Issue: Compliance/other grievance procedure issue; Discrimination/Age; Separation from State/Layoff Recall; Ruling Date: October 14, 2005; Ruling #2006-1160; Agency: Office of Comprehensive Services for At-Risk Youth and Families; Outcome: grievant not in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Office of Comprehensive Services for
At-Risk Youth and Families
Ruling Number 2006-1160
October 14, 2005

The grievant has requested a compliance ruling regarding the grievance that she initiated with the Office of Comprehensive Services for At-Risk Youth and Families (OCS). Specifically, the grievant has asked this Department (EDR) to assign a new consultant to investigate her case and draft a preliminary qualification ruling for the EDR Director. In support, the grievant cites the consultant's assignment to a prior ruling which had concluded that OCS, not the Department of Social Services (DSS), was the grievant's employer. For the reasons set forth below, this Department will not appoint a different consultant to investigate this matter and draft a preliminary ruling.

FACTS

The grievant is employed as a Program Administration Manager III. On March 16, 2005, the grievant was informed that due to an OCS reorganization, her position was being abolished and she would be laid off, effective May 24, 2005. On April 15, 2005, the grievant challenged the agency's action by initiating a grievance alleging misapplication of the layoff policy and age discrimination.

The grievant claimed that she was an employee of DSS and as such, the designated management resolution step-respondents in her April 15th grievance should include management staff from DSS. OCS disagreed, and requested that the EDR Director issue a compliance ruling designating OCS respondents as appropriate.

As typically is the case, the OCS ruling request was assigned to an EDR consultant, Consultant A in this instance, to investigate the facts pertaining to the ruling request. Two of the three EDR consultants who are predominately involved with grievance rulings had spoken with one of the two parties via the EDR AdviceLine; Consultant B had spoken in confidence with the grievant, and Consultant C had spoken in confidence with an agency representative. Consultant A was the only rulings consultant who had not spoken to a party and was accordingly assigned the original ruling request. Again, as is the usual practice, when the fact-finding was complete, Consultant A drafted a preliminary ruling for the EDR Director's review and approval. Ultimately, the EDR Director determined that OCS was the grievant's

employer and that therefore the step respondents should be from OCS, rather than DSS as had been urged by the grievant.

The grievance moved through the management resolution steps and the agency head denied qualification of the grievance for hearing. The grievant then sought qualification from this Department. The qualification ruling request was assigned to Consultant A, again, because she was the only rulings-focused consultant who had not had previous AdviceLine contact with one of the parties to the grievance.[1]

DISCUSSION

The grievant has requested that her ruling request be assigned to another consultant. She asserts that because of Consultant A's involvement with a prior ruling in her case, which, she claims, resulted in a negative finding against her, the qualification ruling should be assigned to a different consultant.

As an initial point, it has long been an EDR practice for consultants to recuse themselves from assignment to a grievance ruling if they had previously spoken with a party to the grievance as an AdviceLine call. The reason for this is to avoid any real or perceived conflict of interest. However, prior responsibility for investigating and drafting a compliance ruling does not present the same potential for conflict, because the substantive merits of a grievance and any related facts are generally not germane to compliance issues, which focus on procedural issues. For instance, in this case, the prior compliance issue involved the determination of the grievant's employer and the designation of the step respondents. Consultant A's involvement with the ruling did not require an examination or consideration of the issues to be addressed in the qualification ruling, specifically, misapplication of the layoff policy and age discrimination. Accordingly, Consultant A had no real exposure to the underlying grievance issues, thus, had no reason to recuse herself.

The grievant asserts that because of Consultant A's earlier involvement and *adverse ruling*, she should not be involved with the qualification ruling. The grievant appears to imply that the consultant may be biased, albeit unintentionally so. In the past, when the issue of recusal of an EDR hearing officer was questioned, on the basis of bias, this Department looked to the Model Code of Judicial Conduct for State Administrative Law Judges (Model Code) and Canons of Judicial Conduct for the State of Virginia (Virginia Canons).[2] Both the Model Code and Virginia Canons instruct that a judge [hearing officer] "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[3] EDR adopted the Virginia Canon's recusal standard for application to EDR

[1] Through its toll-free AdviceLine, EDR provides consultation and advice to state government employees and agency managers on their employment rights and responsibilities, as well as available options in resolving workplace conflict. *See* VA. Code § 2.2-1001(10) and (11).
[2] *See* EDR Rulings #2003-091, -092 and -093; 2004-725; and 2004-934.
[3] Canon 3(E)(1); Model Code Canon 3(C)(1). The American Bar Association Model Code for Judicial Conduct has adopted the same "impartiality might reasonably be questioned" standard. This standard is virtually identical

hearing officers[4] and believes that the Model Code/Canon standard provides guidance that can be applied to EDR's consultants and rulings process as well.

As EDR Ruling #2004-934 noted, the Model Code/Canon standard for the disqualification is an objective one; there must be evidence that would convince a reasonable person that bias exists.[5] In addition, we recognized that while it is well settled that a judge has duty to recuse herself if her "impartiality might reasonably be questioned," she has a concomitant obligation not to recuse herself absent a valid reason for recusal.[6] Moreover, we noted that the mere fact that a judge has ruled against a party is, by itself, generally insufficient to warrant recusal. [7]

Here, the grievant has asserted that she has concerns about Consultant A's neutrality, but has provided no evidence to support the position that Consultant A would conduct a biased investigation or submit a partial draft ruling. The mere allegation of potential bias is not a sufficient reason for a consultant to recuse herself. Accordingly, EDR will not ask Consultant A to recuse herself. This Department's rulings on compliance are final and non-appealable. [8]

Claudia T. Farr, Director

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to the federal statute governing the recusal of federal adjudicators. Under 28 USC § 455(a), a justice, judge, or magistrate "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

[4] EDR Ruling #2004-934.

[5] Disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. United States v De Luna, 763 F.2d 897, 907 (8th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985).

[6] The Courts recognize that a judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified. Laird v. Tatum, 409 U.S. 824, 837 (1972). Mere conclusory allegations of an obvious predisposition and a specific dislike manifested by a judge for a party and which are not supported by any specific facts does not support a motion for disqualification or recusal under 28 USC § 455. Hayes v National Football League, 463 F. Supp. 1174, 1179 (C.D. Cal. 1979). Impartiality of a federal judge need not be demonstrated beyond a reasonable doubt; instead, the trial judge must hear the case unless there is some reasonable factual basis to doubt his impartiality or fairness which is shown by some kind of probative evidence. Blizard v Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979). Recusal is not to be undertaken lightly, since, if one judge withdraws, another must take up the case, and a judge has a duty not to avoid cases just because they are difficult or controversial. United States v Singer, 575 F. Supp. 63, 68 (D. Minn. 1983), affd, 781 F.2d 135 (8th Cir. 1986).

[7] 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). An adverse ruling on a matter at some earlier stage of proceeding is not a sufficient basis for disqualification of a judge. Potlatch Corp. v United States, 548 F. Supp. 155, 156 (N.D. Cal. 1982).

[8] Va. Code § 2.2-1001(5).