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COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2023-5551
May 25, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) in relation to the alleged noncompliance by the Department of Corrections (the “agency”).

FACTS

On or about October 31, 2022, the grievant initiated a grievance challenging his receipt of a Group II Written Notice for using obscene or abusive language. Effective February 14, 2023, following the agency head’s qualification of the grievance for a hearing, EDR appointed the matter to a hearing officer. On April 3, 2023, at the grievant’s request, the hearing officer ordered the agency to produce documents related to disciplinary actions similar to that issued to the grievant in this matter. The order specified that such similar disciplinary actions would include Notices of Improvement Needed/Substandard Performance issued over the past three years. Although the agency requested that the hearing officer reconsider the portion of the order relating to Notices of Improvement Needed, the hearing officer declined to modify it on the following grounds:

The Agency’s treatment of similar offenses could very well include such informal discipline, and is directly relevant to the Agency’s consistency in applying discipline. . . . Further, I overrule the Agency’s objection of undue hardship, as the order is confined to the grievant’s facility.¹

To account for the privacy interests of other employees, the hearing officer’s order allowed for redaction of personally identifiable information and/or the production of relevant information in summary form (*e.g.*, a spreadsheet).²

The agency has requested that EDR find the hearing officer’s order to be out of compliance with the grievance procedure on grounds that the requested Notices of Improvement Needed would not represent discipline for comparable offenses, would violate the privacy interests of the subject employees, and would place an undue burden on the agency’s operations.

¹ Order of Hearing Officer (“Order”), Case No. 11924, April 5, 2023, at 3.

² *Id.* at 1.

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.”³ EDR’s interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided. Just cause is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”⁴ For purposes of document production, examples of just cause include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.⁵ In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well-established and applicable legal privilege,⁶ EDR will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party’s particular interests in obtaining the document.⁷ The grievance statutes further provide that “[d]ocuments pertaining to non-parties 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.”⁸

EDR has also long held that, upon a party’s request for documents, the grievance procedure requires the responsive party to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner. All such documents must be provided within five workdays of receipt of the request. If it is not possible to provide the requested documents within the five-workday period, the party must, within five workdays of receiving the request, explain in writing why such a response is not possible, and produce responsive documents no later than ten workdays from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or “just cause,” the withholding party must provide the requesting party with a written explanation of each claim, no later than ten workdays from receipt of the document request.⁹

In this case, the Agency objects to the hearing officer’s order to produce the following to the grievant:

Copies of all Notices of Improvement Needed/Substandard Performance notices issued to staff in the last 3 years for similar conduct. Personally identifiable information may be redacted to preserve privacy. The Agency may produce the data with a summary document in the form of a spreadsheet of notices or instances for the similarly situated individuals who were subject to the notices for the same

³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁴ *Grievance Procedure Manual* § 9.

⁵ *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936.

⁶ Certain well-established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. *See, e.g.*, EDR Ruling No. 2002-215 (discussing attorney-client privilege).

⁷ *See, e.g.*, EDR Ruling No. 2010-2372.

⁸ Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

⁹ *Grievance Procedure Manual* § 8.2.

offense or for the same conduct as the grievant's at [the facility where the grievant works].¹⁰

The hearing officer found that such documents would be relevant to the defense of inconsistent discipline, acknowledging the grievant's claim that he knew of three "instances of similar offense with the last three years" that apparently did not result in formal discipline.¹¹ EDR finds no grounds to disturb the hearing officer's analysis as to the relevance of the requested documents. Although the agency contends that the grievant has offered no evidence that inconsistent discipline for similar offenses exists, the grievant's lack of access to relevant evidence is presumably the basis for his documents request.¹² Absent just cause, the agency has an obligation to conduct a reasonable search of its records for relevant documents responsive to the request.¹³ Following such search, if the agency withholds responsive documents for just cause, the agency must provide an explanation of the basis for withholding.¹⁴

Here, the agency appears to contend that there is just cause not to conduct any search for the documents at issue, due to the operational burden of reviewing informal disciplinary documents. Because a Notice of Improvement Needed is not the equivalent of formal discipline,¹⁵ information about such Notices issued to employees is kept informally at the supervisory level and not in an employee's personnel file, unless as an attachment to a subsequent formal action that becomes part of a personnel file.¹⁶ Accordingly, EDR has recognized that the time required to search all such records at a facility individually will often be so extensive as to impose an undue burden on an agency, outweighing relevancy as a consideration.¹⁷ To the extent that the hearing officer's order requires facility management to search each and every supervisory file at the institution for relevant informal disciplinary documents, the effort required would appear to be unreasonable based on the information available to EDR at this time. The grievance procedure does not authorize orders for a party to perform an unduly burdensome search.

Nevertheless, the grievant remains entitled to discover relevant evidence that can be identified through reasonable search efforts. Given the agency's apparent objection to any search for informal discipline, however, it is not clear that the issue of reasonable search in this context has been fully explored before the hearing officer. As the hearing officer noted, "the manner and mode of the Agency's recordkeeping or document search" is largely within the agency's control.¹⁸ Therefore, where relevant documents may exist, the agency bears some burden to suggest what limits on a reasonable search might be practical in light of its particular operations.

¹⁰ See Order at 1-2.

¹¹ In his Order, the hearing officer noted the agency's position that there were no written notices responsive to the grievant's request that were related to similar offenses by other employees. See Order at 2.

¹² The agency also appears to argue that informal disciplinary actions are dissimilar from Written Notices by definition. EDR agrees, but this argument again would seem to support the grievant's contention that issuing informal disciplinary actions for similar misconduct would demonstrate inconsistent discipline.

¹³ See *Grievance Procedure Manual* § 8.2.

¹⁴ *Id.*

¹⁵ DHRM Policy 1.60, *Standards of Conduct*, at 6-7.

¹⁶ See DHRM Policy 1.40, *Performance Planning and Evaluation*; DHRM Policy 6.10, *Personnel Records Management*.

¹⁷ See, e.g., EDR Ruling No. 2023-5504.

¹⁸ Order at 3.

For example, an unduly burdensome search could be made reasonable by narrowing its parameters. Here, it appears that the hearing officer's order was at least partially informed by the grievant's claim that he knew of three specific employees who did not receive formal disciplinary action for similar offenses. The agency has not presented grounds for EDR to find that an inquiry regarding these three employees would be so burdensome as to constitute just cause not to conduct any search at all.

As another example, where rigor or completeness would render a search unreasonably burdensome, a less formal search could satisfy the requirements of the grievance procedure – *e.g.*, soliciting responsive information from those managers deemed most likely to be aware of its existence. In this case, the Written Notice charges the grievant with using a specific obscenity to demean a colleague. EDR is not aware of information to suggest why it would be unreasonable to inquire with facility managers whether they have addressed the same or similar language with other employees within the past three years, consistent with the hearing officer's order. The agency is encouraged to present these or any other strategies it deems feasible for the hearing officer's consideration. Future orders on this issue should account for any unusual operational burdens on the agency as well as the likelihood of identifying material evidence.

EDR emphasizes that, as it relates to the informal discipline of other employees, such documents would be relevant and discoverable only to the extent they relate to similar misconduct committed by other similarly situated employees.¹⁹ The question of what records of “similar misconduct” must be produced is defined by the actual misconduct at issue in the grievance.²⁰ EDR has stated that “[t]he key is that the misconduct be of the same character” as the misconduct claimed to have resulted in inconsistent discipline.²¹ In this case, therefore, and absent just cause, the agency would be required to produce only information about informal discipline documenting similar conduct to the conduct at issue in this case, *i.e.*, obscene or abusive language of the same character described on the Group II Written Notice. If such information is identified through reasonable search, it should be produced to the grievant with sufficient protections for the privacy interests of the third parties named therein, per the hearing officer's order.²² If, instead, the agency's reasonable search leads it to assert that no relevant documents exist, the grievant may present the hearing officer with any basis he may have to challenge the agency's assertion. Should the hearing officer decide that the grievant has articulated a sufficient basis for his challenge, the hearing officer may, in his discretion, review any disputed documents *in camera* to determine their relevance.

CONCLUSION

Based on the foregoing, EDR returns the matter to the hearing officer for further discussion with the parties as to reasonable search parameters. However, recognizing that the particulars of a reasonable search for informal disciplinary documents may be susceptible to more tailored instructions, this ruling is not intended to determine that issue with finality. To the extent that further questions arise with respect to compliance with the hearing officer's order and/or the

¹⁹ See, *e.g.*, EDR Ruling No. 2010-2566.

²⁰ EDR Ruling No. 2023-5500.

²¹ *Id.* at 3 (quoting EDR Ruling No. 2010-2376 n.19).

²² If relevant information is identified and determined to be subject to production, EDR further states that we generally support a response to a document request that produces the information in an alternate format to better protect confidential information, such as, for example, a spreadsheet. See EDR Ruling No. 2023-5500.

identification of responsive documents, the parties should raise those specific issues, as needed, to the hearing officer for an initial determination.

EDR's rulings on matters of compliance are final and nonappealable.²³

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²³ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).