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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Numbers 2023-5448, -5453
September 16, 2022

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 failure of Virginia Department of Corrections (the “agency”) to produce requested documents.

FACTS

On or about July 11, 2022, the grievant initiated a grievance challenging a selection process for a Major position at Facility A in which the grievant was not offered the position. The grievant claims that the agency has engaged in retaliation for his reporting of issues to management and prior grievance activity. The grievant has also not been selected as the top candidate in other selection processes: 1) a Major position at Facility B, 2) a Captain position at Facility B, and 3) a Captain position at Facility C. Subsequently, the grievant submitted a new grievance on or about August 22, 2022, which, in addition to other matters, challenges not being selected for these positions. The grievant also reiterates his claims of retaliation and asserts that he is being discriminated against on the basis of race.

The grievant has sought “all emails, investigation reports, discipline (informal or formal), counseling, or any other documentation stemming from the EEO complaint on [a management employee] I submitted on October 5, 2020, from [another officer].” On or about October 5, 2020, the grievant had submitted to the agency information supplied by a subordinate officer that a manager had made comments about certain agency employees being “trash” and “lazy.” The grievant asserts that management has retaliated against him for reporting these concerns. The agency has declined to produce the requested documents, to the extent they exist, due to confidentiality of matters concerning other employees and asserting that the documents are not relevant to the current grievance.

The grievant’s second document request is for “all emails sent between [an agency manager] and [the manager’s human resources contact] from November 2018.” The grievant asserts that there is a communication from the agency manager that indicates a certain employee will not be promoted at another facility due to that individual’s use of the grievance procedure.

An Equal Opportunity Employer

The grievant had also requested these records under the Virginia Freedom of Information Act (FOIA) and was provided certain records, but others were withheld as they contained personnel information of other employees.¹

The grievant additionally states that he has requested “all documentation relating to the promotional process which I grieved, including any forms filled out because of the process.” This request was apparently submitted on or about July 18, 2022.² The grievant has been provided interview notes for his interviews in the selection processes, but the agency has declined to provide any other selection materials as they “would invade other[s’] personal privacy if released.” For example, records the grievant has sought specifically are the Selection Panel Referral Forms.

Lastly, the grievant challenges the involvement of one of the human resources managers (“HR Manager”) from the agency’s central office in his grievances. He alleges that the HR Manager engaged in certain actions related to a prior grievance matter and hearing. The grievant alleges that the HR Manager is biased and that any further handling of his grievances is a conflict of interest. The grievant now asks EDR to issue a compliance ruling due to alleged noncompliance in failing to produce the requested documentation under the grievance procedure and the agency’s alleged failure to exclude the HR Manager from his grievances.

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.”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

¹ The grievant states he has filed a civil action against the agency with a circuit court concerning his FOIA request(s). This ruling has no bearing on those FOIA requests and nothing in this ruling is meant to address the agency’s compliance with the provisions of FOIA, which EDR has no authority to enforce.

² Given the date when this document request was made, it would be reasonable to presume that the only selection process about which this request is related would be the Major position at Facility A challenged in the July 11, 2022 grievance. For example, a grievant cannot request records under the grievance procedure until a grievance is initiated. However, because of the filing of the August 22, 2022 grievance, which appears to concern the other selection processes in which the grievant competed, and the grievant’s apparent continued request for the selection materials, EDR will consider this document request as to all four selection processes challenged.

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).

document.⁷ 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.”⁸

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.⁹

Documentation about Complaint

Under the grievance procedure, parties can only be required to produce records “relating to the actions grieved.”¹⁰ Although the grievance at issue in this case includes a retaliation claim, EDR agrees with the agency that the records, to the extent they exist, reflecting how the agency handled the complaint submitted by another officer and forwarded by the grievant are not relevant to the selection process being challenged in the July 11 grievance. The grievant asserts that he is seeking the records to show that the agency “has intentionally subjected me to disparate treatment compared to others who are/were identically situated.” The grievant asserts that the records show the agency’s “inconsistent application of policy which lends itself to my claim of retaliation.” Disparate disciplinary treatment is certainly a concern that can be raised in a grievance, but it is not at issue in the July 11 grievance about a selection process. We do not agree that the alleged inconsistent application of disciplinary processes is relevant to the grievant’s claims of retaliation under these facts. Moreover, even if we assume that there is an argument that such records could be relevant to the current grievance, the relevance of these records (investigation and/or discipline of another manager’s conduct) and the grievant’s need for obtaining the records would be outweighed by the concerns for privacy of personnel matters concerning nonparties.¹¹ As these records do not relate to the actions grieved and/or their relevance is outweighed by privacy concerns, the agency is not under a duty to produce the records under the grievance procedure.

⁷ See, e.g., EDR Ruling No. 2010-2372.

⁸ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁹ *Grievance Procedure Manual* § 8.2.

¹⁰ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹¹ While the grievance procedure contemplates the production of records of other employees in a manner to preserve their privacy, the grievant would be aware of the subject of the records already and, therefore, redactions would be ineffective at preserving the privacy of any nonparties. See Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2. If these records were more material, there may be other ways in which relevant information could be disclosed with privacy in mind. However, given there is minimal, if any, relevance of these records to the current grievance, there is no basis to do so here.

Emails from 2018

EDR has reviewed information from the agency and none of the records withheld from the grievant in his FOIA request concern any commentary about not promoting an employee due to grievance activity. 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, and those that have been withheld in the FOIA request do not relate to the actions grieved, there is no basis to find that the agency has failed to comply with the grievance procedure.

Selection Documentation

While the grievant has sought "all documentation" about the selection processes challenged, he has only identified certain specific records the agency has failed to produce. For instance, the grievant seeks the Selection Panel Referral Forms ("selection forms"), which the agency has declined to provide. The selection forms reflect the names of the interview panel members and the panel's final selection of a candidate or candidates for hire or for further interview, including appropriate ranking if multiple candidates are involved. As the selection forms concern the selection processes challenged by the grievant, the records would appear to be related to the actions grieved. Although we understand that the selection forms contain information about others, there appears to be virtually no other information contained on the forms other than the names of individuals. Accordingly, EDR cannot find that there is just cause to withhold the selection forms from the grievant as to his document request. EDR would remind both the grievant and the agency that the grievance statutes 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."¹² Accordingly, it would appear to be appropriate to make certain redactions to the selection forms before they are provided to the grievant. However, where the grievant's name appears or where the final chosen candidate is identified (information that is likely already available to the grievant), redactions would not appear to be appropriate.

The other category of selection documentation identified by the grievant during the pendency of this ruling¹³ are the application materials of other candidates. While applications of other candidates are potentially related to the actions grieved, there is just cause for not producing those records at this time. Application materials necessarily contain information about individuals that are not parties to the grievance. EDR does not generally require an agency to produce application materials of other candidates at the request of a grievant at this stage of a grievance absent compelling circumstances that are not present here. The grievant has not presented an interest or need for obtaining the application materials that would overcome the agency's interest in protecting the personal information of other candidates. Accordingly, EDR cannot find that the agency would be in noncompliance for failing to produce application materials concerning these selection processes in this case.¹⁴

¹² Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

¹³ The grievant identified these records to EDR, but has not specifically sought them from the agency.

¹⁴ In the event this grievance is qualified for hearing, the grievant may renew his request for the application materials with the hearing officer. If this occurs, this ruling will not bind the hearing officer in making his or her decision regarding whether production is warranted under the grievance procedure.

Exclusion of HR Manager from Grievances

While the grievant can request that the agency exclude the HR Manager from his grievances, there is no provision of the grievance procedure that would require the agency to do so. EDR cannot find that the HR Manager's continued involvement in the grievant's grievances violates the grievance procedure. Accordingly, EDR has no basis to find that the agency is noncompliant with the grievance procedure for failing to exclude the HR Manager from the grievant's grievances.

CONCLUSION

As described above, EDR directs that the agency provide the grievant with copies of the redacted Selection Panel Referral Forms. As to the remainder the compliance ruling requests, EDR declines to rule that the agency has engaged in noncompliance with the grievance procedure. It appears that, when the grievant requested this ruling, the grievance process in both grievances was temporarily halted after the grievant had received the first step response in each grievance. The grievant is, therefore, directed to either notify the agency that he wishes to advance to the second step or conclude this grievances **within ten workdays of the date of this ruling**.

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

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