Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: May 30, 2012; Ruling No. 2012-3358; Agency: College of William and Mary; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the College of William & Mary
Ruling Number 2012-3358
May 30, 2012

The grievant has requested a compliance ruling in her grievance with the College of William and Mary (the College). The grievant asserts that the hearing officer should have recused herself from Case Number 9831.

FACTS

By e-mail, the grievant requested that the hearing officer recuse herself from Case Number 9831. In a May 22, 2012 Scheduling Order, the hearing officer declined to recuse herself. The basis of the removal request is the hearing officer's handling of and eventual ruling against the grievant in a previous grievance and that the hearing officer is a graduate of the College.

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

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[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)).
[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).

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 her past grievance handled by the hearing officer in support of her claim that the hearing officer should be removed. The grievant essentially challenges certain factual findings by the hearing officer in that case, a procedural issue involving witnesses, and the hearing officer's alleged "aggravated" demeanor.

First, 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. Further, the appropriate time to raise the factual and procedural questions the grievant has noted in support of this ruling was on appeal from the prior grievance hearing,[8] not in this recusal request.

However, though not necessary, this Department has reviewed the hearing decision (Case No. 9688) and pertinent portions of the hearing recording in the prior grievance to investigate the grievant's claims. Based on that review, this Department finds no basis for the grievant's claims of bias. The witness issue was appropriately handled, there was no indication of an "aggravated" demeanor by the hearing officer, and there would be no basis to find that the hearing officer did not have record evidence to support the findings challenged by the grievant, to the extent they were event material to the outcome.

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. Moreover, the hearing officer's status as a past graduate of the College does not demonstrate any basis for this Department to conclude that the hearing officer will be unable to conduct a fair hearing.[9] Therefore, the grievant's request for a

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[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 No. 2004-934 for discussion regarding the high standard associated with recusal.

[8] *See Grievance Procedure Manual* § 7.2. This Department received no such request for review.

[9] *See* Brody v. President and Fellows of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981) (cited by Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1117 (4th Cir. 1988) (noting that "prior association does not, in itself, form a reasonable basis for questioning a judge's impartiality").

new hearing officer is denied. This Department's rulings on matters of compliance are final and nonappealable.[10]

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.[11] 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.[12]

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Claudia T. Farr
Director

[10] Va. Code §§ 2.2-1001(5), 2.2-3003(G).
[11] *Grievance Procedure Manual* § 7.2.
[12] *Grievance Procedure Manual* § 7.3.