Issue: Administrative Review of Hearing Officer's Decision in Case No. 9484; Ruling Date: July 21, 2011; Ruling No. 2011-2919; Agency: Virginia Department of Transportation; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Transportation
Ruling Number 2011-2919
July 21, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9484. For the reasons set forth below, there is no reason to disturb the hearing decision.

FACTS

On July 6, 2010, the grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On August 3, 2010, the grievant timely filed a grievance to challenge the agency's action. On January 31, 2011, a hearing was held at the agency's office and the hearing officer issued a decision on February 16, 2011.[1] The facts and associated holdings of this case, as set forth in the hearing decision in Case No. 9484, are as follows:

> The Virginia Department of Transportation employs Grievant as a Transportation Operations Manager II at one of its Facilities. He has been employed by the Agency for over 20 years. The purpose of this position is:
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> > Manage and oversee all maintenance, maintenance replacement, and construction activities for an assigned geographical area of the Residency. Duties include efficient planning and monitoring of Area's budget to ensure cost-effectiveness. Ensure assigned area complies with safety program. Ensure all in environmental policies and guidelines are in compliance. Resolves complaints from citizens, coworkers and public officials. Manage and direct employee relations programs to include performance evaluations, training, EEO, and employee selection process.
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> One of Grievant's Measures for Core Responsibilities was:

[1] These facts are taken from the Hearing Decision in Case No. 9484 ("Hearing Decision") at 1. Footnotes from the original decision have been omitted here.

> On a (District/Residency/Area) -- wide basis, plans, develops, and monitors the IMS inventory program, to include adhering to purchasing requirements and meeting established IMS goals. Ensures appropriate segregation of duties, compliance to policies and procedures, and meets established deadlines. Establishes, monitors, and adjusts stock levels based on need. Review reports for accuracy and authorizes by signature. Responds to local audit findings and ensures proper resolution to irregularities. Ensures designated backup personnel maintain adequate proficiency levels in performing IMS functions. Adheres to purchasing requirements by established Policies and Procedures.

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Department of General Services, Division of Purchases and Supply sets forth the Agency Procurement and Surplus Property Manual for State agencies to use when purchasing goods and services. Section 2.1(a), Mandatory Sources, provides, in part:

> Term Contracts. To provide more favorable prices through volume purchasing and to reduce lead-time in administrative cost and effort, DGS/DPS and other agencies/institutions with their delegated authority, may establish mandatory use term contracts for goods or services. Written notice of contract awards are used notifying participants (agencies or institutions organizational elements within) of the existence of such contracts. In accordance with the terms and conditions, purchase orders shall be issued in any amount for any goods or services on a term contract available to that participant. Agencies and institutions shall place all orders on mandatory use contracts through eVA. If an item is available on a mandatory contract, participants may not use their local purchasing authority to purchase from another source unless the purchase is exempt by contract terms such as not meeting the contract's minimum order requirement. Vendors who intentionally sell or attempt to sell goods or services to an authorized participant who is under a mandatory contract with another vendor may be suspended and/or debarred by DGS/DPS. The purchase by agency personnel of goods or services that are on DGS/DPS mandatory contracts from non-contract sources may result in reduction or withdrawal of that agency's delegated purchasing authority by DGS/DPS (see 13.7). An exemption from a mandatory state contract may be granted by the DGS/DPS contract officer responsible for the contract. The Procurement Exemption Request form should be used to request an exemption. Approved

> exemption request must be attached to the purchase transaction file either electronically or by hard copy.

Employees responsible for purchasing goods for the Agency must comply with the Agency's Integrated Supply Services Program (ISSP) Policies and Procedures Manual. The Integrated Supply Services Program is a comprehensive logistics management program that supports the current and future supply needs of VDOT. The ISSP incorporates an automated Management Services Program which allows the Department to receive invoices from and process payments to the ISSP Contractor electronically. The Agency selected Company M as the ISSP Contractor to handle its procurement needs. Section 1.4 of the Integrated Supply Services Program Policies and Procedures Manual provides, in part:

> The ISSP Contractor will procure all vehicle and equipment maintenance and repair parts; selected equipment maintenance and repair supplies and tools; some road maintenance materials and supplies; selected road maintenance tools; and limited light maintenance equipment. The ISSP Contract is a mandatory use contract; all items listed on the Master Commodities List (MCL) must be purchased from the ISSP Contractor.

The Agency made its Master Commodities List available to employees on its website. On May 10, 2007, the Agency presented training at Residency S regarding the Master Commodities List. The training was intended for any employee who normally requested and received parts from Company C. Grievant was invited to attend the training.

On October 23, 2007, Grievant attended training entitled Procurement End-User Training. During that two hour class, the Instructor discussed Company M. She told the class that Company M was the mandatory contract for Inventory and Equipment repair parts. She told the class that Company M was responsible for equipment repair parts, even when the item was not listed on the core items list.

On October 23, 2008, Grievant intended training entitled Procurement Annual End-User Training 2008. The Instructor told the class that they should check mandatory sources before they make a direct purchase. She told the class that Company M was the mandatory source for VDOT core inventory items.

On September 16, 2009, Grievant purchased chain lube from Company DF. He discussed the need to purchase the product with his Supervisor and was advised by the Supervisor to purchase the product from Company DF.

On October 14, 2009, Grievant purchased restroom air freshener for use at the Facility where Grievant worked. He did not purchase the item from Company M.

On October 14, 2009, Grievant purchased an asphalt and tar remover for use on his crew's equipment. He did not purchase the item from Company M.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[U]nsatisfactory work performance" is a Group I offense. In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant purchased chain lube from Company DF rather than Company M. There is no basis for the Agency to take disciplinary action against Grievant with respect to his purchase of chain lube because prior to the purchase, Grievant discussed the need for the purchase with his Supervisor and the Supervisor directed Grievant to make the purchase. Grievant was obligated to comply with the Supervisor's instructions. The error made by the Supervisor was not so obvious or significant that Grievant should have known to disregard the instruction.

Grievant was expected to purchase items for the Agency by first determining whether the items were available on the Master Commodities List maintained by Company M. Only if the items were not available on the Master Commodities Lists, could Grievant purchase the items from another company using his Agency issued credit card. The Agency presented credible testimony that the type of items the Grievant purchased were available on the Master Commodities List. The Agency argued that Grievant should have selected the items on the Master Commodities List rather than purchasing items from a vendor other than Company M. On October 14, 2009, Grievant purchased restroom air freshener and asphalt and tar remover from a company other than Company M. Grievant's purchases were inconsistent with the Agency's expectations for his work performance thereby justifying the issuance of a Group I Written Notice.

Grievant testified that he looked on the Master Commodities List for the products could not find them. There is no dispute that the brands of the items that

Grievant purchased were not on the Master Commodities List. Grievant's obligation however, was not to determine whether a product of a particular brand was on the Master Commodities List. His obligation was to determine whether a product of the type he desired was on the Master Commodities List.

Grievant argued that asphalt and tar remover was only available from Company M in 55 gallon drums. He wished to purchase the product in 1 gallon containers so that they can be more easily distributed to his employees. The Agency argued that it would not have been difficult for Grievant to purchase a 55 gallon drum and then put the product into smaller containers if necessary. Although Grievant's justification for his selection is logical, it does not change the fact that asphalt and tar remover was available on the Master's Commodities List from Company M. Grievant was obligated to purchase from Company M given that it had asphalt and tar remover for sale. The fact that the item came in a certain size container did not change the fact that the type of item was available from Company M.

On the other hand, Grievant repeatedly states in his grievance documents that he did not know that Company M was a mandatory source. He argued that because he had not been informed that Company M was a mandatory source, it serves as an excuse for his failure to purchase the items from Company M. The question is what to make of these comments. Grievant's statement that he did not know that Company M was a mandatory source is consistent with the Agency's assertion that if Grievant in fact viewed the Master Commodities List in October 2009, he failed to search diligently and identify the items he needed to purchase. The fact that Grievant did not know in October 2009 that Company M was a mandatory source is not an excuse for his failure to purchase items available on the Master Commodities List.

Grievant argued that the Agency has not established that in September and October 2009, there were items on the Master Commodities List similar to the items that Grievant purchased. The Agency points out that it reviewed the Master Commodities List in January 2010 and found similar items to those purchased by Grievant. The Agency, however, concedes that it does not have a printout or static list of those items available on the days that Grievant made his purchases. The Master Commodities List is a fluid list with items being added and subtracted on a daily or weekly basis. There exists sufficient evidence for the Hearing Officer to conclude that on October 14, 2009 the Master Commodities List contained a restroom air freshener and asphalt and tar remover as items to purchase. The Agency employee responsible for maintaining the Master Commodities List testified that those items were available on the Master Commodities List in October 2009. Grievant has admitted that an asphalt and tar

remover was on the Master Commodities List although it was not available in 1 gallon containers.[2]

Based on the foregoing, and not finding any mitigating circumstances, the hearing officer upheld the discipline against the grievant.[3]

DISCUSSION

Administrative Review

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."[4] 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.[5]

Timeliness of the Hearing Decision

The grievant asserts that the hearing officer erred because the hearing decision was not issued within thirty-five days of the appointment of the hearing officer. In addition, the grievant challenges the failure of the hearing officer to include in the hearing decision the reasons why the decision was not issued within this time period.

According to the grievance procedure and rules established by this Department, absent just cause, hearing officers are instructed to attempt to hold the hearing and issue a written decision within 35 calendar days of appointment.[6] Preferably, hearings take place and decisions are written within this 35-day timeframe. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing.[7] This Department concludes that there was no indication of inappropriate or improper delay in this case that prejudiced the grievant.

In addition, the grievant's argument that the hearing officer erred by failing to include in his decision the reasons for the extension of time past the 35 calendar is somewhat misplaced.

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[2] Hearing Decision at 2-6.
[3] *Id*. at 7.
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] *Grievance Procedure Manual* § 5.1. ("The hearing *should* be held and a written decision issued within 35 calendar days of the hearing officer's appointment.") (Emphasis added).
[7] *See, e.g.,* EDR Ruling No. 2008-1747; EDR Ruling No. 2006-1135. This Department views the 35-day language of the Rules as directive rather than mandatory. Standing alone, failure to issue a decision within the 35-day timeframe does not serve as grounds for a rehearing or favorable decision. *Cf.* Va. Dept. of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 (Jan. 15, 2008) (unpublished decision).

The rules state that "[t]he hearing officer may extend the 35-day time period for just cause – generally circumstances beyond a party's control such as an accident, illness, or death in the family. If an extension [of the 35 calendar day period] is granted, the reasons for the extension should be stated prominently in the written decision."[8] This provision of the grievance procedure applies to those situations where a party to the grievance has asked for a continuance or extension of time. It is not intended to require the hearing officer to include in the decision the reasons why the decision was issued outside the 35 calendar day period in every circumstance, as is apparently believed by the grievant. Based on the foregoing, there is no basis to conclude that the hearing officer violated the grievance procedure in failing to include the reason why his decision was issued beyond 35 calendar days.

Bias

The grievant claims the hearing officer was biased against him because in a previous case with facts similar to those in the grievant's case, the hearing officer had found that the superintendent in the other case had failed to comply with the agency's purchasing policy. The EDR *Rules for Conducting Grievance Hearings (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.[9]

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."[10]

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 approaches the judicial review of recusal cases.[11] 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.'"[12] We find the Court of Appeals standard instructive and hold that in compliance reviews by the EDR Director of assertions of hearing officer bias, the appropriate standard of review is whether the hearing

[8] *Rules for Conducting Grievance Hearings* § III(B).
[9] *Rules* at II.
[10] EDR Policy 2.01, p. 3.
[11] 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.
[12] 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)).

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.[13]

The grievant has offered insufficient evidence of bias. The mere fact that the hearing officer had found that another individual in another case had failed to follow policy is hardly grounds to determine bias in this case. Hearing officers look at cases independently and while the facts of some cases may be similar, hearing officers determine each case on its own merits. Therefore, this Department has no reason to remand the decision for this reason.

APPEAL RIGHTS AND OTHER INFORMATION

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.[14] 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.[15] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[16]

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Claudia T. Farr
Director

[13] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[14] *Grievance Procedure Manual* § 7.2(d).
[15] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[16] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).