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COMPLIANCE RULING

In the matter of the Virginia Community College System
Ruling Number 2024-5647
December 19, 2023

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management to challenge the hearing officer’s pre-hearing order regarding the production of documents in Case Number 12024. For the reasons discussed below, the grievant has not presented a basis on which EDR may disturb the hearing officer’s order.

FACTS

The grievance at issue in Case Number 12024 addresses the grievant’s challenge to a Group III Written Notice with termination received from her now former employer, a community college within the Virginia Community College System (“the college” or “the agency”). According to the Written Notice, the grievant was absent from work without approval for 78 consecutive days beginning May 23, 2023.¹ The grievant’s revised request for information, dated November 28, seeks 1) all emails in her former email account from January 1, 2023 until the account’s closure, and 2) emails exchanged between certain identified agency employees from January 1, 2023 to September 15, 2023 that mention the grievant’s name. The college has objected to the grievant’s requests and the parties have exchanged explanations and responses with the hearing officer. The hearing officer issued an order on November 22, 2023, which was subsequently amended in email following the revised request. As a result, the hearing officer has ordered the college to produce 1) emails to or from identified individuals regarding the grievant’s absences from work and her disability benefits claim, and 2) emails to or from identified individuals² referencing claims made by the grievant about discrimination, harassment, or retaliation. The grievant challenges the hearing officer’s order and seeks a ruling from EDR on the matter.

¹ It appears the grievant sought, but was not approved for, disability benefits.

² The grievant asserts in her compliance ruling request that the hearing officer’s order, as it is worded, will only require the agency to produce emails that were also sent to her. However, we do not read the hearing officer’s order to be so limited in the way the grievant reads it.

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.”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 document.⁷

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.”⁸ 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”⁹ While a party is not required to create a document if the document does not exist,¹⁰ 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.¹¹ 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.¹² For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.¹³

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).

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

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

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

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

¹¹ *Rules for Conducting Grievance Hearings* § III(E).

¹² *See, e.g.*, EDR Ruling No. 2012-3053.

¹³ *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

In her compliance ruling request, the grievant states that the hearing officer's order will not produce emails exchanged with the Virginia Community College System Human Resources ("HR") office about her claims of discrimination, harassment, and retaliation. While this appears to be an accurate assessment based on the information available to EDR, it appears that the grievant's document request that was intended to address these claims does not appear to identify members of the System HR office as records she sought. Consequently, if this is information she seeks, she should address that with the hearing officer to have the original order modified again, if the hearing officer agrees. The grievant also states that she had requested the full content of her email account to gather communications she had with "any other relevant agencies, etc." As the grievant does not identify what such records are or why they are relevant, EDR has no basis to find that the hearing officer's order is improper. To the extent there are communications with particular agencies the grievant believes are relevant, she should identify those communications and their relevancy to the hearing officer for further modification of the documents order.

The hearing officer's determinations as to what records the agency should produce appear to be based on determinations of relevancy and materiality. EDR cannot find that the grievant has presented a basis to support an argument that the hearing officer has abused his discretion or violated a grievance procedure rule in such evidentiary determinations. Ultimately, it is in the hearing officer's discretion to determine how far relevance might extend as to the context of the grievant's claims. Based on the record to this point, EDR cannot find that the hearing officer has abused that discretion in determining that the grievant is not entitled to the entirety of her email account or other records more broadly defined, subject to any further issues that may be raised, as discussed above.

CONCLUSION

Based on the foregoing discussion and at this stage of the proceedings, the arguments asserted by the grievant do not provide a basis for EDR to determine that the hearing officer's order for production of documents was an abuse of discretion or violated a grievance procedure rule. Consequently, EDR will not disturb the hearing officer's order.

EDR's rulings on matters of compliance are final and nonappealable.¹⁴

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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)).

¹⁴ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).