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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5320
December 6, 2021

The Virginia 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 11723. For the reasons discussed below, EDR finds no basis to disturb the hearing officer's order.

PROCEDURAL BACKGROUND

The grievance at issue in Case Number 11723 challenges the grievant's receipt of a Group III Written Notice with termination of employment. The Written Notice referenced three complaints against the grievant for "acts unbecoming a Human Resource Officer." On October 11, 2021, the grievant filed a motion to compel documents the agency had objected to producing. On October 19, 2021, after hearing the parties' arguments on the motion, the hearing officer reportedly ordered the agency to produce certain documents, either directly to the grievant or to the hearing officer for *in camera* review.[1] The agency has asked EDR to find that the hearing officer abused his discretion in ordering the agency to produce three categories of documents identified in the grievant's motion to compel: (1) panel interviewer notes on another employee's interview for an agency job opening (to be produced *in camera*); (2) Written Notices issued to a Warden during 2020-21; and (3) emails or memoranda concerning the grievant's alleged misconduct from the email accounts of 21 agency 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."[2] EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-

[1] It does not appear that the hearing officer issued a written order or recorded audio of the pre-hearing conference on the grievant's motion to compel. Accordingly, for purposes of this ruling, we analyze the nature of the order as it is described in the parties' filings.

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

related information *must* be provided. Further, a hearing officer has the authority to order the production of documents.[3] 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.[4] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[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.

Interview Notes

In his motion to compel, the grievant sought the panel interview notes associated with another agency employee ("Employee A"), the interviewee. The grievant alleges that he had a discussion with one of the interviewers about conducting the interview incorrectly. According to the grievant, the discussion became antagonistic. Subsequently, the grievant asserts the interviewer's wife made one of the complaints that led to the grievant's termination. Thus, the grievant argues, the interview notes are relevant to show the complainant's bias against the grievant. The hearing officer apparently ordered the agency to produce the interview notes for *in camera* review to assess relevance. The agency objects that the notes have no relevance and, in any event, should not be disclosed because they contain confidential information. The agency argues that the grievant can just as effectively elicit any relevant facts during witness examination.

At this time, we can identify no error in the hearing officer's approach. At the hearing, a material issue will be whether the grievant engaged in the conduct charged by the Written Notice.[9] The charges appear to be based on complaints from other staff. To the extent the grievant intends to present a defense that one or more of these complaints was not credible, he is entitled to obtain evidence relevant to that defense, absent just cause. The grievant has indicated a belief that one of

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[3] *Rules for Conducting Grievance Hearings* § III(E).
[4] *See*, *e.g.*, EDR Ruling No. 2012-3053.
[5] *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)).
[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.
[9] *Rules for Conducting Grievance Hearings* § VI(B)(1)

the complainants had reason to make a malicious complaint against him, and that reason stemmed from an issue with the interview of Employee A. The interview notes could lay a foundation to prove that reason, and they could assist the hearing officer's assessment of witness credibility more generally. In light of those possibilities, the hearing officer's order for the agency to produce the notes for careful assessment *in camera* appears to be a reasonable way of ensuring the availability of relevant evidence while protecting the privacy of employees not otherwise involved in the grievance. While EDR has not reviewed information that would clearly demonstrate how these interview notes are relevant, that is not the question for EDR to determine at this time. The hearing officer has not yet made a relevancy determination. The *in camera* review is sought to make that decision. Ultimately, it is in the hearing officer's discretion to determine how far relevance might extend in this context. Based on the record to this point, EDR cannot find that the hearing officer has abused that discretion in ordering production of the interview notes for *in camera* review only.

For consideration of the question of relevance, EDR encourages the hearing officer to be mindful of the confidential nature of the content of such records relating to a non-party. If the hearing officer determines that there is some portion of the interview notes that is relevant and is to be produced to the grievant, production should be limited to only the relevant portion of the documentation. All other information on the interview notes must be redacted as confidential information of a non-party.[10]

Disciplinary Records

The grievant also seeks "copies of the Written Notices issued to [the Warden] for his conduct in the Calendar Years 2020 and 2021." The grievant asserts that, during this time period, the Warden received Written Notices for violating the same policies cited in the grievant's discipline. The agency has agreed to produce appropriately redacted disciplinary records showing similar violations from the same agency facility where the grievant worked, but objects to producing disciplinary records "issued before [the Warden's] tenure and unrelated to his position at" the grievant's facility.

However, the grievant maintains that the only documents actually in dispute relate to a Written Notice issued to the Warden on May 10, 2021, for violation of agency Operating Procedures 135.1, 135.3, and 145.3, as well as DHRM Policy 2.35 – all policies the grievant was also charged with violating. The grievant asserts that this Written Notice was issued to the Warden when he was an employee at the grievant's facility. The agency has not contested the grievant's characterization of the documents sought. Therefore, to the extent the hearing officer has ordered production of disciplinary records arising from similar offenses at the same facility, we cannot say at this time that such an order is an abuse of discretion.

That said, as additional guidance as these proceedings continue, we observe that the grievant's request seeks information broader than what EDR generally requires to be produced concerning the issue of inconsistent discipline. Typically, records of disciplinary actions are relevant only if they relate to similar misconduct committed by other similarly situated employees.[11] EDR has not reviewed information that would support a contention that the Warden is a similarly situated employee as to the grievant, a Human Resource Officer, for purposes of

[10] *See* Va. Code § 2.2-3003(E); *Grievance Procedure Manual,* § 8.2.
[11] *See*, *e.g.*, EDR Ruling No. 2010-2566.

considering consistency of discipline in this case. Furthermore, 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."[12] While citation to the same or similar policies may be relevant, it is not dispositive as to whether discipline is of the same character. The record is unclear as to whether the hearing officer has addressed these issues with finality and, if so, the grounds for his decision. Without more, then, we will not disturb the order as it is characterized by the parties' filings on the grounds offered by the agency. However, our conclusion does not prevent the hearing officer, in his discretion, from considering arguments that have not yet been fully developed or decided at the pre-hearing stage.

Emails

Finally, the grievant has requested "copies of any emails, memorandum, concerning the alleged incident involving [the grievant] from the email accounts" of 21 agency employees. The agency advises that it has identified approximately 188 emails that "may be responsive" to the grievant's request. However, the agency argues that it "does not have" the personnel resources to review these emails for necessary confidentiality measures in a timely manner, and accordingly it has offered to allow the grievant's counsel to review the responsive emails unredacted on the agency's premises "at a mutually agreeable time and location." The agency proposed that counsel specify onsite which emails he intends to use for the grievant's case, and the agency would then devote resources to appropriately redacting that narrowed set. The agency objects to the hearing officer's order that it must "use resources it does not have to assist Grievant in preparing his case against the Agency, when a reasonable alternative has been provided to the Grievant."

The grievant presents a different view of the agency's proposal: that the emails must be reviewed in Richmond, which the grievant's counsel asserts is a six-hour drive from his office. The grievant further maintains that, if all 188 emails are relevant, then the agency should produce all of them, as the hearing officer has ordered.

Again, we find no basis in the record thus far to conclude that the hearing officer has abused his discretion during the pre-hearing proceedings. We have long applied the principle that, absent just cause, all relevant grievance-related information *must* be provided. The parties do not appear to dispute that 188 emails in the agency's possession are relevant to the grievant's request. Ordinarily, parties are not required to decide well before the hearing which relevant evidence they will *not* be relying on. Moreover, we cannot say that 188 is a number of emails that suggests an unusually burdensome review. There is also no indication of how many of the 188 emails, if any, counsel's onsite review could be expected to exclude from the set of documents the agency will ultimately need to produce. Accordingly, the agency has not demonstrated that just cause exists not to produce relevant evidence.

That said, we appreciate that the document production requirements of this matter will likely consume valuable agency resources. Nothing in this ruling is intended to foreclose logistical compromises on this issue that may be reasonable and warranted. For example, if the set of probative emails is likely to be significantly fewer than 188 and the agency can offer a review location local to the grievant's counsel's office, we would encourage the parties to pursue such a compromise independently. However, for purposes of this ruling, we have no grounds to conclude

[12] EDR Ruling No. 2010-2376 n.19.

at this time that a reasonable alternative to production exists and should have been ordered by the hearing officer, as a matter of compliance with the grievance procedure.

CONCLUSION

Based on the foregoing discussion and at this stage of the proceedings, the agency has not provided a basis for EDR to conclude that the hearing officer has abused his discretion or violated a grievance procedure rule. Consequently, EDR will not disturb the hearing officer's order as it is described in the parties' submissions.

EDR's rulings on matters of compliance are final and nonappealable.[13]

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