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**COMPLIANCE RULING**

In the matter of the Virginia Department of Corrections  
Ruling Number 2023-5504  
February 6, 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 December 1, 2022, the grievant initiated a grievance challenging her receipt of a Group II Written Notice for failing to work a mandatory draft day. On or about December 7, 2022, the grievant sought five categories of records from the agency. After providing a notice of noncompliance to the agency head on December 21, the Warden responded to the grievant’s requests on December 29, 2022. The grievant asserts that the agency has failed to comply with the grievance procedure by withholding requested documentation or providing insufficient responses to the grievant’s requests. The grievant also asserts that the agency’s refusal to copy her representative on correspondence is not compliant with the grievance procedure. 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

<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.

relevant document under the grievance procedure, and in the absence of a well-established and 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>

#### *Written Notices issued to other employees*

The grievant seeks "[a]ll similar written notices (by offense codes) from the central region issued to officers and above in the last three years."<sup>8</sup> 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 are relevant only if they relate to similar misconduct committed by other similarly situated employees.<sup>9</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>10</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>11</sup> In this case, it appears that the agency disciplined the grievant for failure to work a mandatory draft day. If the agency were to gather information about all disciplinary actions invoking the offense codes cited on the Written Notice, much 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., failure to work a mandatory draft day.

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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> 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. *E.g.* EDR Ruling No. 2017-4522.

<sup>9</sup> *See, e.g.*, EDR Ruling No. 2010-2566.

<sup>10</sup> EDR Ruling No. 2010-2376 n.19.

<sup>11</sup> EDR Ruling No. 2023-5500.

The grievant's request is also overly broad as to the question of similarly situated employees. First, records for the entire central 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. Second, the grievant seeks disciplinary information concerning all employees ranked officer and above. While EDR would agree that the relevance of records of similarly situated employees is not always defined by the rank of the individual involved, it can be determinative depending on the facts of each case. Here, the grievant is a non-supervisory correctional officer. Accordingly, EDR does not find support for considering employees with a supervisory rank to be similarly situated to the grievant in this case. 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>12</sup> Given that records related to employees above the rank of correctional officer 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 grievant's non-supervisory rank.

The grievant has requested 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.<sup>13</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.

### *Notices of Improvement Needed*

The grievant has requested "all Notice of Improvement Needed/Substandard Performance notices issued to staff in the last 3 years for missing draft days or similar misconduct." EDR presumes that such records are being requested on the issue of inconsistent discipline, in that the grievant argues a Notice of Improvement Needed (NOIN) is the usual result for an employee who fails to work a mandatory draft day. An NOIN is not the equivalent of formal discipline.<sup>14</sup> Accordingly, information about NOINs issued to employees are kept at the supervisory level and not in an employee's personnel file, unless as an attachment to a formal action that becomes part of a personnel file.<sup>15</sup> While there may be factors that could arise in a particular case that would

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<sup>12</sup> See, e.g., Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>13</sup> See EDR Ruling No. 2023-5500.

<sup>14</sup> DHRM Policy 1.60, *Standards of Conduct*, at 6-7.

<sup>15</sup> See DHRM Policy 1.40, *Performance Planning and Evaluation*; DHRM Policy 6.10, *Personnel Records Management*.

warrant review of NOINs issued to similarly situated employees, EDR is not aware of any such factors in this case. Further, under the facts available in this case, EDR finds that any relevance of such records is outweighed by the privacy interests of the non-parties in their confidential personnel records. In addition, as the agency has pointed out, the burden that would be required to locate such records is extensive since NOINs are kept at the supervisory level. EDR finds that there is just cause for the agency not to produce the requested NOINs for these reasons.

#### *Draft Procedure*

The grievant has sought “any draft procedure, memorandum or otherwise, that was physically/electronically distributed to staff that was in effect during September 2022.” The Warden’s response indicated that there is no such draft procedure. The grievant has in turn produced a memo, dated June 1, 2022, that purports to be a draft procedure. The agency has attempted to explain that the memo was not initially discovered or produced because of an unintentional oversight caused by the agency’s migration of email platforms. The grievant disputes the agency’s explanation and calls the Warden’s response “bad faith.”

EDR inquired further about the matter of the draft procedure. The confusion arises in that the Warden has apparently been unable to find an email distribution of the June 1, 2022 memo, which is what the grievant requested – any procedure that was distributed to staff. The document itself has been located on an electronic drive (after the grievant’s identification of the June 1, 2022 memo), but it is unclear at this time whether the memo was distributed to staff. The agency is continuing to investigate that question. Nevertheless, to the extent any such applicable draft procedure exists, it would appear the grievant has it in her possession. While the grievant ascribes “bad faith” to the Warden’s response, we do not find that to be the case. The Warden surmised that the only reason she would be unable to locate an email distribution of the memo (if it occurred) was because of the email migration. Thus, the agency responded with that information. Although the agency could have provided a more fulsome response to explain the steps being taken to determine the matter, we do not find the agency’s response to have been in bad faith. We cannot find that the agency was intentionally attempting to withhold requested documents it knew existed.

#### *Draft Calendar*

The grievant has requested copies of “the original draft calendar(s) for September.” The Warden indicates that there is no such record because the spreadsheet was overwritten daily. While the grievant describes this situation as “appalling,” EDR generally considers the nonexistence of responsive documents to be just cause that excuses a party’s failure to provide requested information. Because the requested records do not exist, there is no basis to find that the agency has failed to comply with the grievance procedure.

#### *Copying the grievant’s advocate on correspondence*

The grievant asserts that the agency is violating the grievance procedure, specifically Section 1.9 addressing civility issues, by not copying her advocate, who is also an agency employee, on grievance correspondence. There is no provision of the grievance procedure that requires the agency to copy the grievant’s advocate on correspondence prior to the hearing stage of the grievance process. Further, because the grievant’s advocate is also an agency employee, the agency appears to be cautious with providing information about another employee’s personnel

situation to another employee. Although there is nothing that would prohibit the agency from copying the grievant's advocate and the grievant's consent could arguably alleviate any concerns in this regard,<sup>16</sup> there is no provision that requires this action at this stage of the grievance process. Accordingly, we cannot find that the agency has failed to comply with the grievance procedure.

### CONCLUSION

EDR directs the agency to provide the grievant with information about disciplinary actions issued to other employees to the extent described in this ruling. "Documents 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>17</sup> The agency is directed to provide this information within ten workdays of the date of this ruling. As to the remainder the compliance ruling requests, EDR declines to rule that the agency has failed to comply with the grievance procedure.

EDR would further note that there appears to have been a potential or forthcoming compliance dispute regarding the grievance moving forward while the grievant was seeking to address the alleged noncompliance that is the subject of this ruling. Per Section 8.2 of the *Grievance Procedure Manual*, a "party requesting the documents has the option of demanding, in writing, that the grievance process temporarily halt until the documents are provided." It appears that the grievant has done so in this case. Accordingly, the grievance is not required to advance until the agency provides the grievant with the information directed to be provided in this ruling.

EDR's rulings on matters of compliance are final and nonappealable.<sup>18</sup>

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<sup>16</sup> See DHRM Policy 6.05, *Personnel Records Disclosure*.

<sup>17</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

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