



JANET L. LAWSON  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219  
Tel: (804) 225-2131  
(TTY) 711

**COMPLIANCE RULING**

In the matter of the Virginia Department of Corrections  
Ruling Number 2023-5500  
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 order regarding the production of documents in Case Number 11874. For the reasons discussed below, EDR directs the hearing officer to reconsider the order for the production of documents.

PROCEDURAL BACKGROUND

The grievance at issue in Case Number 11874 challenges the grievant’s receipt of a Group III Written Notice with termination of employment. In response to a request for records and a motion to compel production submitted by the grievant, on December 20, 2022, the hearing officer issued an order for the production of documents by the agency. The agency has objected to the hearing officer’s order on various grounds addressed further below. The agency requests this ruling to address alleged noncompliance with the grievance procedure.<sup>1</sup>

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.”<sup>2</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>3</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>4</sup> In determining whether just cause exists for

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<sup>1</sup> In the grievant’s response to the ruling request, the grievant raises an issue about an alleged ex parte communication. The agency has provided the pertinent details in its rebuttal. There have been no improper ex parte communications.

<sup>2</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>3</sup> *Grievance Procedure Manual* § 9.

<sup>4</sup> See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

nondisclosure of a relevant document under the grievance procedure, and in the absence of a well-established and applicable legal privilege,<sup>5</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>6</sup>

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.”<sup>7</sup> 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 . . . .”<sup>8</sup> While a party is not required to create a document if the document does not exist,<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.<sup>12</sup>

The grievant seeks, and the hearing officer has ordered produced, records of disciplinary actions issued to other facility employees within certain categories. The grievant asserts that such records are relevant on the issue of mitigation, specifically inconsistent discipline concerning similarly situated employees. EDR has reviewed the hearing officer's order and the parties' respective submissions. The hearing officer's order does not comply with the grievance procedure and must be modified consistent with the following directives.

The grievant seeks information broader than what EDR generally requires to be produced concerning the issue of inconsistent discipline. Typically, records of disciplinary actions are relevant only if they relate to similar misconduct committed by other similarly situated

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<sup>5</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>6</sup> *See, e.g.*, EDR Ruling No. 2010-2372.

<sup>7</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>8</sup> Rules of the Supreme Court of Virginia, Rule 4:9(a).

<sup>9</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>11</sup> *See, e.g.*, EDR Ruling No. 2012-3053.

<sup>12</sup> *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)).

employees.<sup>13</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>14</sup> While citation to the same or similar policies 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. In this case, it appears that the agency principally alleges that the grievant failed to supervise a cell extraction properly, failed to intervene when inmate abuse occurred during the extraction, and completed an official report of the incident that lacked pertinent information, namely information about the abuse. If the agency were to gather information about all disciplinary actions invoking the policies and offense codes cited in the grievant's request, most of that information would not be relevant. As such, the agency is only required to produce information about discipline that is similar to the conduct for which the grievant was specifically disciplined, i.e., when an employee was disciplined for failure to supervise a cell extraction properly, failure to intervene in a situation of inmate abuse, or completing an incident report that lacked pertinent information.

The grievant has requested, and the hearing officer has ordered produced, disciplinary records as to all facility employees regardless of their position. The agency asserts that only disciplinary records issued to employees in the same rank as the grievant, a Captain, would be relevant, an argument rejected by the hearing officer. While EDR would agree that the relevance of records of similarly situated employees is not always defined by the rank of the individual involved, the particular factors in this case require a much more limited relevancy determination than all facility employees. First, to be similarly situated, the discipline must concern a supervisory employee given what the grievant was charged with in this case. Additionally, considering the nature of the misconduct, EDR does not find support for considering employees with the rank lower than Captain to be similarly situated under these facts. 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>15</sup> Given that records related to employees below the rank of Captain would have virtually no material impact on a mitigation determination, and in light of the privacy interests of non-parties, the disciplinary records in this case must be limited to only employees at the rank of Captain and above at the facility.

The grievant has requested, and the hearing officer has ordered produced, the actual (redacted) disciplinary records, rather than the information in another format. The agency has indicated that it would provide a spreadsheet "summarizing the contents of the actual Written Notices, excluding any personal identifiers." EDR has generally supported 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 here. The only information that is relevant is the ultimate action taken in the particular situation with enough description of the misconduct to understand its relevance to the question of mitigation. Therefore, to avoid production of non-

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<sup>13</sup> See, e.g., EDR Ruling No. 2010-2566.

<sup>14</sup> EDR Ruling No. 2010-2376 n.19.

<sup>15</sup> See, e.g., Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

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. However, the agency would be required to produce enough details about the misconduct in each comparable circumstance for a proper evaluation by the hearing officer.<sup>16</sup> Therefore, the agency must produce more than a basic category of misconduct, such as a description of the actual misconduct itself. If the agency is unable to provide sufficient information in a spreadsheet format, then the redacted records themselves should be produced.

The last issue for consideration in this ruling is the relevant time period for which records should be produced. While EDR does not mandate a particular look-back period, in the past we have upheld orders for disciplinary records going back three years as potentially relevant.<sup>17</sup> Accordingly, absent a showing by the grievant as to why records dating from an earlier date would be relevant (which has not been presented to EDR's awareness), the hearing officer should impose a look-back period of three years from the date of the grievant's termination. Consequently, based on information shared by the agency during the pendency of this ruling, the grievant's request for disciplinary records of three specifically identified employees must be omitted from the hearing officer's amended order. The agency has presented information that any disciplinary actions issued to those three individuals, one of whom the agency states it has no record of having been employed at the facility, occurred more than three years ago. As such, the agency has no relevant records responsive to that portion of the grievant's request.

#### CONCLUSION

Based on the foregoing discussion, EDR directs the hearing officer to amend his pre-hearing orders to be consistent with the directives in this ruling. EDR's rulings on matters of compliance are final and nonappealable.<sup>18</sup>

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

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<sup>16</sup> A spreadsheet generated by the information system identified in the agency's submission alone, and without any additional information, would likely not meet this goal.

<sup>17</sup> EDR Ruling No. 2017-4522.

<sup>18</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).