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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5335
January 6, 2022

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to his September 24, 2021 grievance. The grievant alleges that the Department of Corrections (the “agency”) has failed to produce documents required by the grievance procedure.

FACTS

On or about September 24, 2021, the grievant initiated an expedited grievance claiming retaliation. He cited emails from his facility’s administrative staff informing him that they would need to dock his pay for time spent in in-service training and military duty. On October 19, 2021, the grievant submitted a request for documents pursuant to the grievance procedure. On October 22, 2021, the agency denied the request in full, claiming that producing the requested documents would be unduly burdensome. On October 26, the agency head declined to qualify the grievance for a hearing, asserting that the grievant’s pay was never docked and that any discussion of doing so was mistaken. On November 2, 2021, maintaining his claims of retaliation, the grievant narrowed his previous request for documents. However, the agency again declined to produce documents, citing undue burden. The grievant now asks EDR to issue a compliance ruling granting all of the relief sought by the grievance¹ or, in the alternative, ordering the agency to produce the documents the grievant has requested.

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

¹ The relief listed on the Grievance Form A is: “Full pay for the [dates on which the grievant was told his pay would be docked]. Full re[s]cission of the Group III Written Notice issue[d] to me on 12/9/2020. . . . I am also requesting an immediate stop to all forms of retaliation/harassment in any form, especially disparate treatment.”

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

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

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.

In this case, the grievant has requested the following documents:

- 1) All range and in-service dates for all Lieutenants and Captains at the [grievant’s work facility] for 2021.
- 2) All *Leave and Activity Reporting Forms* (P8s) submitted by all Lieutenants and Captains at [the grievant’s facility] that indicate leave usage on range and in-service dates for 2021.
- 3) All *Leave and Activity Reporting Forms* (P8s) submitted by exempt security staff in the last 3 months at [the grievant’s facility].
- 4) All emails or other communications sent from . . . any . . . person that . . . does Human Resource or timekeeping work, indicating to an exempt employee of the need to use leave for a partial/missed workday due to training or military absence.
- 5) Any correspondence, electronic or otherwise, sent to [the timekeeper at the grievant’s facility] directing her to scrutinize the time of individuals with low leave balances.

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.

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.

According to the grievant, these documents are related to his claim of retaliation by agency management. He has asserted that retaliation was evident when his facility's timekeeper indicated his pay would need to be docked for time he spent in training and in military service:

Attempting to dock my pay for the days I was at the range/military constitutes increased surveillance and retaliation. If this was normal practice, the Agency would have no problem providing emails sent to each exempt security employee notifying them of the need to use leave to make up for range days (as they did to me). If no such emails exist, then those employees would have a *Leave Activity Reporting Form* to reflect their leave usage. . . . If none of these documents exist, and I doubt they do, then the attempt by the Agency to dock my pay for the same situation is harassment and retaliation by the Agency.

In response, the agency director explained that the timekeeper "had been directed to monitor leave usage on a daily basis for employees with small amounts of accrued leave balances to prevent overpayments" and had mistakenly advised the grievant that he had been overpaid for certain absences. Confirming that the grievant should not be, and was not, subject to pay docking as a result of such absences, the director asserted: "While it is unfortunate the [t]imekeeper made an error regarding the application of your leave for military duty, it was a mistake made in good-faith." Following the agency head's determination that the grievance is not qualified for a hearing, the agency has maintained that producing the requested documents would unduly burden the agency by necessitating hours of work that are not justified by any benefit to the grievance process.

It appears that Requests 1, 2, 3, and 4 are related to the grievant's claim that comparable exempt employees are not instructed to use their annual leave or have their pay docked for periods of training or military service. However, the agency does not dispute the claim that the timekeeper's communications with the grievant were not consistent with normal practice. Instead, the remaining dispute evident from the grievance record is whether the timekeeper's error was an innocent mistake or whether it resulted from retaliation by agency management. Request 5 appears to be directly related to that issue, *i.e.* whether the explanation offered by the agency is accurate.

Upon review of the parties' positions following the management resolution steps, it appears that Requests 1, 2, 3, and 4 present broad inquiries that would require extensive searches across numerous staff email accounts and implicate personnel and personal information of other employees. Responding to these four requests would therefore require at least some staff work hours for search and redaction by the agency. Moreover, the grievant has suggested that his requests are intended to show that evidence favorable to the agency *does not exist*. Given that the agency has apparently conceded that docking the grievant's pay as described in the grievance would not be consistent with policy and likewise would not be required of other employees, we conclude that any documents produced in response to these four requests would either be irrelevant or provide little to no material value for any substantive issue that remains contested at this late stage of the grievance process. Considering the balance of interests, the agency's assertion of undue burden with respect to the grievant's Requests 1, 2, 3, and 4 does not constitute a failure to comply with the grievance procedure.

However, based on the current record, we identify no indication that the agency would be unduly burdened by responding to the grievant's Request 5, which seeks correspondence directing the timekeeper to "scrutinize the time of individuals with low leave balances." Such emails, if they

exist, could reasonably confirm or contradict the agency's account of the timekeeper's error and, as such, they would relate to retaliation as a live issue in the grievance. Furthermore, nothing in the record suggests that documents responsive to this request would be voluminous or require extensive redaction. Accordingly, we cannot say that the agency has presented just cause to withhold documents responsive to the grievant's Request 5.

CONCLUSION

Based on the foregoing discussion, the agency is directed to produce records responsive to the grievant's Request 5, as described above. The agency must produce any such records **within ten workdays of the date of this ruling**. The agency must redact any such records as appropriate to protect the privacy of nonparties.¹⁰

EDR's rulings on matters of compliance are final and nonappealable.¹¹

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

¹¹ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).