

Issues: Compliance – Grievance Procedure (Hearings and Other); Ruling Date: August 3, 2011; Ruling No. 2012-3047, 2012-3048; Agency: Department of Correctional Education; Outcome: Hearing Officer in Compliance, Agency in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Correctional Education
Ruling Numbers 2012-3047, 2012-3048
August 3, 2011

The grievant has submitted two separate compliance ruling requests to this Department (EDR) in her May 16, 2011 grievance with the Department of Correctional Education (the agency or DCE). For the reasons discussed below, the grievant's arguments are without merit.

FACTS

In a July 22, 2011 letter, EDR appointed a hearing officer for the grievant's May 16, 2011 grievance. The grievant argues that information included with that appointment packet was prejudicial and renders the hearing officer incapable of rendering a fair and impartial decision in her case. The information disputed by the grievant appears on the Form B submitted by the agency, which is not a document prepared or completed by EDR. On the line of the Form B asking for information about "Other Employee Grievance(s) Arising From Same Incident," the agency (DCE) listed the following: "Grievant [other agency employee] has been through the hearing phase and has appealed the hearing officer's decision."

The grievant has also asserted that the agency's June 6, 2011 letter to EDR, which led to the issuance of EDR Ruling No. 2011-3014, indicated impermissible contact with a hearing officer. However, the agency's letter does NOT indicate any such contact with a hearing officer, but rather, mentions a call that was made to an EDR Consultant through EDR's AdviceLine. The grievant requests compliance rulings to address these matters.

DISCUSSION

*Removal*¹

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

¹ Ordinary EDR practice requires that a party to a grievance first raise with the hearing officer any issue that could lead to the recusal or removal of a hearing officer. See, e.g., *Grievance Procedure Manual* § 6.4. However, because the issues argued by the grievant involve the packet provided to the hearing officer by this Department, in the interests of administrative efficiency, the issues will be addressed and resolved at this time without requiring the grievant to first address the matter with the hearing officer.

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 Rather, the grievant relies on information submitted to the hearing officer on the Form B as having a prejudicial impact on her case. Even if the facts were as the grievant sees them, there is no basis to find that there has been any prejudice to the grievant's case or that the hearing officer has been somehow prevented from being fair and impartial. The reference to the other employee's grievance on the Form B does not even indicate how the two grievances might be related. It is not clear what prejudice the grievant believes could possibly result from the inclusion of such a benign statement.

Hearing officers are required to decide each grievance individually on the facts admitted in the record in that grievance, not based on what evidence may be submitted in other grievances.⁸ Therefore, the fact that the hearing officer may now be aware⁹ that there was another grievance that may be arguably related in some unidentified way has no prejudicial impact on the grievant's case. Indeed, both parties have appeal rights following the decision of the hearing officer to address such issues as failure to decide the case on the record evidence

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." *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.

⁸ See, e.g., *Grievance Procedure Manual* § 5.9.

⁹ It is also notable that the assigned hearing officer would have already been aware of any potential similarity, notwithstanding the inclusion of any information on the Form B, simply by having heard the previous matter.

and/or bias of the hearing officer.¹⁰ Having shown no indication that anything provided at this point could possibly prejudice the grievant's case or render the hearing officer incapable of providing a fair and impartial hearing, the grievant's request for a new hearing officer is denied.

(Non-)Contact with a Hearing Officer

The grievant claims the agency stated in its June 6, 2011 letter to this Department that it had contacted a hearing officer who allegedly stated that the grievant's May 16, 2011 grievance should not proceed to a hearing. The grievant is wrong. The agency's letter indicates that the agency contacted an EDR Consultant through this Department's AdviceLine, NOT a hearing officer. Such AdviceLine discussions are perfectly appropriate.¹¹ Further, this Department cannot control the extent to which an AdviceLine caller may mishear and/or later mischaracterize information provided by an EDR Consultant on the AdviceLine. The grievant's argument of any violation of the grievance procedure in this instance is specious.

CONCLUSION

This Department's rulings on matters of compliance are final and nonappealable.¹² The hearings process has been stayed pending the resolution of the grievant's compliance ruling request.¹³ That stay is now lifted and the hearings process may commence. For purpose of calculating hearing timelines, the effective appointment date of this matter will now be considered to be the date of this ruling.

Claudia T. Farr
Director

¹⁰ See *Grievance Procedure Manual* §§ 7.2, 7.3.

¹¹ See *Grievance Procedure Manual* § 1.1. Further information about EDR's AdviceLine, which is provided for the use of both employees and managers, for example, is available at <http://www.edr.virginia.gov/adviceline.htm>.

¹² Va. Code §§ 2.2-1001(5), 2.2-3003(G).

¹³ See *Grievance Procedure Manual* § 6.1.