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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2022-5318
October 26, 2021

The Department of Behavioral Health and Developmental Services (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 11720.

FACTS

On June 3, 2021, the agency issued to the grievant a Group III Written Notice with termination for alleged verbal abuse of a patient arising out of an incident that occurred on May 12. The grievant timely filed a dismissal grievance challenging her termination, and a hearing officer was appointed on July 19. The grievant, through her counsel, submitted a request to the hearing officer on October 6 seeking an order for the production of certain documents. On October 7, the hearing officer issued an order directing the agency to produce, in relevant part, the following documents:

1) A copy of the video recording/surveillance footage of the May 12, 2021 incident . . . that was presented to [the grievant] during the investigation;
2) Copies of [W]ritten [N]otices issued to employees within the last two years for offenses similar to Grievant's alleged offenses. The Agency may redact employee names.[1]

The agency subsequently indicated to the grievant's counsel that it was unable to produce a copy of the video recording due to patient privacy concerns, though it could "provide reasonable access" to the recording at the facility where the grievant worked. The grievant's counsel submitted to the hearing officer a motion to compel, seeking a copy of the recording and noting that the agency had also failed to produce copies of the Written Notices as ordered.

The agency requested a compliance ruling from EDR on October 21, 2021 to address the hearing officer's order for production of these documents. In its request, the agency argues that "it is reasonable to make the video recording/surveillance footage available to the grievant and legal

[1] The hearing officer's order directed the agency to produce other documents in addition to these items, which it has done without objection.

counsel for review prior to the hearing," rather than providing a copy of the recording, because of its "legitimate concerns and reasons about maintaining the security of its psychiatric hospital and preserving privacy of its patients." The agency further notes that the grievant will "have full access to the video recording of May 12, 2021 [incident] during the grievance hearing." In addition, the agency states that it is unable to produce copies of Written Notices for similar misconduct because no "report of disciplinary actions . . . exist[s] electronically" and the agency "would have to create a manual report to evaluate each case in order to deliver such findings."

Also on October 21, 2021, the hearing officer conducted a prehearing conference with the parties that had been scheduled before the agency submitted its request for a compliance ruling to EDR. The grievant's counsel has represented to EDR that, at the prehearing conference, the parties discussed making arrangements for a remote viewing of the recording that "would effectively allow Counsel and Grievant to review the Video in preparation for the grievance hearing." According to the grievant's counsel, the agency indicated that it would investigate this option, but has not yet provided a final response. The grievant's counsel further states that the hearing officer discussed issuing a protective order if production of a copy of the recording was necessary. The grievant's counsel reiterates that, if a remote viewing of the recording is not possible, requiring travel to the facility to view the recording instead of producing a copy of the recording would impose "a significant hardship and unnecessary burden."

Regarding the agency's production of Written Notices, the grievant's counsel has represented that, during the prehearing conference, the agency alleged the request was overly broad. The grievant's counsel states that, in response, she verbally modified the request to "all written disciplinary actions in the last two years that concern 'verbal abuse' as cited for the Grievant's alleged conduct."

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."[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 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]

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

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."[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 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.

A hearing officer has the authority to order the production of documents and issue witness orders.[10] As long as a hearing officer's orders are consistent with the document discovery and witness testimony provisions of the grievance procedure, the determination of what documents are ordered to be produced or witnesses are ordered to appear at the hearing is within the hearing officer's discretion.[11] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[12]

Video Recording of the Incident

There appears to be no dispute in this case that the video recording of the incident is relevant to the disciplinary action that will be addressed at the hearing. Instead, the agency essentially argues that there is just cause for it to withhold production of the recording to preserve the security of the facility and the privacy of patients at the facility. We do not disagree that the agency has articulated potentially legitimate concerns about these matters. In such a situation, it may be reasonable for the agency to make video footage available for review at a facility in lieu of producing a copy of the recording(s) to the grievant, as it has offered here.

However, it is also within the hearing officer's discretion to direct an alternate method of production when warranted by the circumstances and when such a method is available. In this case, the parties have already discussed making arrangements for a remote viewing of the video that would not require the grievant or her counsel to travel physically to the facility. The hearing officer also appears to have discussed with the parties the option of issuing a protective order that

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[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] Va. Code § 2.2-3005(C)(3); *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 omitted)).

would limit the use and presentation of the recording.[13] To the extent the parties reach an agreement about an alternative method of satisfying this request, either of these methods—arranging a remote viewing or producing the recording to the grievant's counsel under a protective order—would appear to be consistent with the grievance procedure and within the hearing officer's discretion, while also satisfying the concerns articulated by the agency.

Nonetheless, we are mindful that the hearing in this matter is scheduled for November 3, 2021, and thus the parties have little time to resolve this issue while affording the grievant sufficient time to review the recording in advance of the hearing. We therefore encourage the parties to engage in good-faith discussions to reach an agreement about an appropriate method of making the video recording available to the grievant. The parties should contact the hearing officer as needed to request the issuance of any further orders (*e.g.*, a protective order) or to address matters further.

Written Notices Issued to Other Agency Employees

Typically, records of disciplinary action are relevant only if they relate to similar misconduct committed by other employees.[14] 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."[15] In this case, the grievant received a Group III Written Notice for alleged verbal abuse of a patient. Therefore, only disciplinary records issued to other employees for similar misconduct would be relevant. The hearing officer ordered the agency to produce to the grievant "[c]opies of [W]ritten [N]otices issued to employees within the last two years for offenses similar to Grievant's alleged offenses," with identifying information redacted. At the October 21, 2021 prehearing conference, the grievant's counsel further limited this request to disciplinary records for verbal abuse of patients, the primary charge identified in the Group III Written Notice issued to the grievant.

The hearing officer's order appears to limit production of disciplinary records to only those Written Notices for similar misconduct as that for which the grievant was disciplined. The grievant's counsel has additionally agreed to limit the production of disciplinary records to only those involving allegations of verbal abuse. Moreover, we have reviewed nothing that would demonstrate why review of relevant documents for the previous two years would be unreasonable here. Although EDR does not mandate a particular look-back period, in the past we have upheld orders for disciplinary records going back three years as potentially relevant.[16] We understand the agency's assertion that complying with this request may require some level of manual effort and review; however, the agency's argument is unpersuasive in this case to demonstrate just cause for not producing the disciplinary records as ordered.

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[13] *See Rules for Conducting Grievance Hearings* § III(E) ("For cases involving particularly sensitive relevant documents . . ., the hearing officer has the authority to issue protective orders to limit the use and presentation of relevant documents for the hearing.").
[14] *See*, *e.g.*, EDR Ruling No. 2010-2566.
[15] EDR Ruling No. 2010-2376 n.19.
[16] EDR Ruling No. 2017-4522. Generally speaking, the longer the time period between events, the less relevant they are to demonstrate potentially inconsistent disciplinary action. Many events could alter an agency's approach to disciplining employees for certain misconduct over time, including a change in management.

For the foregoing reasons, we find that the hearing officer's order for the production of Written Notices issued within the past two years constitutes an appropriate exercise of discretion in this case. To satisfy this request, the agency could produce the actual disciplinary records or create a separate listing as described by the grievant's counsel with descriptions of the particular misconduct. In whatever format the information is produced, the documentation must be redacted to protect the privacy of those not personally involved in the grievance, consistent with the hearing officer's order.

CONCLUSION

Based on the foregoing discussion and at this stage of the proceedings, the arguments asserted by the agency do not provide a basis for EDR to determine that the hearing officer's order for production of the documents discussed above 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.[17]

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