Issue: Administrative Review of Hearing Officer's Decision in Case No. 9521; Ruling Date: April 25, 2011; Ruling No. 2011-2946; Agency: Virginia Employment Commission; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia Employment Commission
Ruling No. 2011-2946
April 25, 2011

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9521. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 9521 are as follows:[1]

> The facts in this matter are largely uncontested. The location where the Agency operates was purchased by the Agency as an existing structure several years ago. That structure had a three (3) bay garage attached to it. Each of the bays had an entrance door and an exit door that opened in such a fashion that you could drive a vehicle into and out of each bay. Accordingly, there were six (6) doors as a part of this attached three-car garage. The Agency, not needing a garage, obtained the necessary permits from the county so that this area could be used as an overflow area for the Agency's clients. This area had tables and chairs and for several years has not been used as a garage. It is used as an area for people to either wait for service or for the Agency to have meetings.
>
> On the morning of the event that created this grievance, the Grievant drove her daughter's car to work. During the morning hours, the Grievant observed tow trucks in the parking lot removing vehicles. The Grievant, concerned that her daughter had missed payments on her car loan, contacted her daughter and verified her concern. The Grievant, portraying herself as her daughter, called the lender and again verified that the loan payments were in arrears. The Grievant, fearful that the car would be towed, asked one fellow employee if she could follow the Grievant to a more discrete location to park the car. That employee indicated that she could not leave work at that time and, accordingly, could not assist the Grievant.

[1] *See* Decision of Hearing Officer, Case No. 9521, issued March 16, 2011 ("Hearing Decision") at 3-4.

The Grievant, obtained the keys to the doors of the former garage, moved some chairs and tables to clear one (1) of the bays, opened the garage door and put her daughter's car inside the garage and then closed the door. The Grievant did not seek permission from any level of management.

Sometime later, the Grievant's first level manager [("Ms. M")],[2] while on a smoking break, noticed a vehicle inside of the building. [Ms. M] went to the break room where her manager [("Ms. A")] was and asked if she was aware that there was a vehicle inside the building. The Grievant was in this same break room and immediately left the break room and indicated to [Ms. M] that she wished for her to step out into the hall and to say no more about the vehicle. The Grievant then explained to [Ms. M] why the vehicle was in the break room.

[Ms. M] testified before the Hearing Officer that she told the Grievant, "not to do this ever again," and to "immediately remove the vehicle from the building." The first area of dispute in testimony before the Hearing Officer was that the Grievant denied that [Ms. M] told her to immediately remove the vehicle.

[Ms. M] testified that she then told [Ms. A] about this situation immediately after the conversation with the Grievant. These two (2) conversations took place at approximately 2:45 p.m.

At approximately 4:45 p.m., that same day, the vehicle was still in the building and both Ms. A and Ms. S met with the Grievant to ascertain why the vehicle was placed in the building and why it was still in the building.

Pursuant to the investigation of this matter, the Human Resources Manager came to the Agency the day after this took place and interviewed various parties. When she interviewed the Grievant, the Grievant testified that no one assisted her in placing the car inside the building. When she interviewed the security guard, who was on his first day of work for this Agency, he testified that the Grievant had asked him to help move furniture and he had.

When the Grievant testified, she stated that she did not talk to anyone before she moved the car into the building. She testified that she wanted to keep the issue of repossession confidential. She admitted that Ms. M then came to the break room and asked Ms. A if she was aware that there was a car inside the building. The Grievant denied that Ms. M told her to move the car immediately. The Grievant did admit that Ms. M told her not to do it again. The Grievant

[2] We note that the facts in the hearing decision appear to be internally inconsistent when making references to "Ms. M" and "Ms. A." It appears their names were inadvertently switched in some of the findings of fact which have been appropriately corrected in this ruling. Any such inconsistencies, however, are harmless error as they are immaterial to the hearing officer's dispositive findings of fact; nor did the grievant object to any name inconsistencies in her request for administrative review.

admitted that, in the years that she had worked at this Agency at this location, she had never seen a vehicle parked inside the building.

The Grievant called as a witness the fellow employee, whom she asked to help her move the vehicle. That employee testified that she certainly would not park a car inside the building.

The Grievant admits that she placed a car inside the building and it is incredible to assume that she did not know that this would be an unauthorized use of the building. The Grievant testified that she felt the Agency had a positive burden to notify employees in writing that the area was not suitable for parking a vehicle.

* * * * * * * * * * * * * * * *

The Grievant was issued a Group III Written Notice on December 1, 2010 for:

> You have demonstrated unacceptable conduct under the Standards of Conduct Policy 1.60 Failure to follow supervisory instructions, unauthorized use of state property, and insubordination.[3]

Pursuant to the Group III Written Notice, the Grievant was terminated on December 1, 2010. On December 21, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. On February 9, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On March 8, 2011, a hearing was held at the Agency's location.[4]

In a March 16, 2011 hearing decision, the hearing officer upheld the Group III Written Notice with termination.[5] The hearing officer denied the grievant's request for relief from retaliation.[6] The hearing officer denied the grievant's request for reconsideration on April 8, 2011.[7] The grievant now seeks administrative review from this Department.

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."[8] If the hearing

[3] *See* Hearing Decision at 1.
[4] *Id*. (Footnotes have been omitted here.)
[5] *Id*. at 5.
[6] *Id*. at 4.
[7] *See* Decision of Hearing Officer, Case No. 9521 ("Reconsideration Decision") issued April 8, 2011 at 2.
[8] Va. Code § 2.2-1001(2), (3), and (5).

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.[9]

Hearing Officer's Ability to Conduct a Fair Hearing

A. Bias

Citing Section 6.4 of the *Grievance Procedure Manual* (Hearing Officer Noncompliance), the grievant asserts that the hearing officer's decision was noncompliant pursuant to EDR Policy 2.01 (Hearing Officer Program Administration). It appears the grievant contends that because the hearing officer's factual findings tend to support the agency's position in this case, he was biased against the grievant.

The *Rules for Conducting Grievance Hearings (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.[10]

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."[11]

The grievant has not identified any applicable rules or requirements to support her 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.[12] 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.'"[13] 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

---

[9] *See Grievance Procedure Manual* § 6.4(3).
[10] *Rules* at II.
[11] EDR Policy 2.01, p. 3.
[12] 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.
[13] 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)).

harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[14] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[15]

In this particular case, there is no such evidence. 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.[16] This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. Therefore, this Department finds no reason to disturb the hearing officer's decision for this reason.

B. Appearance of Bias

The grievant contends that the hearing officer "presented a hindrance" which allegedly "created an adverse employment action that resulted in a major impact on the terms and condition" of her employment. The general conduct of the hearing is within the sound discretion of the hearing officer.[17] Thus, noncompliance with the grievance procedure and *Rules for Conducting Grievance Hearings* on such grounds will only be found if the hearing officer has abused that discretion. The grievant has not explained the hindrance which she believes the hearing officer presented. Based on this Department's review of the hearing record, it cannot be concluded that the hearing officer abused his discretion in conducting the hearing such that a new hearing would be warranted. Both parties were able to present their cases adequately and neither was materially prejudiced.

C. Inadequate Time at Hearing

The grievant asserts that she did not have sufficient time to present her case pursuant to Section 5.4 of the *Grievance Procedure Manual*. Specifically, the grievant alleges that "had certain information been provided prior to the hearing, the hearing may have gone on longer than anticipated." The *Rules* do not expressly require that the hearing officer grant a party a particular amount of time to present their case. Generally, hearings can be concluded in a day or less but there is no requirement that a hearing last an entire day.[18] However, a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.[19]

After reviewing the grievance hearing tapes, this Department cannot conclude that the hearing officer denied the grievant a fair opportunity to present her case. Over the course of the day, the hearing officer heard approximately five hours of testimony. With respect to the grievant's claim that certain information should have been provided prior to the hearing, we note

---

[14] *See, e.g.*, EDR Ruling No. 2011-2807.
[15] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[16] *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.")
[17] *E.g.*, EDR Ruling No. 2009-2091.
[18] *Rules* at III(B). The *Rules* state that "[t]he hearing on a grievance may be divided into one or more sessions, but generally should last no longer than a total of 8 hours."
[19] The *Rules* further state the "hearing may continue beyond 8 hours, however, if necessary to a full and fair presentation of the evidence by both sides." *Id.*

that the grievant failed to identify in her request for administrative review the information she sought. Our review of the hearing tapes indicates that the grievant in fact presented three witnesses during the hearing in addition to her testimony. While she may have wished for additional time, we cannot conclude that the amount of time she was granted was insufficient or unfairly prejudiced her, or that additional time would have changed the outcome. Thus, we will not disturb the decision on this basis.

Alleged Noncompliance by the Agency

The grievant also alleges that the agency was noncompliant with Section 6.3 of the *Grievance Procedure Manual*. Specifically, the grievant asserts that the agency "presented a hindrance" that allegedly "created an adverse employment action that resulted in a major impact on the terms and conditions" of her employment. Again, the grievant fails to identify the hindrance. We decline to speculate as to the nature of the hindrance.

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.[20] 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

_____
Claudia T. Farr
Director

[20] *Grievance Procedure Manual* § 7.2(d).
[21] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[22] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).