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**COMPLIANCE RULING**

In the matter of the Virginia Department of Corrections  
Ruling Number 2023-5557  
May 26, 2023

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

FACTS

On or about March 17, 2023, the grievant initiated a grievance challenging her receipt of a Group III Written Notice issued on February 22, 2023. The Written Notice at issue alleges that the grievant allowed another agency employee (Counselor A) to use the bathroom in an unoccupied cell that was being actively video-recorded and did not report the incident to Counselor A or management. The grievant sought multiple categories of records from the agency, some of which the agency provided, some of which the agency has withheld for various reasons. The grievant asserts that the agency has failed to comply with the grievance procedure by withholding requested documentation. The grievant now asks EDR to issue a compliance ruling regarding these issues, which are discussed in more detail below.

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.”<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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

<sup>1</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>2</sup> *Grievance Procedure Manual* § 9.

<sup>3</sup> See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

applicable legal privilege,<sup>4</sup> 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.<sup>5</sup> The grievance statutes further provide 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."<sup>6</sup>

EDR has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty 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 the 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.<sup>7</sup>

#### *Discipline issued to other employees*

The grievant identifies two agency employees who allegedly failed to report an accident in a state vehicle and seeks information about discipline issued to these individuals. The grievant appears to assert that the identified circumstance is relevant because the grievant is being held responsible for a failure to report occurrences and/or "dishonest" behavior, whereas those two employees were allegedly not demoted, reassigned, transferred, or given a reduced pay. The grievant further argues that such evidence supports a claim of discrimination on the basis of race due to the purportedly different disciplinary results reached. Typically, records of disciplinary actions are relevant only if they relate to similar misconduct committed by other similarly situated employees.<sup>8</sup> 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."<sup>9</sup> While citation to the same or similar policies and offense codes may be relevant, it is not dispositive as to whether discipline is of the same character. Accordingly, the question of what records must be produced is defined by the actual misconduct at issue.<sup>10</sup>

While the occurrence giving rise to the disciplinary action in this case and that of the incident involving damage to a state vehicle appear to involve some conduct that is similar (failing to report), the factual situations are quite dissimilar. The car accident incident appears to be a more

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<sup>4</sup> 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).

<sup>5</sup> *See, e.g.*, EDR Ruling No. 2010-2372.

<sup>6</sup> Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

<sup>7</sup> *Grievance Procedure Manual* § 8.2.

<sup>8</sup> *See, e.g.*, EDR Ruling Nos. 2010-2566, 2010-2376 n.19.

<sup>9</sup> EDR Ruling No. 2023-5500 at 3 (quoting EDR Ruling No. 2010-2376 n.19).

<sup>10</sup> *Id.*

rudimentary failure to follow policy, whereas the grievant's disciplinary action arises under concerns of anti-harassment, civility, and ethics. Accordingly, EDR cannot find that the discipline in the failure to report a car accident is of the same character as the grievant's disciplinary action. Further, because we are considering the production of disciplinary records of non-parties, we must be mindful of protecting those individual's privacy interests in their confidential personnel information.<sup>11</sup> Consequently, it is EDR's determination that these records do not need to be produced at this stage of the grievance.

EDR notes that this determination presents somewhat of a close call as a matter of relevancy. Should additional information become available suggesting that documentation withheld at this stage is material to the grievant's claims and should be produced at a later phase in the grievance, our determinations in this ruling do not prohibit such production if ordered -- for instance, at the hearing phase of this grievance -- if it advances that far. If such records are later 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. Disclosure of the actual disciplinary records themselves, with appropriate redactions, is not necessarily precluded, but can lead to unforeseen complications. Even after redacting a disciplinary record, there could be significant personnel information remaining that might later be identified and linked to a particular individual. Further, much of the content of the disciplinary records are not relevant to the issues grieved. The only information that is relevant is the ultimate action taken with enough description of the misconduct to understand its relevance to the question of mitigation. Therefore, to avoid production of non-relevant personnel information and inadvertent disclosure of identifiable personnel information, EDR finds that a spreadsheet approach would meet an agency's obligations to produce information about relevant discipline of non-parties.<sup>12</sup> However, the agency would be required to produce enough details about the misconduct in each comparable circumstance for a proper evaluation of the relevant evidence. If the agency is unable to provide sufficient information in a spreadsheet format, then the redacted records themselves should be produced. Lastly, EDR would note that nothing in this ruling would prevent the grievant from eliciting testimony about these events and any disparate disciplinary actions through the questioning of witnesses at hearing, if determined relevant by the hearing officer.

#### *Written Statement of Counselor A*

The grievant has sought a copy of the written statement of the incident from Counselor A. While the agency has described that this statement is "privileged" and will not be provided, the agency has not asserted an apparent privilege, but is rather attempting to protect information reported by other employees so as not to dissuade future reports by employees and to protect the integrity of the "process." Although the agency's concern is understandable, the concerns about the integrity of the investigation are lessened at this point since the investigation is concluded. Further, it cannot be said that Counselor A's written statement is not related to the actions grieved. Indeed, the agency cited to this statement as a supporting document when providing the grievant due process for this incident. Therefore, EDR cannot find that there is a just cause basis to withhold a record so central to the discipline at issue as this written statement in its entirety. The agency

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<sup>11</sup> See, e.g., Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>12</sup> See EDR Ruling No. 2023-5500.

must produce the statement, but should do so in a manner as to preserve the privacy of the individuals not personally involved in the grievance.<sup>13</sup>

*Training Record of Counselor A*

The grievant has sought the training record of Counselor A to demonstrate that the Counselor was aware of the observation cell and, presumably, that it was being recorded. The agency has withheld the training record on the basis of an alleged lack of relevance and to protect the privacy of individuals not personally involved in the grievance. The agency's assertions of protecting another employee's personnel information is a legitimate assertion of just cause. While we cannot say that such information is entirely irrelevant, it is not clear that information in the grievant's training record will demonstrate evidence in support of the basis for which it is requested and is, therefore, of limited materiality. Accordingly, EDR finds that protecting Counselor A's personnel information is sufficient just cause to outweigh any limited relevance of this information. The agency need not produce the training record of Counselor A. As stated above, nothing in this ruling would prevent the grievant from eliciting testimony about Counselor A's knowledge and/or training through the questioning of witnesses at hearing, if the grievance advances that far.

CONCLUSION

EDR directs the agency to provide the grievant with requested records to the extent described in this ruling. The agency is directed to provide this information within ten workdays of the date of this ruling.

EDR's rulings on matters of compliance are final and nonappealable.<sup>14</sup>

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<sup>13</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

<sup>14</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).