Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: May 26, 2011; Ruling No. 2011-2991; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2011-2991
May 26, 2011

The grievant, through her representative, has requested a compliance ruling in her grievance with the Department of Behavioral Health and Developmental Services (the agency). The grievant asserts that the hearing officer should have recused himself from Case Nos. 9586 and 9587. In a May 20, 2011 response, the hearing officer declined to recuse himself. Accordingly, the grievant has asked the EDR Director to remove the hearing officer from this case.

FACTS

In a letter dated May 19, 2011, the grievant's representative requested that the hearing officer remove himself from Case Nos. 9586 and 9587. In a May 20, 2011 response, the hearing officer refused to recuse himself. The basis of the removal request is that the hearing officer ruled against the grievant in a previous grievance and the grievant intends to call the hearing officer as a witness.

DISCUSSION

Removal

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 matters of compliance with the grievance procedure.[1] The authority granted to this Department includes the appointment of administrative hearing officers to conduct grievance hearings.[2] 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.[3] 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

[1] Va. Code § 2.2-1001(2), (3) and (5).
[2] Va. Code § 2.2-1001(6).
[3] *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)).

demonstrated actual bias, or has clearly and egregiously undermined the integrity of the grievance process.[4]

The party moving for removal has the burden of proving bias or prejudice.[5] 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.[6] The grievant has pointed to a past ruling against her in support of her claim that the hearing officer should be removed. This Department has previously noted that the mere fact that a hearing officer has ruled against a party in the past is, by itself, generally insufficient to warrant recusal.[7] The same applies to removal. Moreover, the grievant has advanced no reason for calling the hearing officer as a witness. This Department is disinclined to speculate as to a viable reason for such an action and believes that few, if any, exist for such an extraordinary measure.

At this time, the grievant has not presented sufficient evidence that the hearing officer has demonstrated actual bias or has 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 hearing should her concerns persist. 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 issues including, but not limited to, bias.[8] 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.[9]

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Claudia T. Farr
Director

[4] *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).
[5] *E.g.*, Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).
[6] *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." *Id.* at 314, 416 S.E.2d at 459. We believe that a more expansive review of bias claims is appropriate and should not be limited solely to the question of whether a pecuniary interest was implicated. *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."). Even when this case is reviewed for any actual bias, pecuniary or otherwise, none appears present.
[7] *See* EDR Ruling Nos. 2008-2003; 2007-1520; and 2006-1160. Adverse rulings do not establish bias or prejudice, nor create a question as to judicial impartiality. Honneus v. United States, 425 F. Supp. 164, 166 (D. Mass. 1977). *See also* EDR Ruling #2004-934 for discussion regarding the high standard associated with recusal.
[8] *Grievance Procedure Manual* § 7.2.
[9] *Grievance Procedure Manual* § 7.3.