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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2024-5669
February 28, 2024

The Department of Behavioral Health and Developmental Services (the "agency") has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management in relation to alleged noncompliance by the hearing officer in Case Number 12048. The agency further seeks to have the hearing officer removed from this case due to alleged bias.[1]

FACTS AND PROCEDURAL HISTORY

On or about November 17, 2023, the grievant filed a dismissal grievance to challenge her disciplinary termination of employment with the agency. EDR appointed the matter to a hearing officer, effective December 18, 2023. Following an initial prehearing conference with the parties, the hearing was scheduled for February 15, 2024. On February 3, 2024, the grievant requested the hearing officer to issue witness orders to various witnesses. After considering and overruling objections from the agency, witness orders were issued on February 5, 2024. One of the witnesses ordered to appear at the February 15 hearing was an agency employee who will be referred to as Witness A. On February 6, the agency notified the hearing officer that Witness A would be unavailable for the hearing as they will be traveling out of the country to attend to an "emergent family matter." Upon inquiry from the hearing officer, the agency further advised that Witness A was scheduled to depart on February 9 and return on February 18, though it was indicated that the return date was "fluid." The hearing officer communicated to the parties in a 5:41 p.m. email on February 6 that she would take the testimony of Witness A prior to his departure and before the scheduled hearing. The hearing officer indicated that this testimony would be taken at 7:00 a.m. on February 8 at the agency's facility unless another time could be selected. The hearing officer further requested the parties to advise as to their joint availability and provided that she would be available all day (7:00 a.m. – 9:00 p.m.) on February 7 and 8 to take Witness A's testimony. The

[1] The agency's original ruling request was submitted February 7. The agency supplemented the request with a memo on February 13. The hearing officer was invited to submit a response and did so on February 21. Although in a February 13 email EDR specifically invited the agency to submit documentation in support of its ruling request, EDR has received no such information from the agency to date (although the hearing officer provided substantial documentation). The agency has not contacted EDR to indicate that it would be submitting any further information or to request time to do so. Accordingly, EDR is proceeding with this ruling based on the information available.

agency's advocate indicated that he was not available on February 7 or 8 at any time. The grievant's advocate indicated that he was available. Accordingly, the hearing officer issued an amended order on February 7 affirming that the testimony of Witness A would be taken at 7:00 a.m. on February 8. The order notes that the agency can substitute a different advocate for purposes of the testimony. The order also put the parties on notice that if Witness A was not made available the hearing officer "may draw an adverse inference resulting in the Hearing Officer resolving a dispute in the Grievant's favor" and that other sanctions "may be imposed as permitted by the *Rules for Conducting Grievance Hearings*."[2]

The agency asserts that the hearing officer failed to comply with the grievance procedure by issuing the February 7 order for Witness A's testimony. EDR received the agency's ruling request on the afternoon of February 7. As the testimony was scheduled for 7:00 a.m. on February 8, EDR had insufficient time to issue a ruling. Accordingly, EDR advised the parties and hearing officer that pursuant to the *Grievance Procedure Manual*, the request for a compliance ruling paused the grievance process meaning that the scheduled testimony would not take place on February 8.

The agency's ruling request also seeks to have the hearing officer removed from this matter due to alleged bias. By letter dated February 11, sent by email on February 12, the hearing officer denied the agency's then unspecified allegations of bias, but, nevertheless, decided to recuse herself. The grievant asked the hearing officer to reconsider this decision, which she did. In an order dated February 13, the hearing officer issued an order rescinding her withdrawal from the case. In the order, the hearing officer again reiterated that she has neither possessed nor demonstrated bias in the case, and that the agency had not demonstrated support for its motion that she be removed. The hearing officer further noted the provision in the *Rules for Conducting Grievance Hearings* that states the "hearing officer also has a concomitant obligation not to recuse himself or herself absent a valid reason for recusal."[3]

Shortly afterward on February 13, the agency submitted an additional letter providing support to its motion to have the hearing officer removed from the matter. As EDR was now asked to address not only the witness issue but allegations of bias, EDR notified the parties and hearing officer that a ruling would not be issued before the February 15 hearing. As such, the hearing officer was asked to remove the hearing from the docket and continue the matter generally until EDR could issue a ruling. EDR notified the parties that any documentation that supports the allegations of bias (or disputing those allegations) should be submitted.[4] The hearing officer was

[2] The agency states that the inclusion of this discussion in the order was "highly inappropriate" and does not comply with the grievance procedure. EDR finds that the language in the hearing officer's order is accurate. An agency is required to make available its own employees ordered by the hearing officer to appear at hearing. *Rules for Conducting Grievance Hearings* § III(E). Failure to do so without just cause may lead to the hearing officer taking an adverse inference against the noncompliant party. *Id.* § V(B). The agency's argument that the hearing officer has no authority to do so is not accurate.

[3] *Rules for Conducting Grievance Hearings* § III(G) (internal quotation omitted).

[4] As indicated previously, the agency has submitted nothing further.

also invited to submit a response to the agency's allegations, which she has done in the form of an Amended Recusal Order with attached documentation.[5]

DISCUSSION

Witness Testimony

While a compliance ruling request to EDR generally stays a grievance process,[6] EDR prefers not to intervene to disrupt hearing proceedings, especially on the basis of a last-minute request for a compliance ruling. As such, EDR will at times decline to accept such a ruling request depending on the factual circumstances, potential for prejudice, and likelihood of finding that noncompliance has occurred. In this particular case, the imminent nature of the witness testimony and the unusual circumstances led EDR to intervene.

The *Rules for Conducting Grievance Hearings* (the "*Rules*") describe a hearing officer's authority to issue orders, including those involving matters of discovery. One provision of the *Rules* states that "hearing officers may not order (without both parties' agreement) discovery by (i) witness deposition (testimony recorded and provided under oath prior to the hearing) … ."[7] Although the format described by the hearing officer was intended to be a portion of the hearing itself, the timing of the testimony was similar to such a deposition that is not to occur except with the parties' agreement, in part to mitigate the impact of grievance proceedings on state agency operations.

However, EDR's determination is not solely based on this provision of the *Rules*. Indeed, we understand the hearing officer's goal here and we would stress that there could be circumstances in which taking testimony of a witness in advance of hearing could be proper. Even in such circumstances, it is preferable that such advance testimony occur with the agreement of both parties if possible. Here, we cannot find circumstances that would justify the scheduled time, with short notice and over a party's objection, to be reasonable. EDR acknowledges that the hearing officer appears to have been attempting to secure the testimony of a witness, prior to that witness departing the country for an extended period, without disrupting the hearing date. Though a laudable goal, the time available in which to execute that plan and provide the parties (and witness) enough notice and time to prepare – effectively one business day in this case – seems too drastic here. It is also not reasonable to presume that state-employee witnesses can be compelled to appear for testimony outside normal business hours[8] without confirming the availability of the parties and the witness.[9] While such a decision could make sense when there are no other options,

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[5] Further discussion of the hearing officer's Amended Recusal Order will be made below as relevant to the particular questions at issue.

[6] *Grievance Procedure Manual* § 6.1.

[7] *Rules for Conducting Grievance Hearings* § III(E)

[8] *Cf.* DHRM Policy 1.25, *Hours of Work*, at 6 (defining "Public Service Hours" as "[t]he normal operating hours for most state agencies, which consist of at least eight hours per work day, usually from 8:30 a.m. to 4:30 p.m.").

[9] For example, the agency's advocate indicated he was not available. Although this will be discussed below, the hearing officer's response that the agency could simply designate a different advocate on short notice was not reasonable in these circumstances. Generally, parties should be able to have their chosen advocate available in applicable grievance proceedings. Nevertheless, some situations may make a hearing officer's directive to utilize an

there is not information available to EDR that would suggest no other options were reasonably available. Although Witness A was scheduled to be out of the country past the date of the hearing, there was nothing indicating that Witness A would never be available at a later date. Further, allowing the matter to proceed to the hearing would provide record evidence for the hearing officer to further consider the relevance and materiality of Witness A's testimony and other options for receiving their testimony. For these reasons, EDR saw a sufficient basis to intervene to address this matter.

EDR would observe that the manner in which the hearing officer chose to handle this issue was likely influenced by the agency's responses that contained limited information. Although the agency has indicated generally in its letter to EDR that Witness A was not available at the time scheduled by the hearing officer, EDR has not been provided any information suggesting that assertion or a basis for it was conveyed to the hearing officer. In addition, the agency did not provide to the hearing officer or EDR an indication as to whether the witness might have been available at another time on February 7 or 8. Given that Witness A was traveling out of the country due to a family matter, we would expect a hearing officer to demonstrate empathy appropriate to the type of family matter Witness A was traveling to address. Such information (at least in a basic way) could have been conveyed by the agency to provide the hearing officer facts necessary to determine whether it was proper to demand Witness A to testify in advance of their travel date. Lastly, the agency's advocate indicated he was not available at any time on February 7 or 8. The grievant has presented evidence suggesting that may not have been a true statement.[10] Although we can accept and appreciate the agency advocate's intent to challenge having the testimony of Witness A taken at all on the ordered date, the grievant's evidence illustrates why a bare assertion of unavailability may carry little weight. Without finding that such conduct has occurred here, we would caution any grievance participant from manufacturing an inability to proceed based on availability that may not be accurate. EDR acknowledges that these factors explain the hearing officer's attempt to direct a solution with time being short. Nevertheless, EDR finds that the hearing officer's directive for testimony to occur in the manner ordered, within 48 hours immediately before the witness was allegedly preparing to leave the country for an emergent matter, was not compliant under these particular facts.

Request for Removal of Hearing Officer

The *Rules* provide that a hearing officer is responsible for

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable

alternate advocate more reasonable, especially with more advance notice, taking into consideration and balancing the surrounding factors such as the impact to the parties, available alternatives, and/or the importance of the evidence. The information available to EDR does not suggest that the exigencies involved would have mandated that the agency proceed with a different advocate.

[10] The grievant has presented indication that the agency's advocate was at the facility for a little less than two hours meeting with an agency manager on one of the dates in question. The agency's advocate has not responded to the grievant's point or disputed the grievant's assertion that the statement about being totally unavailable on February 7 and 8 was not true.

> rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing[s] Program Administration.[11]

Section III(G) of the *Rules* provides that a hearing officer must recuse herself "in any hearing in which the [hearing officer's] impartiality might reasonably be questioned," unless the parties are advised of the basis for the potential recusal and "the parties consent to the hearing officer's continued service . . . ."[12] Grounds for recusal include situations in which the hearing officer "has a personal bias or prejudice concerning a party or a party's advocate."[13]

EDR's approach to recusal is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.[14] The Court of Appeals has indicated that "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.'"[15] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[16] The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.[17]

The agency has identified multiple examples of conduct or determinations by the hearing officer that it argues supports its argument that the hearing officer is biased and must be removed.[18] The first such example, and the precipitating reason for this ruling, was the above-discussed issue involving the testimony of Witness A. While EDR found that the hearing officer's order was not compliant with the grievance procedure, such a difference in perspective about the proper handling of a time-sensitive matter does not demonstrate bias on the part of the hearing officer. Each of the agency's other points are addressed below.

Acceptance of Recordings into Evidence

The agency asserts that the hearing officer failed to "exercise due diligence" by allegedly accepting into evidence three audio recordings "without the approval from the agency." The agency states that the hearing officer accepted these recordings into evidence without ensuring that protected health information of patients was redacted. The grievant counters that the recordings do not contain protected health information of patients.

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[11] *Rules for Conducting Grievance Hearings* § II.
[12] *Id.* § III(G) (alteration in original) (internal quotation marks and citation omitted).
[13] *Id.*
[14] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.
[15] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").
[16] EDR Ruling No. 2012-3176.
[17] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[18] One of the issues is a mistake by the hearing officer in a witness order that identified a different case. EDR does not equate making a mistake with demonstrating bias. When pointed out, the hearing officer apparently corrected the mistake, and we see no basis to address this issue further.

EDR would observe that information has not been presented about the content of these recordings so we are unable to address the veracity of the agency's claims. Further, it would appear that the agency is objecting to the exchange of exhibits between the parties in advance of the hearing. As the hearing has yet to occur, it is unclear how the hearing officer has admitted any evidence into the record as yet, and the hearing officer has confirmed in the Amended Recusal Order that she has not done so. Further, the agency would have the ability to make objections to such evidence, but EDR has not been presented with information suggesting that such an objection has been made and already overruled by the hearing officer. Indeed, the hearing officer has confirmed that no such objection was submitted by the agency. Accordingly, the agency's claim does not appear to be substantiated that the hearing officer has engaged in any impropriety here, much less anything that suggests bias.

Order for video footage

The agency states that the hearing officer issued an order "regarding an allegation of Agency noncompliance" related to requested video footage. The agency states that the hearing officer was advised that the video footage does not exist and is not related to the actions grieved. While the agency has not described why the hearing officer's order was improper or how it demonstrates bias, EDR acknowledges that the hearing officer has provided a detailed description of the pertinent communications surrounding this issue in the Amended Recusal Order. EDR would further observe that the grievant indicates that this matter is "resolved" by the agency's statement that the video was not related to the actions grieved. The agency's memo provides no indication why the hearing officer's conduct suggests bias, and EDR has also independently found no such indication.

Labeling witnesses as "hostile"

The agency states that the hearing officer "failed to correct" the grievant's advocate when he labeled certain witnesses as "hostile" witnesses in emails exchanged. The agency's advocate further indicates that he raised this to the hearing officer as a matter under the Code of Civility provisions of the *Grievance Procedure Manual*,[19] but the hearing officer did not address the concern. The agency has not provided the email exchanges in question; the grievant states that the agency has not provided any objections by email.[20] The hearing officer has been unable to locate any communication from the agency raising an allegation that the grievant violated the Code of Civility. As the agency has provided no documentation to substantiate its claim that the hearing officer has failed to address its concern, we find the agency's contention without merit.

Moreover, the grievant has provided an explanation about labeling these witnesses as "hostile." The grievant indicates that it is anticipated that these witnesses will offer testimony contrary to the grievant's position in this case. EDR finds nothing unusual with the grievant providing information about the anticipated testimony of certain witnesses and whether such

[19] *Grievance Procedure Manual* § 1.9.
[20] The grievant also states that the agency's advocate has refused to work with the grievant on their list of witnesses, which the hearing officer encouraged the parties to do so that redundant witnesses could be eliminated.

testimony would be in support of or adverse to their case.[21] Labeling a potentially adverse witness as "hostile" does not run afoul of the grievance procedure's Code of Civility in this context. The agency's argument here would appear to be misplaced.

Ruling on witness list

The agency appears to take issue with the hearing officer's ruling on objections to certain of the grievant's witnesses that will be presented on the grievant's character.[22] The agency has provided little, if any, explanation to its argument. The hearing officer's Amended Recusal Order describes the hearing officer's rulings, which appear to have overruled both parties' objections to the opposing party's witnesses. Accordingly, in consideration of the hearing officer's Amended Recusal Order, we have no basis to dispute the hearing officer's ruling and cannot find that it demonstrates any concerns of bias.

Special Justice role

The agency states that the hearing officer also has a role as a Special Justice over facility patient cases and commitment proceedings. The agency states there is a "high probability" that the hearing officer has interacted with the grievant in previous proceedings. The agency also suggests that the grievant's advocate has a familiarity with the hearing officer because he has referred to her as "Judge." Even if there has been contact between the hearing officer and witnesses in this case in other proceedings, the agency has not articulated why such prior contact creates an issue of bias. For example, hearing officers in grievance matters will routinely come into contact with employees and advocates that appear in multiple grievance proceedings. Previous contact with such individuals does not preclude the hearing officer from serving in a case in which such individuals are involved. The agency also suggests that the hearing officer's interaction with witnesses in either grievance or Special Justice proceedings could create a conflict of interest and might cause her to draw a negative inference in future cases. Again, EDR fails to understand the agency's concern here. To find otherwise would mean that a decision-maker could not serve in their role any time they recognized anyone in the proceeding – witness or advocate.[23] If a hearing officer makes determinations that are not based on the record evidence, but are somehow influenced by a personal dislike of an individual or entity, that would be inappropriate. Hearing officers have the duty to recuse themselves if such a concern were to arise.[24] However, there is no evidence of that occurring with this case or with this hearing officer.

In conclusion, EDR finds no merit to the agency's suggestion that the hearing officer is biased such that removal is warranted. EDR has not been provided with information that would call into doubt the hearing officer's ability to provide fair and impartial consideration to the record

[21] Notably, the hearing officer's Scheduling Order requires the parties to include with lists of witnesses "the thrust of what they believe each witness will provide in testimony."
[22] The Amended Recusal Order clarifies that only one of the grievant's proposed witnesses will address the grievant's character, as opposed to the six witnesses the agency suggests were to be character witnesses.
[23] The hearing officer further states that she sought input from the Judicial Inquiry and Review Commission (as well as EDR) and, based on this inquiry, the hearing officer determined there is no conflict of interest or bias.
[24] *E.g.*, *Rules for Conducting Grievance Hearings* § II.

evidence in this case and to conduct a proper proceeding. The hearing officer has appropriately determined that there is no basis for her to recuse herself. Accordingly, the agency's request is denied.

CONCLUSION

With the issuance of this ruling, the stay of the grievance proceeding is lifted. Accordingly, the hearing officer and parties should arrange to reschedule the hearing. If Witness A is not available on the date of the rescheduled hearing, the hearing officer and parties can work to identify a proper way to accept their testimony. For example, the hearing officer could leave the record open at the conclusion of the rescheduled hearing for purposes of having Witness A testify at a later date and in an appropriate format.

EDR's rulings on matters of compliance are final and nonappealable.[25]

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Office of Employment Dispute Resolution

[25] *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).