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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2023-5517
February 24, 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 prehearing order dated February 22, 2023, regarding the production of documents in Case Number 11868. For the reasons discussed below, EDR finds no basis for the hearing officer to reconsider the order.

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, with a hearing initially scheduled for December 5, 2022. It appears that, while the grievance was pending, the grievant was tried criminally for the same or similar alleged acts giving rise to the Written Notice. Per the agency’s request to continue the hearing until a transcript of the criminal trial could be obtained, the hearing was rescheduled for March 1-2, 2023. On February 22, 2023, the parties participated in a prehearing conference to address the grievant’s assertion that the agency had failed to produce requested documents, including the criminal trial transcript. After hearing the parties’ arguments, the hearing officer issued an order (the “Order”) finding that the transcript was relevant to the proceedings and must be produced to the grievant. In response, the agency has requested that EDR issue a compliance ruling on grounds that the Order constituted an abuse of the hearing officer’s discretion.

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 A hearing officer may also recognize “just cause” for withholding documents, to include undue burden.¹²

In this case, the agency asserts that the Order unreasonably requires the agency to identify its rebuttal evidence prior to the hearing. The agency also contends that the transcript is “as readily accessible to the Grievant” by request to the court reporter as it is to the agency. Moreover, the agency argues that the Order was based on an unsupported conclusion that it would be “cost prohibitive” for the grievant to obtain his own copy of the transcript.

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)).

¹² *Grievance Procedure Manual* § 8.2.

Upon our review of the agency's arguments and the recording of the conference on February 22, we find no basis to disturb the Order. The agency does not appear to contest that the transcript is a document in its records that relates to the management actions or omissions grieved. As such, per section 8.2 of the *Grievance Procedural Manual*, the transcript "shall be made available" absent just cause. In consideration of this standard, we do not interpret the hearing officer's Order, as written, to be contingent on whether the agency ultimately chooses to use portions of the transcript as rebuttal evidence at the hearing. To the extent that this rationale was discussed at the prehearing conference, it appears to have been a reflection of the grievant's position that he would not pursue his request if the agency would not be using the transcript as evidence of any kind.

As to the grievant's ability to obtain his own copy of the transcript from the court reporter, EDR does not read section 8.2 of the *Grievance Procedure Manual* to limit a party's production obligations only to documents that cannot be obtained from third parties. Therefore, the requirements of section 8.2 are not excused merely on grounds that the transcript may be available from another source, which may not be subject to EDR's enforcement of the grievance procedure. To the extent the agency argues that producing the transcript would be an undue burden given the grievant's ability to obtain it himself, it does not appear that any such burden was articulated to the hearing officer. By contrast, information presented at the prehearing conference suggested that the cost to the grievant of obtaining his own copy of the transcript would be thousands of dollars.¹³ Accordingly, we are unable to identify a basis that would have compelled the hearing officer to find just cause for the agency to withhold its copy of the transcript as a relevant document.

In light of the standard hearing officers must apply in ordering the production of relevant documents, we cannot conclude that the Order issued on February 22, 2023 was an abuse of discretion or otherwise out of compliance with the grievance procedure. Because the hearing will proceed less than one week from the date of this ruling, the agency should comply with the Order as soon as possible. Moreover, we encourage the parties to raise any additional evidentiary issues at the hearing or request another continuance as necessary for full consideration of the issues.¹⁴

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

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¹³ Although the agency objects to the hearing officer's consideration of this factor, it does not appear to have been the basis for the Order. Instead, the Order appears to be a straightforward application of the standards set forth in section 8.2 of the *Grievance Procedure Manual* and section III(E) of the *Rules for Conducting Grievance Hearings*.

¹⁴ EDR has not been presented with any argument as to whether any of the content within the criminal trial transcript should be redacted or otherwise withheld. Accordingly, we have no information to evaluate such concerns, which have not been raised by either party, to the extent they exist.

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