

⁷ *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

⁸ *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.")

hearing should her concerns persist. In addition, following the hearing and issuance of the hearing officer's decision, parties will 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

⁹ *Grievance Procedure Manual* § 7.2. Nothing in this ruling is intended to preclude the grievant from raising any argument relating to the propriety of the exclusion of any witness as a matter of compliance in a later request for administrative review. This note should not be viewed as any sort of commentary of the correctness (or impropriety) of the striking of witnesses, only that the appeal option remains should the grievant wish to exercise it.

¹⁰ *Grievance Procedure Manual* § 7.3.