Issue: Compliance – Grievance Procedure (documents); Ruling Date: April 5, 2017; Ruling No. 2017-4522; Agency: Department of Corrections; Outcome: Hearing Officer Not in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2017-4522
April 5, 2017

The Department of Corrections (the "agency") has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") to challenge the hearing officer's pre-hearing order regarding the production of documents in Case Numbers 10928, 10929, 10930, and 10931. For the reasons discussed below, EDR finds that the hearing officer's order must be amended in certain respects.

FACTS

This ruling pertains to the cases of four grievants who were each issued a Group III Written Notice and terminated from employment with the agency due to alleged misconduct arising out of an incident with an offender in which they were all involved. EDR has appointed the same hearing officer to hear these cases separately, and the four grievants are represented by the same legal counsel. The grievants, through their counsel, submitted a request for the production of documents to the hearing officer on March 4, 2017. On March 8, 2017, the hearing officer ordered the agency to produce thirty separate categories of documents to the grievants. The agency disclosed thirteen categories of documents pursuant to the hearing officer's order on March 10, 2017, and stated that the remaining seventeen categories of documents were "not being sent at [that] time." On March 15, 2017, the grievants, through counsel, notified the agency that its production of documents did not comply with the grievance procedure and the hearing officer's order. On the following day, March 16, 2017, the agency requested a compliance ruling from EDR, alleging that the grievants' requests and, by extension, the hearing officer's order, do not comply with the grievance procedure for a variety of reasons.

DISCUSSION

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."[2] EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. Further, a hearing officer has the authority to order the

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.
[2] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

production of documents.[3] As long as a hearing officer's order is consistent with the document discovery provisions of the grievance procedure, the determination of what documents are ordered to be produced is within the hearing officer's discretion.[4] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[5]

The grievance statutes further state that "[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance."[6] Documents and electronically stored information, as defined by the Supreme Court of Virginia, include "writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form . . . ."[7] While a party is not required to create a document if the document does not exist,[8] parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects that the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

Virginia Freedom of Information Act and DHRM Policy 6.05, Personnel Records Disclosure

In support of its position with regard to some of the seventeen outstanding document requests, the agency asserts that disclosure of responsive documents is not mandated by the Virginia Freedom of Information Act ("FOIA") and/or that DHRM Policy 6.05, *Personnel Records Disclosure*, prohibits the production of non-party employees' personnel records. EDR has consistently held that document requests under the grievance statutes are not associated with FOIA.[9] While EDR will look to FOIA for guidance as to what documents shall be produced under the grievance procedure, FOIA exemptions do not generally provide automatic protection from disclosure. Where appropriate in this ruling, EDR will consider relevant provisions of FOIA as a guide in assessing whether there is just cause to withhold responsive documents.

Similarly, EDR has long held that, to the extent materials otherwise protected by a DHRM policy are sought by a grievant in conjunction with the grievance process, DHRM policy is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.[10] Thus, where documents from a non-party employee's personnel record are relevant to a grievance, DHRM Policy 6.05, *Personnel Records Disclosure*, do not constitute

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[3] *Rules for Conducting Grievance Hearings* § III(E).
[4] *See, e.g.*, EDR Ruling No. 2012-3053.
[5] *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citation and internal quotation marks omitted)); Morris v. Commonwealth, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citation omitted)).
[6] Va. Code § 2.2-3003(E); *Grievance Procedure Manual,* § 8.2.
[7] Rules of the Supreme Court of Virginia, Rule 4:9(a).
[8] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[9] *See, e.g.*, EDR Ruling No. 2014-3728; EDR Ruling Nos. 2010-2381; EDR Ruling No. 2009-2136; *see also* Frequently Asked Grievance Questions, http://www.dhrm.virginia.gov/EDR/faqs.htm.
[10] *E.g.*, EDR Ruling Nos. 2009-2348, 2009-2357; EDR Ruling No. 2006-1312; EDR Ruling No. 2004-683.

just cause to deny access to documents by itself. Accordingly, this argument will not be discussed further in this ruling.

The parties' additional arguments regarding specific document requests that are in dispute are numbered in the manner in which they were originally listed in the hearing officer's order.

> 10. *"A copy of the written notices and corresponding institutional investigation report and special investigation unit reports concerning any incidents involving the use of force since 2011";*
> 14. *"A copy of the written notice and corresponding institutional investigation report and special investigations unit reports involving an incident . . . where Officer [N] was disciplined for a similar incident";*
> 15. *"A copy of any videotape footage to include both rapid eye footage and any hand held camera footage of the incident for which Officer [N] was disciplined for";*

Requests 10, 14, and 15 are effectively requests for information related to disparate or inconsistent discipline of other employees who may have engaged in misconduct similar to that for which the grievants were disciplined. The agency argues that Request 10 is overly broad. The agency further asserts that many of its internal investigations relate to "conduct that could be considered criminal," and that the Code of Virginia prohibits the disclosure of "[c]riminal history record information."[11] The agency's reliance on this provision of the Code appears to be misplaced, as the section cited by the agency in support of this argument protects the disclosure of criminal records,[12] and EDR has reviewed nothing to indicate that an employee's disciplinary and/or investigative records would consist of his or her "criminal history record information" as that term is defined in the Code.[13]

Having considered the arguments advanced by the parties, however, EDR finds that, if it is to proceed, the hearing officer's order with regard to these requests must be modified in certain general respects.

Similar Misconduct

Typically, records of disciplinary action are relevant only if they relate to similar misconduct committed by other employees.[14] In determining whether the misconduct of other employees is similar to a grievant's, EDR has further stated that "[t]he key is that the misconduct be of the same character."[15] In this case, the Written Notice issued to the grievants state that they used "[e]xcessive "[f]orce" in an encounter with an offender. Request 10 seeks disciplinary and

[11] Va. Code § 19.2-389.
[12] *Id.* §§ 9.1-101, 19.2-389. The Code defines "criminal history record information" as "records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, information, or other formal charges, and any disposition arising therefrom." *Id.* § 9.1-101.
[13] If any responsive documents do indeed consist of "criminal history record information," the agency may present any argument that there is just cause to withhold responsive documents to the hearing officer. *See Rules for Conducting Grievance Hearings* § III(E).
[14] *See, e.g.*, EDR Ruling No. 2010-2566.
[15] EDR Ruling No. 2010-2376 n.19.

investigative records for "any incidents involving the use of force since 2011." Request 14 seeks these same documents in relation to an incident involving a specific agency employee. These requests must be limited to charges of "excessive force" to adhere to relevancy of similar behavior and/or misconduct by other agency employees. Accordingly, documents responsive to Request 14 are only relevant to the extent they relate to discipline for "excessive force."

Scope of Production

In most cases involving a claim of inconsistent treatment of employees, a grievant may obtain relevant documents addressing the treatment of employees in the grievant's reporting line, division/department, and/or at the same office or facility. Request 10 appears to contain no limitation on the scope of employees about whom responsive documents must be produced. Having reviewed the information submitted by the parties, EDR has not identified any reason why documents related to all agency employees should be produced. Accordingly, there is just cause to limit disclosure of documents to the grievants because complying with the hearing officer's order would impose an undue burden on the agency. The hearing officer's order must be narrowed to discipline issued at the grievants' facility.[16]

The grievants also seek records back to 2011. EDR has reviewed nothing that would demonstrate why review of records going back that far is relevant. Generally speaking, the longer the time period between events, the less relevant they are to demonstrate potentially inconsistent disciplinary action. This is especially due to the fact that many occurrences could change an agency's approach over time, including a change in management. Accordingly, EDR will impose a three year period prior to the incident at issue for records to be gathered. Ordering documents from 2011 to the present is not supported by the information presented to EDR.

Investigative Files

As they are currently phrased, Requests 10, 14, and 15 would require production of the contents of investigative files relating to incidents in which other employees were potentially subject to disciplinary actions or counseling. For purposes of presenting evidence on the issue of inconsistent discipline, however, neither the content of an investigative file nor the details of how the investigation began (the "initial action") are normally relevant. It is not the hearing officer's role to take evidence on and re-litigate past disciplinary actions not at issue. To determine whether the agency has taken disciplinary action consistently and assess the similarity of the behavior to the instant case, all that is relevant is the final action (whether disciplinary or counseling) and some recitation of the misconduct that gave rise to the action. Thus, the agency is not required to produce the entire contents of investigative files or "videotape footage" of the incident involving Officer N, or any other incident for which documents are produced pursuant to these requests. The only documents subject to disclosure would be redacted information reflecting the agency's final action and describing the misconduct in sufficient detail as is appropriate for the particular case.[17]

[16] If the hearing officer finds that there are sufficient reasons to better define the scope of production with input from both parties, he has the discretion to do so.

[17] Accordingly, if the agency wishes to produce this information in a compiled format, such as a table, rather than the disciplinary action documents themselves, that would be appropriate as long as the relevant information identified above is conveyed.

These requests also appear to seek documents regarding incidents that may not have resulted in discipline or counseling. In such situations, there may be no document that shows the final action taken in response to the incident or even documentation about the incident. Indeed, gathering responsive information for incidents that did not rise to the level of disciplinary action is inherently difficult, especially considering there is no requirement under the grievance procedure for the agency to create a document if it does not already exist. However, if the agency determines that investigation files that resulted in no disciplinary action or counseling exist in the relevant scope and relating to misconduct of a similar character, it would only be obligated to provide documentation that contains a recitation of the misconduct that gave rise to the investigation.

With respect to Request 10, 14, and 15, the hearing officer's order must be modified to be consistent with the above parameters.

13. *"A color copy of any photographs taken of Offender [S] on the date of the incident or any time thereafter";*
21. *"A copy of the medical records of Offender [S] from the 26th of August, 2016 through today";*
22. *"A copy of any medical reports or records regarding injuries received by anyone involved with the incidents that day to include Offender [S], Offender [H], Sergeant [P], or Officer [L]";*

The grievants claim that documents responsive to Requests 13 and 21 are relevant to show the "extent or level of injury" to the offender during the incident for which they were disciplined. The grievants further argue that documents responsive to Request 22 would "show the combativeness of the inmate" on the day the incident occurred. The agency claims that medical records of the offender and other employees are protected from disclosure by the Health Insurance Portability and Accountability Act of 1996.[18]

EDR finds that the documents sought in these requests are not relevant to the management actions at issue in this case and need not be produced. The grievants were disciplined for using excessive force during an encounter with an offender. Any of the grievants may have used excessive force without necessarily causing injury to the offender. In other words, the degree to which the offender was injured does not necessarily determine whether any of the grievants used excessive force in violation of agency policy.[19] Additionally, any minimal relevance of the offender's medical information is outweighed by the privacy interest of the offender.

Evidence that the offender may have caused injury to agency employees is not relevant to show whether the level of force used by the grievants was appropriate under policy. EDR is aware of nothing to suggest that agency employees are permitted to use excessive force to restrain an offender when that offender is violent or has injured agency employees. Furthermore, again, any minimal relevance of the medical information of other agency employees is outweighed by the privacy interest of the employee in his/her medical records. Any potentially

[18] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.
[19] EDR has also reviewed nothing in the information submitted that the degree to which the offender was injured is in dispute or the basis for the disciplinary action.

relevant information about the combativeness of the offender during the incident can be obtained through other evidence or testimony rather than these records. Accordingly, EDR finds that the agency need not produce documents responsive to these requests.

However, EDR does note that the agency has indicated it has no objection to providing each individual grievant with his own medical record. To the extent any of the four grievants would like a copy of his own medical record, he would be entitled to request and receive that information.

16. *"A copy of any emails sent or received from the accounts of the [agency employees] concerning [Grievants] from the date of 08/26/2016 through today";*

The agency argues that Request 16 is overly broad and producing email records from the specified individuals would impose an undue burden. While the grievants dispute the agency's assertions and state that the agency can utilize a program to "simply" search the grievants' names over the identified email accounts, there is still some burden associated with this request. As it is currently phrased, this request would also result in the disclosure of any emails referencing any of the four grievants for a period of over six months. While there may be records of some emails from this time period potentially relevant to the grievances, the grievants have not demonstrated any compelling justification for conducting a search of the identified individuals' email accounts that would warrant the agency undertaking the burden to do so. Nothing presented by either party addresses why certain of the identified individuals would potentially have relevant emails. Further, EDR is reluctant to order a comprehensive search of investigator email accounts without understanding the potential impacts. Accordingly, it is EDR's determination that the agency need not produce records pursuant to the request at this time. If the grievants wish to seek records pursuant to this request, further discussion with the hearing officer will be necessary to explain and balance the parties' needs and burdens. For example, at a minimum, the hearing officer's order with regard to Request 16 would have to be revised such that it is sufficiently tailored so as to capture only those emails that are related to the incident for which the grievants were disciplined.

17. *"A copy of any emails from the Warden or any other administration official concerning the proper procedure to carry an offender or regarding a prohibition against carrying an offender in the future";*
18. *"A copy of an email sent out by Captain [S] to other staff members concerning the carrying of offenders sent sometime after this incident";*

The agency asserts that documents responsive to these requests are protected from disclosure pursuant to Section 8.01-418.1 of the Code of Virginia. Such reliance is misplaced. The Code section cited by the agency relates to the admissibility of evidence in civil court proceedings; the grievance procedure, however, states that "[f]ormal rules of evidence do not apply" in grievance hearings,[20] and thus the agency's argument does not constitute just cause for responsive documents to be withheld.

[20] *Grievance Procedure Manual* § 5.8(5); *Rules for Conducting Grievance Hearings* § IV(D).

The agency claims that it has already produced documents responsive to Request 17 and objects to production of the documents sought in Request 18. The grievants assert that they have not received documents in response to Request 17, but that the agency has provided the documents sought in Request 18. Regardless of what has not been produced by the agency in response to these two requests, the agency must provide the grievants with any documents that have not yet been disclosed.

19. *"A copy of institutional infractions of Offender [S]";*
20. *"A copy of the complete criminal record of Offender [S] as available on CORIS";*

The grievants argue that the offender's record of "institutional infractions" and criminal history, as sought in Requests 19 and 20, are relevant to show that the offender "has a history of violence" and are necessary to "attack the credibility" of the offender's statements about the incident. EDR finds that, while documents responsive to these requests could potentially be minimally relevant, the agency's interest in protecting the documents from disclosure outweighs their limited probative value. As stated above, EDR is unaware of anything to suggest the use of excessive force would have been justified because the offender had engaged in violent behavior before or during the incident, and thus any documents sought for that purpose would not be relevant.

In addition, while information about the offender's previous behavior and criminal convictions could be relevant to impeach credibility of any statements he may have provided to the agency, it appears that any such documents in the agency's possession would not typically be subject to disclosure under FOIA or other relevant provisions of the Code of Virginia.[21] Although certain circumstances could justify the production of these types of documents in relation to a grievance hearing, there is nothing under the limited disclosure provisions of the grievance procedure that would support disclosure of these offender records in this case. Furthermore, EDR has reviewed nothing to suggest that the offender will testify at the hearing or, indeed, whether the offender provided information during the investigation that was used as the primary basis for the issuance of the disciplinary actions such that the grievants will be unable to mount a defense to the charges in the absence of responsive documents. While the agency is not required to produce documents responsive to Requests 19 and 20, the grievants may question any witnesses who testify about their knowledge of the offender's behavior both before and during the incident, provided the hearing officer finds that such evidence is relevant.

23. *"A copy of the duty rosters for 08/26/2016 through 08/29/2016";*
25. *"A copy of all log books from B-[Building] on the date of the incident";*

The grievants assert that documents responsive to these requests are relevant to "identify potential witnesses," to verify the grievants' movements on the day the incident occurred, and to show that the facility "was working short of staff" when the incident occurred. The agency argues that complying with these requests will "jeopardize the security [of agency] facilities and operations, and the security and safety of staff, offenders and the community." The agency's arguments demonstrate just cause for withholding these records. Documents that would tend to show when and where the grievants were located in the facility on the day of the incident could

[21] *See* Va. Code §§ 2.2-3706, 19.2-389.

be of limited relevance to the grievants' theories as to why the discipline was unwarranted or too severe. Consequently, the agency's arguments about potentially jeopardizing security outweigh the grievants' need for these documents and they may be withheld. Also, to the extent the grievants need to identify eyewitnesses to the incident, there should be easier ways to locate such witnesses than producing extensive logbooks and duty rosters, which will contain largely irrelevant information. Further, as the grievants were obviously participants in and present at the incident, they should be aware as to the identity of eyewitnesses.

27. *"A copy of all communications from the agency to upper level management concerning this incident to include emails, memorandums, letters and the like concerning this incident";*

The agency claims that Request 27 is overly broad because it "gives no start or stop times" and does not "explain[] the meaning of the terms [sic] 'and the like.'" EDR's review indicates that this request is not sufficiently tailored to capture documents that might be relevant to the grievances. The members of "upper level management" targeted by this request are not identified with sufficient specificity to allow the agency to conduct a reasonable search for responsive documents. As written, a search for relevant documents would necessarily entail potentially reviewing extensive amounts of emails from individuals who may or may not have any involvement in or relevant information about the incident at issue in the grievances. As such, it would be overly burdensome to require the agency to respond to this request. The grievants have demonstrated no basis to reasonably explain why the agency should conduct such an extensive search. Accordingly, there is just cause for the agency to not respond to this request.

28. *"A copy of any policy the Agency alleges is relevant to these proceedings";*
29. *"A copy of any agency policy containing a definition for what 'due care' is";*
30. *"A copy of any agency policy that allows someone to be disciplined for the actions of another person."*

The agency argues that all documents responsive to Request 28 have been produced, that no documents responsive to Request 29 exist, and that Request 30 is "ill-conceived" because no such policy exists. The grievants agree that the agency has complied with Request 28. With respect to Requests 29 and 30, the grievance procedure provides that a party is not required to create documents that do not exist.[22] EDR considers the nonexistence of responsive documents to be just cause that excuses a party's failure to provide requested information.[23] EDR has reviewed nothing to show that any documents responsive to Requests 29 and 30 exist and have been improperly withheld by the agency, and therefore considers these requests to have been satisfied.

CONCLUSION

Based on the foregoing, the hearing officer is directed to amend his order as it relates to Requests 10, 14, and 15 so it is consistent with the parameters and directives in this ruling. The agency must produce documents responsive to those requests, as well as any other outstanding requests discussed in this ruling. The agency must redact personally identifying information in

[22] Va. Code § 2.2-3003(E).
[23] Although not an issue in this case, there are circumstances under which some act of bad faith by a party could negate a claim of just cause based on the nonexistence of requested documents.

any documentation produced in response to these requests to protect the confidentiality of nonparties.[24]

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

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[24] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[25] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).