

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: May 2, 2011; Ruling No. 2011-2971; Agency: Virginia Commonwealth University; Outcome: Hearing Officer in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the University of Virginia Health System
Ruling No. 2011-2971
May 2, 2011

The grievant has requested a compliance ruling concerning hearing Case Number 9566. The grievant seeks the removal of the designated hearing officer and the appointment of a new hearing officer. Because there is insufficient evidence of grounds of bias, this Department (EDR) must deny the grievant's request.

FACTS

On February 16, 2011, the grievant initiated a grievance challenging his termination. The agency qualified the grievance for hearing on March 14, 2011. On April 5, 2011, a hearing officer was appointed to hear Case Number 9566. In accordance with the *Rules for Conducting Grievance Hearings*,¹ the hearing officer set the hearing for May 3, 2011 and established April 27, 2011 as the date for each party to exchange their witness list and documents with the hearing officer and the other party prior to the hearing.

In an email dated April 26, 2011, the grievant requested that the designated hearing officer remove himself from Case Number 9566 and that this Department appoint a new hearing officer. The grievant alleges that the designated hearing officer failed to timely call him back regarding hearing procedure questions and did not provide him with ample time to submit his evidence. In an email dated April 27, 2011, the grievant further elaborated that he felt it was unfair for the hearing officer to require him to exchange a copy of the documents he intends to present at hearing to the agency. In an April 26, 2011 email response, the hearing officer declined to recuse himself.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and issue final rulings on

¹ *Rules for Conducting Grievance Hearings*, § III(D).

matters of compliance with the grievance procedure.² The authority granted to this Department includes the appointment of administrative hearing officers to conduct grievance hearings.³ This Department's power to appoint necessarily encompasses the power to remove a hearing officer from the assigned hearing, should it become necessary, and to appoint a new hearing officer.⁴ However, EDR has long held that its power to remove a hearing officer from a grievance should be exercised sparingly and reserved only for those cases where the hearing officer has demonstrated actual bias, or has clearly and egregiously undermined the integrity of the grievance process.⁵

The party moving for removal has the burden of proving bias or prejudice.⁶ In this instance, the grievant has presented no evidence establishing that the hearing officer possesses or has exercised such bias or prejudice as to deny the grievant a fair hearing.⁷ The grievant has pointed out that the hearing officer allegedly did not return the grievant's phone calls and purportedly did not provide the grievant with ample time to submit his evidence. However, delay in returning a telephone call does not by itself serve as clear evidence of bias. Furthermore, it appears the hearing officer gave the grievant ample time to submit his evidence since the grievant had until April 27, 2011 to do so. More importantly, we note the grievant did not raise an objection to this exchange date until April 26, 2011, which is only one day prior to the due date.

In sum, based upon the evidence proffered by the grievant here, we cannot conclude that the grievant has presented sufficient evidence of bias to warrant the removal of the hearing officer. Therefore, the grievant's request for appointment of a new hearing officer is denied. It should be noted that the grievant will have the opportunity to raise his concerns with the hearing officer if they occur at hearing. In addition, following the hearing and issuance of the hearing officer's decision, parties have the opportunity to request administrative review of the decision based on such issues as bias.⁸ Moreover, judicial review of the decision may be sought from the circuit

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

³ Va. Code § 2.2-1001(6).

⁴ See *Carlucci v. Doe*, 488 U.S. 93, 99 (1988) ("absent a 'specific provision to the contrary, the power of removal from office is incident to the power of appointment'") (quoting *Keim v. United States*, 177 U.S. 290, 293 (1900)).

⁵ E.g., EDR Ruling No. 2004-725; see also *Welsh v. Commonwealth*, 14 Va. App. 300, 314-17, 416 S.E.2d 451, 459-61 (1992) (discussing the very high standard used by a reviewing court in determining whether a trial court judge should be disqualified from hearing a case on the basis of alleged bias).

⁶ E.g., *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

⁷ See *Welsh*, 14 Va. App. at 315, 416 S.E.2d at 459-460 ("In Virginia, 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,' and is a matter left to the reasonable discretion of the trial court." (Internal citations omitted).) "As a constitutional matter, due process considerations mandate recusal only where the judge has 'a direct, personal, substantial, pecuniary interest' in the outcome of a case." *Welsh*, 14 Va. App. at 314, 416 S.E.2d at 459. See also *Jackson*, 267 Va. at 229, 590 S.E.2d at 520 "In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge."

⁸ *Grievance Procedure Manual* § 7.2.

court once all administrative reviews are complete, if any, and the hearing officer's decision is final.⁹

Claudia T. Farr
Director

⁹ *Grievance Procedure Manual* § 7.3.