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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2023-5495
January 20, 2023

The Virginia Department of Corrections (the “agency”) has requested a compliance 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 orders regarding the production of documents in Case Number 11868. For the reasons discussed below, EDR directs the hearing officer to reconsider the orders for production of documents.

PROCEDURAL BACKGROUND

The grievance at issue in Case Number 11868 challenges the grievant’s receipt of a Group III Written Notice with termination of employment. In an email sent on the afternoon of December 2, 2022, the grievant sought the production of 19 categories of records from the agency. The following Monday, December 5, 2022, the hearing officer issued an order for the agency to produce all 19 categories of records. It is EDR’s understanding that no conference between the parties and the hearing officer has occurred to discuss these record requests. The agency sought this ruling by an initial request dated December 20, 2022. Subsequently, the grievant sought an additional four categories of records on December 21, 2022, which the hearing officer directed the agency to produce by order issued on December 29, 2022. The agency has asked EDR to find that the hearing officer abused his discretion in ordering the agency to produce the requested documents. The agency supplemented its arguments in a submission dated January 10, 2023, which the grievant responded to by letter on January 20, 2023.

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, in a timely fashion.”¹ 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.”² For

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

² *Grievance Procedure Manual* § 9.

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.³ 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,⁴ 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.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.

Further, a hearing officer has the authority to order the production of documents.⁹ 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.¹⁰ For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.¹¹

The agency has made certain blanket statements, such as all records requested by the grievant not being relevant or the grievant's document requests being overly burdensome. In reviewing the records requested, we would agree that it appears the grievant's requests are potentially overly broad and seek some information that would not be relevant to the actions grieved. However, EDR is unable to assess such claims in this ruling as the agency has not presented any context or argument for the blanket assertions. Accordingly, EDR will assess the

³ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

⁴ 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).

⁵ See, e.g., EDR Ruling No. 2010-2372.

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 *Rules for Conducting Grievance Hearings* § III(E).

¹⁰ See, e.g., EDR Ruling No. 2012-3053.

¹¹ 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)).

claims presented by the agency in its supplemental compliance ruling request as to points have been raised on specific items.

Lack of Opportunity to be Heard

The agency asserts that the hearing officer issued orders for documents without the opportunity to provide input or objection. The agency states that there are certain records that are not relevant and/or are already in the possession of grievant's counsel.¹² It is not clear whether the agency has sought a pre-hearing conference with the hearing officer to address the document requests and whether it was denied, but, to EDR's awareness, no such conference has occurred. This matter appears to be complex factually and has had associated criminal proceedings. Thus, it would appear reasonable that the hearing officer should hear from the parties to determine issues of relevance and need. EDR directs that the hearing officer hold the issued orders in abeyance until such time as a pre-hearing conference can be held for the parties to address the issues for the hearing officer's consideration. Following such a conference, the hearing officer's orders must be modified based on the parties' contentions at the conference and in accordance with the directives in this ruling.

Item 11 – active/pending Written Notices for a relevant witness

The grievant has sought to have produced Written Notices that were active or pending in November 2021, shortly before the incidents giving rise to this case occurred, for a relevant witness. EDR presumes that the purpose for this inquiry is a credibility issue as to the witness. There is no general rule for the admissibility of past disciplinary records of witnesses in a grievance hearing. However, EDR does not adopt a practice that a witness's past disciplinary records must be produced in all grievance proceedings. Indeed, in most matters, such issues are of minimal relevance at best. Further, under the facts available, EDR finds that any relevance of such records is outweighed by the privacy interests of the non-party in their confidential personnel records. Accordingly, in reassessing the document orders in this case, the hearing officer shall not order production of Item 11 at this time.¹³

Item 13 – defensive tactics training records for a relevant witness

The grievant has sought records that reflect a relevant witness's completed defensive tactics training. EDR is unclear why such records would be relevant. Any minimal relevance here is outweighed by the privacy interests of a non-party in their confidential personnel records. The hearing officer is directed to omit Item 13 in any future order for production of documents.

Item 15 – use of force and incident reports concerning a separate incident

Based on the description of the records, this request appears to relate to an incident that was different than the one for which the grievant was disciplined. It appears that the grievant is seeking this information to question the credibility of a relevant witness. While we do not find that

¹² The grievant's attorney notes that those documents in their possession are potentially subject to a protective order and unable to be used for purposes of the grievance. Such a matter is proper for the hearing officer to assess and determine the impact on the document requests in this case.

¹³ EDR's ruling in this regard does not prevent the hearing officer from admitting testimony about such issues at hearing.

information about this incident cannot be asked about at hearing (if permitted by the hearing officer), we also do not find that production of the records themselves is warranted. Even if there is limited relevance to the issues of this case, requiring production of this information will result in the disclosure of non-relevant personnel information and the records of an unrelated agency investigation. The grievant's interests in obtaining the requested information are accordingly outweighed. To the extent the hearing officer finds the information relevant, the unavailability of the records does not prevent the grievant from pursuing this line of questioning. The hearing officer must omit Item 15 in any future order for production of documents.

Items 16 & 17 – records regarding a relevant witness's short-term disability claim

The grievant has sought these records to question the credibility of a relevant witness. EDR has reviewed the grievant's submission and arguments about these records. EDR finds the claims to be irrelevant to this proceeding. To the extent there is any limited relevance, it is outweighed by the witness's privacy interests in their own medical history and personnel information. The hearing officer is directed to omit Items 16 and 17 from any future order for production of documents.

Attorney-Client Communications

The agency has asserted that there may be records responsive to certain document requests, including Items 18, 19, and the supplemental document requests, that include attorney communications. The grievance procedure recognizes such matters of privilege as just cause for not producing records.¹⁴ Accordingly, in responding to any order for production of documents, the agency is not required to produce such privileged records, to the extent they exist.

Supplemental records requests

The agency challenges the grievant's supplemental records requests on the basis of relevance. EDR is unable to evaluate the relevance of these requests at this time. EDR directs the hearing officer to receive information and arguments from the parties to determine the relevance and need for these records. EDR does observe, however, that it appears that much of the subject of the sought communications would appear to relate to matters subsequent to the grievant's termination. It is unclear how these records are related to the actions grieved. The hearing officer must take such information into account in any future order for productions of documents.

CONCLUSION

Based on the foregoing discussion and at this stage of the proceedings, the hearing officer is directed to reconsider his orders for the production of documents consistent with this ruling. To the extent either party maintains that any resulting orders are not in compliance with the grievance procedure, the parties may request a compliance ruling from EDR to address such issues.

EDR's rulings on matters of compliance are final and nonappealable.¹⁵

¹⁴ See, e.g., EDR Ruling No. 2002-215.

¹⁵ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

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