



EMILY S. ELLIOTT  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219  
Tel: (804) 225-2131  
(TTY) 711

**COMPLIANCE RULING**

In the matter of the Virginia Department of Transportation  
Ruling Numbers 2019-4910  
May 3, 2019

The Virginia Department of Transportation (the “agency” or VDOT) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Department of Human Resource Management in relation to the hearing officer’s order for the production of documents in Case Number 11330. The agency alleges that the hearing officer’s order is inconsistent with the grievance procedure.

FACTS

The grievant in this case initially received a Group II Written Notice for failure to follow a supervisor’s instructions and/or insubordination. In short, the supervisor requested to review information the grievant had prepared for an upcoming meeting and the grievant refused to provide the information to the supervisor. During the resolution steps of the grievance filed by the grievant to challenge the disciplinary action, the third step-respondent reduced the Written Notice to a Group I due to the grievant’s otherwise satisfactory work performance. The grievance was not resolved during the management resolution steps and was qualified for a hearing. EDR appointed a hearing officer for the matter as Case Number 11330.

During the pre-hearing phase of this case, the grievant requested that the hearing officer order the agency to produce certain documentation. On April 5, 2019, the hearing officer issued an order that the agency produce the following documents:

- 1. All applications for employment held by VDOT relating to [the supervisor] since January 1, 2011. The Agency may redact all information regarding the applications for employment except for information describing the prior positions held by [the supervisor], the duties of those positions, and the number of employees supervised by [the supervisor].*

---

<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

2. *All Group II Written Notices issued by VDOT Central Office from January 1, 2016 through January 1, 2019 for offense code 13, Failure to follow instructions and/or policy including the offense of insubordination. The Agency may redact employee names or other personal identifying information from those written notices.*

On April 17, 2019, EDR received the agency's request for a compliance ruling regarding the hearing officer's order. The agency objects to the production of these records on various grounds, including the lack of relevance and that the requests are overly broad.

## 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.”<sup>2</sup> EDR's interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided. Further, a hearing officer has the authority to order the production of documents.<sup>3</sup> 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.<sup>4</sup>

“Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”<sup>5</sup> 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.<sup>6</sup> The statute further states 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.”<sup>7</sup> 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, EDR will generally weigh the interests expressed by the party for nondisclosure of relevant documents against the requesting party's particular interests in obtaining the documents.<sup>8</sup> When EDR determines that there is “just cause” to withhold documentation, even if relevant, the records need not be produced under the grievance procedure.<sup>9</sup>

### *Supervisor's Job Applications*

In seeking her supervisor's job applications, the grievant appears to argue, in part, that her supervisor is not qualified for her position and/or has insufficient supervisory experience. At this stage of the proceedings, EDR will not make a finding that such a claim is entirely

---

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

<sup>3</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>4</sup> *See, e.g.*, EDR Ruling No. 2012-3053.

<sup>5</sup> *Grievance Procedure Manual* § 9.

<sup>6</sup> *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

<sup>7</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>8</sup> *E.g.*, EDR Ruling No. 2011-2827.

<sup>9</sup> *See, e.g.*, EDR Ruling No. 2014-3728.

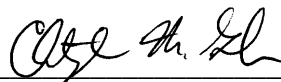
irrelevant. However, it is unclear how such a claim bears much materiality to the subject of the grievance. Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue.<sup>10</sup> In a grievance hearing about whether an employee failed to follow a supervisor's instructions, the requisite skill or experience of that supervisor is not generally at issue. EDR has reviewed no special circumstances making such an inquiry a material question in this case. Accordingly, the grievant's interest in obtaining these records for her grievance is exceedingly low.

On the other hand, production of personnel records such as another employee's job applications, even in redacted form, is not warranted under the grievance process without a sufficient basis. EDR finds that there is no basis to intrude into the supervisor's job applications in this case. Further, the job applications would not appear to be very probative of what the grievant is trying to argue. In this regard, EDR does not find that the grievant is prohibited from presenting witness testimony or other evidence as to her supervisor's past experience and/or positions, if deemed relevant by the hearing officer. However, EDR finds just cause for the agency to withhold production of the job application materials at this time. Requiring the production of the job applications in this case would be inconsistent with the document discovery provisions of the grievance procedure.

#### *Disciplinary Records*

The agency has already produced Group II Written Notices for conduct of a similar nature to the conduct for which the grievant received the disciplinary action at issue in Case Number 11330. Typically, records of disciplinary action are relevant only if they relate to similar misconduct committed by other employees.<sup>11</sup> 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."<sup>12</sup> In this regard, EDR finds that the agency has substantially complied with the hearing officer's order in this instance, in that it has provided disciplinary records properly within the zone of relevance of this case. Any additional Group II Written Notices would be of such minimally relevant value that there is no basis to require their disclosure in this case. If the grievant wishes to present evidence at hearing as to the agency's progressive disciplinary practices, that can be addressed through appropriate witness testimony, if deemed relevant by the hearing officer.

EDR's rulings on matters of compliance are final and nonappealable.<sup>13</sup>



Christopher M. Grab, Director  
Office of Employment Dispute Resolution

---

<sup>10</sup> 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.'" (citations 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." (citations omitted)).

<sup>11</sup> See, e.g., EDR Ruling No. 2010-2566.

<sup>12</sup> EDR Ruling No. 2010-2376 n.19.

<sup>13</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).