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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Numbers 2023-5502, 2023-5503
February 9, 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 11876. In addition, the grievant has requested a compliance ruling to challenge the hearing officer's determination that the agency would not be ordered to produce certain records. For the reasons discussed below, EDR directs the hearing officer to reconsider and amend the order for the production of documents.

PROCEDURAL BACKGROUND

The grievance at issue in Case Number 11876 challenges the grievant's receipt of a Group III Written Notice with demotion. In response to a request for records by the grievant, on January 5, 2023, the hearing officer issued an order for the production of documents by the agency. The agency objected to the hearing officer's order on various grounds and sought a protective order.[1] On January 10, 2023, the hearing officer issued a ruling affirming his order for the production of documents and declining the agency's request to issue a protective order.[2] The agency requests this ruling to address alleged noncompliance with the grievance procedure.

The grievant requested documentation related to a 2018 incident in which it is alleged that an agency employee's incident report was inconsistent with the facts of the situation, which is similar to part of the Written Notice received by the grievant in this case. The hearing officer did not require the agency to produce documentation regarding the 2018 incident because it occurred more than three years before the discipline at issue in this case. The grievant seeks a ruling to challenge the hearing officer's determination in this regard. In addition, the grievant has sought

[1] The specifics of the grievant's requests and the agency's objections, to the extent relevant to this ruling, are addressed further below.

[2] The agency's initial ruling request did not contain detailed objections and, as such, the agency supplemented its ruling request with a later submission. While the grievant asserts that the agency's submission was untimely and in bad faith, EDR does not find either to be the case. EDR allowed time for the agency to submit a supplemental brief and the grievant was given the opportunity to respond. The grievant's responsive submission has additionally been reviewed and considered in this ruling.

this ruling to address the agency's failure to provide records pursuant to the hearing officer's January 5, 2023 order as yet.

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."[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 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."[8] 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 . . . ."[9] While a party is not required to create a document if the document does not exist,[10] 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.[11] 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

[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); *Grievance Procedure Manual,* § 8.2.
[9] Rules of the Supreme Court of Virginia, Rule 4:9(a).
[10] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[11] *Rules for Conducting Grievance Hearings* § III(E).

officer's discretion.[12] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[13]

Agency's Objections

Video Footage

The grievant has requested, and the hearing officer has ordered produced, video footage of the incidents that occurred on April 29, 2022 and May 24, 2022, which gave rise to the disciplinary action issued to the grievant. The agency has objected to disclosing the video footage "without any guardrails as to the sharing, copying and distribution of the videos." The agency asserts that due to the depiction of the housing unit, distribution of the videos could compromise the safety and security of the facility. The agency also asserts that distribution of the video would require alteration to protect the identity of inmates, which the agency describes as unduly burdensome, and could alter the quality and content of the video. Instead, the agency has offered to provide opportunities for the grievant and her representative to review the videos and to have the videos available for the hearing. It is unclear whether this particular issue was presented for consideration by the hearing officer and declined as it is not specifically addressed in the hearing officer's ruling.

The agency does not appear to object to the relevance of the requested video footage, and EDR would concur that such footage would appear to be relevant to this case. However, EDR accepts the agency's position that unlimited distribution of video footage of the internal operation of a correctional facility could compromise issues of safety and security. Such concerns are weighty and we defer to the agency and its expertise in these matters. Further, the agency has not contended that the video footage must not be reviewed or used in this case at all; rather, the agency has provided an alternative means for the evidence to be reviewed and considered instead of providing a physical copy to the grievant. Providing a grievant access to review this type of evidence and to make it available for the hearing satisfies the agency's responsibility to provide requested records under the grievance procedure under these facts.[14]

Disciplinary Actions Issued to Other Employees

The grievant seeks, and the hearing officer has ordered produced, records of disciplinary actions with similar offense codes as those on the grievant's disciplinary action issued to other Eastern Region employees at the rank of Unit Manager/Captain and above for the previous three years. However, the grievant seeks information broader than what EDR generally requires to be produced concerning the issue of inconsistent discipline. Typically, records of disciplinary actions

[12] *See*, *e.g.*, EDR Ruling No. 2012-3053.
[13] *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)).
[14] *See*, *e.g.*, EDR Ruling No. 2022-5318. EDR would further remind the parties that, to the extent the video footage is made an exhibit, it is a part of the hearing record, and must, therefore, additionally be made available not only for the hearing officer's consideration, but also for any appeals, such as those by EDR and a circuit court. To the extent there are protections needed for video footage once the record proceeds beyond EDR's control, the parties would need to address such matters with the applicable forum.

are relevant only if they relate to similar misconduct committed by other similarly situated employees.[15] 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."[16] While citation to the same or similar policies or 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. 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. The grievant's request is also overly broad as to the question of similarly situated employees. Records for the entire Eastern Region would be too broad as employees at different facilities would not be similarly situated. Therefore, the agency need only produce information about discipline occurring at the grievant's facility.

Finally, the grievant has requested, and the hearing officer has ordered produced, the actual (redacted) disciplinary records, rather than the information in another format. However, 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. 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-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.[17] 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.

Post Audits

The grievant has requested, and the hearing officer has ordered produced, post audits for the two dates on which the incidents giving rise to the Written Notice occurred. The grievant explains that information in the post audits in combination with duty rosters[18] will demonstrate that staffing was "critically low" at the time of the incidents. The agency states that the post audits contain information that "could severely and substantially compromise the safety and security of the operations of the … facility, its employees[,] and the inmates if there are no redactions, or restrictions on who, when[,] and how someone can access the detailed operations of the Agency." The post audits appear to document how many staff are required for each post at the facility on a

[15] *See*, *e.g.*, EDR Ruling No. 2010-2566.
[16] EDR Ruling No. 2010-2376 n.19.
[17] *See* EDR Ruling No. 2023-5500.
[18] The grievant has also sought, and the hearing officer has ordered produced, duty rosters and shift status reports for the days in question. The agency's supplemental brief does not raise an objection for EDR's review as to the duty rosters and shift status reports.

given day and shift. The agency states that "[s]ecurity is weakened … if outside sources are privy to information detailing a lack of coverage or the movements and responsibilities of an officer on a post."

Focusing solely on the post audits, the agency raises important concerns. These records would seem to contain information about staffing requirements for each post and shift at a facility. While it is unclear to EDR how post audits from dates occurring nearly a year ago weaken current security, we accept and respect the agency's expertise in matters of security of correctional facilities. Further, the entirety of the post audit would not seem to be relevant to the grievant's argument that the facility was understaffed. For example, if the grievant is asserting that the facility was understaffed overall, only information about total required staffing would appear to be arguably relevant. If the grievant is asserting that certain posts were understaffed, then limited information from the post audit would be arguably relevant, but not the entire report. Consequently, the agency has demonstrated just cause for not producing all the post audits unredacted.

EDR is unable to determine the materiality of evidence about understaffing to the facts of this case. For example, it is unclear whether or how understaffing affected the incidents for which the grievant was disciplined. Such matters should first be assessed by the hearing officer. Once the hearing officer decides what evidence about understaffing may be relevant to the questions for determination in the case, an appropriate assessment can be made of what documentation the agency must produce in a limited way so as not to compromise the facility's safety and security. As such, EDR directs the hearing officer to reconsider the order for production of post audit information for a narrower disclosure order. There should be a way to produce the limited information that might be relevant to the grievant's assertion, perhaps in an alternative format, without providing the entirety of the records, much of which would not be relevant to the case.

Protective Order

The agency's initial ruling request appeared to address the hearing officer's denial of a protective order, as this was also the primary issue addressed in the hearing officer's ruling on January 10, 2023. However, the agency's supplemental request does not contain any specific arguments about the denial of the protective order or any basis as to why the agency asserts that the hearing officer's action was not in compliance with the grievance procedure. Therefore, EDR has no basis to find the hearing officer's denial noncompliant. EDR would offer that documents obtained under the grievance procedure are to be utilized only for grievance purposes.[19] Accordingly, while the hearing officer could appropriately decline to issue an order that essentially restates this requirement, a request for a protective order that would help ensure that specific documentation is used only for purposes of the grievance and not in any other way would appear to be consistent with the grievance procedure's intent.

Grievant's Requests

The grievant has sought records from a separate incident that occurred in 2018. The hearing officer declined to order the agency to produce this information because it was more than three years before the incident at issue in this case. The grievant has sought a ruling from EDR to

[19] *Grievance Procedure Manual* § 8.2.

produce information about the 2018 event, such as incident and investigative reports. The grievant argues that the 2018 incident is similar to her case in that it involves an inmate interaction where the employee's written report was inconsistent with video of the incident. The grievant asserts that this information is relevant to her claims of discrimination and equal protection.

As stated above, in terms of evidence about inconsistent treatment, EDR has generally upheld a look back period of three years. As the hearing officer appears to have denied the grievant's request on a similar basis, EDR cannot find that the hearing officer abused his discretion in this determination. Further, the 2018 incident occurred at a different facility than the one at which the grievant worked, which would be another basis to find that the evidence does not involve similarly situated employees. In addition, even if the hearing officer were to determine that evidence about inconsistent treatment arising from the 2018 incident is relevant to this case, there would not be a basis to obtain the investigative files about that incident. For purposes of presenting evidence on the issue of inconsistent discipline, the contents of an investigative file are not normally relevant. It is not the hearing officer's role to take evidence on and re-litigate past disciplinary actions not at issue.[20] As stated above, 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. Consequently, the hearing officer was correct to not order the agency to produce incident and investigative reports from the 2018 incident.

The grievant has also requested that EDR address the agency's failure to comply with the hearing officer's order to produce documentation. As the agency was appealing the hearing officer's order, there was not a basis to comply until the matter was settled.[21] Accordingly, we do not find that the agency has failed to comply with the hearing officer's order at this time. As EDR is directing the hearing officer to reconsider and amend the pre-hearing order as stated in this ruling, the matter will need to be further addressed by the hearing officer to determine what documentation is to be produced.

CONCLUSION

Based on the foregoing discussion, EDR directs the hearing officer to reconsider and amend his pre-hearing order to be consistent with the directives in this ruling, specifically with respect to the production of disciplinary records and post audit reports. EDR's rulings on matters of compliance are final and nonappealable.[22]

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[20] *See* EDR Ruling No. 2017-4522.
[21] *See Grievance Procedure Manual* § 6.1 ("A challenge to EDR will normally stop the grievance process temporarily.").
[22] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).