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COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2023-5581
July 14, 2023

The 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 11942, and the necessity of issuing a protective order limiting the grievant's use of documents produced by the agency. For the reasons discussed below, EDR declines to disturb the pre-hearing order.

PROCEDURAL BACKGROUND

The grievance at issue in Case Number 11942 challenges the grievant's receipt of a Group III Written Notice with termination, charging her with failing to report inmate boundary violations as required by agency policy. On May 17, 2023, the agency requested that the appointed hearing officer enter a protective order for the agency's exhibit binder due to the inclusion of an investigation report to be produced to the grievant. Specifically, the agency requested an order to limit use of the produced documents "solely in furtherance of the grievance at issue," to prevent disclosure "to anyone else who is not directly involved in the grievance hearing," and to require the grievant to "return or destroy the documents once the grievance and any appeals have ended."

By written opinion dated June 19, 2023 (the "Order"), the hearing officer directed the parties as follows:

> Agency may request any documents entered as evidence at Grievant's hearing be kept confidential and in Grievant's Attorney's custody at all times. Grievant's Attorney may review these documents with his client . . . while in Grievant's Attorney's custody. Any documents given to Grievant's Attorney prior to the hearing and not presented as evidence at the hearing must be returned to the Agency.

The hearing officer also directed that the grievant "may request and receive copies of Written Notices that relate to specific infractions of [certain agency policies]," with redaction of "personal names or identifying information."

The agency now seeks a ruling by EDR that the hearing officer's order fails to comply with the requirements of the grievance procedure. Specifically, the agency contends that the hearing officer's failure to issue the requested protective order violates the requirement to protect the privacy of third parties and exposes the agency to security risks, presumably in the event that the grievant misuses disclosed documents. In addition, the agency objects to the hearing officer's order that the agency produce copies of actual disciplinary documents issued to other employees.

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 produced. Just cause is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."[2] 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.[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.

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

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] Where documentary evidence contains sensitive or confidential information that may compromise third-party privacy, a hearing officer also has authority "to issue protective orders to limit the use and presentation of relevant documents for the hearing."[12]

Return of Agency Documents

As argued in the agency's compliance ruling request, the agency objects to producing a copy of the internal investigative report which apparently led to the disciplinary action taken against the grievant. It appears that the agency initially sought to condition production of this confidential report on an order from the hearing officer that the grievant must "return or destroy the documents once the grievance and any appeals have ended." However, in its ruling request, the agency requests "the return of the Agency's evidence binder and all its contents at the conclusion of the hearing in this matter . . . ."

The hearing officer's Order appears to have addressed the agency's confidentiality concerns by articulating that confidential documents should remain in the custody of the grievant's attorney "at all times." Nevertheless, the agency continues to seek a protective order that would seem to go further by directing the grievant's attorney to return or destroy the documents at some point following the hearing. The agency also appears to request that this directive apply to the entirety of its documentary exhibits.

Based on the information made available to EDR at this time, we cannot conclude that the hearing officer failed to comply with the grievance procedure by declining to issue the requested protective order. As an initial matter, a hearing officer would generally not be required to issue an independent order that merely restates the requirements of the grievance procedure – *i.e.* that documents disclosed "are to be used for grievance purposes only."[13] However, the *Rules* arguably support a hearing officer's authority to approve case-specific conditions on the disclosure of sensitive information, as warranted by the particular considerations at issue. In every case, the appropriateness of such conditions will be highly dependent on the nature of the information to be disclosed and the range of feasible options for making relevant information available.

Here, although EDR has not been provided with the documents at issue, we presume there is little doubt that the agency's investigative report contains information that would compromise

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[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] *Rules for Conductive Grievance Hearings* § III(E).
[13] *Grievance Procedure Manual* § 8.2.

the privacy of third parties if disclosed. In such cases, redaction is a standard method of protecting sensitive information that appears on relevant documents, and the agency has in fact indicated an intention to produce a copy of the investigative report to the grievant's attorney with appropriate redactions.[14] However, because the agency is pursuing an additional protective order, we infer that the agency views redaction alone as insufficient to protect the privacy interests potentially at risk in the report, and seeks to recover its exhibit binder after the hearing on that basis.

To the extent that the agency seeks the return of its entire exhibit book immediately after the conclusion of the hearing, we find no basis in the available record, the grievance procedure, or other applicable authority that would justify such an extraordinary directive at this time. Thus, we find no error in the hearing officer's decision not to order the return of the agency's entire exhibit book. As stated above, EDR interprets the grievance statutes to require that, absent just cause, all relevant grievance-related information *must* be produced. It follows that production limitations based on just cause should not be granted in blanket fashion, but should instead be approved only upon a careful review as to specific documents. As we are not aware that the hearing officer was provided an opportunity for such review as to the agency's entire exhibit book, we identify nothing that would have required the hearing officer to issue a protective order as to the agency's entire exhibit book.

As to the investigative report specifically, EDR is not persuaded that the proposed protective order would have been effective for the agency's purposes. Following disposition of the grievance, the hearing officer would presumably lack jurisdiction to enforce any such order. Therefore, if we understand correctly that the agency is concerned about wider disclosure of information following disposition of the grievance, it is not clear how the agency would invoke the protective order to pursue a remedy. Accordingly, we cannot find that the hearing officer abused her discretion or otherwise failed to comply with the grievance procedure by declining to grant the proposed order as to the agency's investigative report.

We note that nothing in this ruling prevents the parties from exploring additional solutions with the hearing officer to protect the confidentiality interests asserted in the agency's ruling request. For example, EDR would remind the parties that the grievance procedure requires relevant documents to "be made available."[15] It is not uncommon in grievance proceedings that agencies choose to comply with this requirement by allowing the grievant to review sensitive documents (such as confidential video recordings) on the agency's premises, but not to make copies or take custody of such documents.[16] Although we would discourage agencies from relying on this method as a matter of course, this approach would likely be more effective in protecting particularly sensitive documents than relying on a hearing officer's limited authority to enforce a protective order.

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[14] Redaction of certain information could address all of an agency's concerns in similar situations, depending on the contents of the actual documents. For example, if sufficient identifying or other confidential information could be redacted such that the resulting version is acceptable for public viewing, then the use or return of such a record would not seem to be of continuing concern. However, there may very well be records that cannot be redacted effectively to alleviate these concerns or such redactions may prevent the disclosure of information relevant and material to the grievance proceeding.

[15] Va. Code § 2.2-3003(E).

[16] *See*, *e.g.*, EDR Ruling No. 2022-5318.

Production of Comparators' Written Notices

In addition to the protective order issue, the agency argues that the hearing officer has failed to comply with the grievance procedure by ordering the agency to provide copies of actual written notices issued to other employees. Specifically, the hearing officer directed that the grievant "may request and receive copies of Written Notices that relate to specific infractions of [certain agency policies]," with redaction of "personal names or identifying information." The agency objects on grounds that, given the confidential nature of other employees' disciplinary documents, it prefers to reproduce relevant information from those documents on a spreadsheet to be provided to the grievant.

Typically, records of disciplinary actions are relevant only if they relate to similar misconduct committed by other similarly-situated employees.[17] 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."[18] As such, the agency can be required to produce information only about discipline that is similar to the conduct for which the grievant was specifically disciplined.

With regard to third parties' disciplinary or other personnel records, EDR has generally supported a response to a document request that produces the information in an alternate format in order 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 other employees' disciplinary records may not be relevant to the grievance to be heard. In many if not most cases, the only relevant information 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 has generally supported such information being reproduced in an alternative format, such as a spreadsheet, provided the agency provides enough details about the misconduct in each comparable circumstance for a proper evaluation of the relevant evidence.[19]

At this time, it is unclear whether the hearing officer has ruled on whether a spreadsheet is permissible as an alternative means of production in compliance with her Order, or whether she was asked to do so. The Order imposes limits on the scope of similar misconduct and indicates that the agency should produce disciplinary documents within that scope. Given our precedents described above, EDR would not interpret the hearing officer's Order to preclude the use of a spreadsheet to provide relevant information from other employees' disciplinary records. However, given the limited record for our review at this time, our interlocutory conclusion in this regard should not prevent the parties from raising additional concerns on this issue to the hearing officer, if not fully addressed herein.

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[17] *See*, *e.g.*, EDR Ruling No. 2010-2566. In general, similarly-situated employees must also work at the same facility as each other. *See, e.g.*, EDR Ruling Nos. 2023-5502, -5503.
[18] *E.g.*, EDR Ruling No. 2010-2376 n.19.
[19] *See* EDR Ruling Nos. 2023-5502, -5503; EDR Ruling No. 2023-5500.

EDR's rulings on matters of compliance are final and nonappealable.[20]

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[20] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).