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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2023-5576
July 21, 2023

The grievant 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 handling of requests for the production of documents in Case Number 11947, which concerns a grievance with the Virginia Department of Corrections (the “agency”). For the reasons discussed below, EDR directs the hearing officer to further address the matters in the manner described herein.

PROCEDURAL BACKGROUND

The grievance at issue in Case Number 11947 challenges the grievant’s receipt of a Group III Written Notice with termination for alleged fraternization with a family member of an inmate. Apparently as a result of information submitted by a confidential informant, the agency has charged the grievant with meeting the mother of an inmate in a store parking lot. During the course of the grievance, the grievant has sought multiple categories of documents. While the agency has made available some information, other documents requested were withheld.¹ The grievant sought to address the agency’s noncompliance with the hearing officer as early as April 4, 2023. It does not appear that the hearing officer responded to the grievant’s request until June 12, 2023, stating that the agency had until June 30 to provide records, which appears to be the exhibit exchange date, one week before the hearing. As the hearing officer has not addressed the grievant’s compliance requests, the grievant sought this ruling to compel production of requested records.

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.”² 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

¹ The categories of records in dispute will be identified and discussed further below.

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

sufficiently compelling to excuse not taking a required action in the grievance process.”³ 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.⁴ 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,⁵ 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.⁶

The grievance statutes further state that “[d]ocuments pertaining to non-parties 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.”⁷ 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”⁸ While a party is not required to create a document if the document does not exist,⁹ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects 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.¹⁰ 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.¹¹ For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.¹²

Hearing Officer compliance

Pursuant to Section 6.3 of the *Grievance Procedure Manual*, claims of party noncompliance occurring during the hearing phase should be raised with the hearing officer. Here, the grievant is alleging that the agency is not complying with the document discovery provisions

³ *Grievance Procedure Manual* § 9.

⁴ *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936.

⁵ 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).

⁶ *See, e.g.*, EDR Ruling No. 2010-2372.

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

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

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

¹⁰ *Rules for Conducting Grievance Hearings* § III(E).

¹¹ *See, e.g.*, EDR Ruling No. 2012-3053.

¹² *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 and internal quotation marks omitted)).

of the grievance procedure.¹³ The grievant attempted to raise the issue with the hearing officer, essentially to no avail. Rather than issuing any orders for the production of documents, the hearing officer has relied on the directive to exchange all proposed exhibits in advance of the hearing. Allowing a party to wait until the exhibit exchange date to produce records requested (far in advance of the hearing date) under the grievance procedure is not an acceptable response to the issues of noncompliance. For example, if the grievant is to exchange all proposed exhibits by the exchange date, but does not receive records responsive to his requests until that exchange date, the grievant has no opportunity to review the records and determine whether any will be included as proposed exhibits. It is also unclear whether the hearing officer was requiring the agency to produce any records that were the subject of dispute between the parties. The hearing officer here needed to address the grievant's compliance request and determine whether any additional orders needed to be issued to compel the production of requested documents. Accordingly, EDR is remanding the matter to the hearing officer to address the grievant's compliance request with consideration of the matters specifically addressed below.

Guidance with respect to documents requested

Video Footage and SIU investigation

The disciplinary action issued to the grievant states that the agency's Special Investigation Unit (SIU) received a statement from a confidential informant about the grievant's alleged meeting with an inmate's mother in a store parking lot. The disciplinary action reflects that video evidence of the parking lot meeting was reviewed. The grievant appears to have been given the opportunity to review the video, but a copy has not been provided because the agency describes the video as "privileged." The agency has not identified an applicable privilege. Given that this video recording appears to have occurred in public, it is unclear what interests are at play that prevent the agency from providing a copy of the recording to the grievant. Thus, on remand, the hearing officer should direct the production of the video evidence to the grievant subject to consideration of any further objection(s) that may be provided by the agency and response by the grievant.¹⁴

As to other records that may exist concerning the SIU's investigation of the grievant leading to the disciplinary action at issue, it is unclear what records exist, what records will be relied upon by the agency, and what information has specifically been sought by the grievant. To the extent there are witness statements or report materials that contain evidence on which the disciplinary action is based, it is reasonable to assume that such records should be produced to the grievant. Given the information was received by a confidential informant and the nature of the work of SIU, it is equally important for such records to be redacted before production in such a manner that protects appropriate information from disclosure. These are matters for consideration by the hearing officer on remand to determine what records have been requested, exist, and/or should be produced (and in what format) upon input from both parties.

¹³ See *Grievance Procedure Manual* § 8.2.

¹⁴ The grievant additionally seeks answers to questions about how and when the video evidence was obtained. While these may be relevant questions, the agency is not compelled to answer them at this time. See *Rules for Conducting Grievance Hearings* § III(E) ("[T]he grievance procedure does not require, and hearing officers may not order (without both parties' agreement) discovery by ... interrogatories . . ."). The grievant will have the opportunity to question available witnesses during the grievance hearing and elicit testimony about these issues.

Drug dog alert and search of grievant's vehicle

The grievant seeks evidence about an incident on January 19, 2023 in which a drug dog alert on the grievant led to a drug test, strip search, and search of his vehicle. The grievant seeks video evidence of the drug dog alert, body camera footage of the search of his vehicle, and photographs of the vehicle search. The grievant alleges that an officer was signaled as to his arrival on the day of the drug dog alert, suggesting that he was targeted for search. The grievant further states that as a result of the search of his vehicle, some of his possessions in the vehicle were damaged. The agency states that this information is “privileged,” but no privilege has been identified. However, the agency has indicated that the grievant can make arrangements to view the evidence in the presence of agency officials.

The agency does not appear to contest the relevance of this evidence. As this matter is addressed in the grievant's grievance, EDR also has no basis to dispute that the information is potentially relevant at this stage – although the hearing officer has the opportunity to address questions of relevance on remand. Accordingly, it would appear that such information should be made available to the grievant. While the agency has not established any “privilege” applicable to this information, some of the information involved is potentially sensitive as it involves matters occurring within a secure facility. EDR has not, however, reviewed at this stage a basis to withhold evidence that presumably occurred outside the facility involving the grievant's personal vehicle and property. Accordingly, on remand the hearing officer must determine what of this requested evidence should be produced to the grievant directly or made available for review at the agency's facility due to the nature of the evidence (in consideration of the positions of both parties).¹⁵

Inmate complaints

The grievant seeks information about the number of inmate complaints lodged against him since January 2021, including copies of the complaints themselves if they involved the inmate whose mother the grievant is alleged to have met in the store parking lot. The agency asserts that such information is not relevant to the actions grieved in this case and will not be provided to protect the privacy of those not involved in the grievance. The grievant argues that the information is relevant to establish that he is not liked by the inmates at the facility where he worked to suggest, therefore, that he would not be involved in illicit activities involving inmates. The grievant further argues that complaints from the inmate in question would substantiate a “strong motive for retaliation.”

At this stage, EDR does not find a basis for the agency to produce the information requested about inmate complaints. For example, the number of complaints themselves provides limited material information to the grievant's claims of not being well-liked. Additionally, any alleged retaliatory motive by the inmate against the grievant would not be established by complaints, but rather by the grievant's conduct involving the inmate (to which the inmate might arguably attempt

¹⁵ Providing a grievant access to review certain types of evidence and to make it available for the hearing satisfies the agency's responsibility to provide requested records under the grievance procedure, depending on the nature of the information. *See, e.g.*, EDR Ruling No. 2022-5318. EDR would further remind the parties that, to the extent such evidence is made an exhibit to the hearing, 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, for example, once the record proceeds beyond EDR's control, the parties would need to address such matters with the applicable forum.

to retaliate). Therefore, this evidence would appear to be of minimal relevance, which is outweighed by the concerns of the privacy of inmates in their complaints. More importantly, it would appear that the grievant could assert the points he is trying to make through other means and evidence, including his own testimony. While this ruling does not preclude the hearing officer from determining that evidence about inmate complaints is relevant, depending on the next steps in this case, EDR does not find a basis to order the agency to produce this information at this time.

Other Investigative Files on Grievant

The grievant seeks “all statements, allegations, tips, files and any other documentation collected by investigators regarding [the grievant].”¹⁶ The agency states that the information is “privileged and [will] only be provided to you in the context of this grievance.” On March 21, 2023, the agency indicated that information will be provided with appropriate redactions. However, according to the grievant, no information has been provided.

To the extent such materials relate to the investigation that has given rise to the disciplinary action in this case, that issue has been addressed in this ruling above. To the extent there are other documents responsive to this request, EDR has not reviewed information that explains why such materials would be relevant to the actions grieved in this case at this time. However, on remand, if the hearing officer determines that there is relevance to investigative documentation unrelated to the facts giving rise to this case, this ruling does not preclude the hearing officer from ordering production. However, as these requests involve investigative documents, questions of just cause would require carefully balancing the parties’ respective interests as to whether or what information should be disclosed and in what format (with appropriate redactions).

CONCLUSION

Based on the foregoing, EDR directs the hearing officer to address the grievant’s requests concerning the agency’s alleged noncompliance consistent with the directives and guidelines in this ruling. EDR’s rulings on matters of compliance are final and nonappealable.¹⁷

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¹⁶ The grievant also makes reference to a 2021 investigation by a particular investigator regarding certain allegations made against the grievant.

¹⁷ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).