

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: July 28, 2017;  
Ruling No. 2018-4589; Agency: Virginia Polytechnic Institute and State University;  
Outcome: Hearing Officer in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
*Office of Equal Employment and Dispute Resolution<sup>1</sup>*

**COMPLIANCE RULING**

In the matter of Virginia Polytechnic Institute & State University  
Ruling Number 2018-4589  
July 28, 2017

The grievant has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management to challenge the hearing officer’s pre-hearing order regarding the production of documents in Case Number 10977/10978.

FACTS

The grievant in this case has timely filed two grievances with Virginia Polytechnic Institute & State University (the “University”), the first disputing her original performance evaluation and the second challenging her re-evaluation and termination.<sup>2</sup> Both grievances were qualified for a hearing by EEDR and consolidated for a single hearing.<sup>3</sup> EEDR appointed a hearing officer on March 8, 2017. Upon request by the grievant, the hearing officer issued an order to the University to produce certain documents. Specifically, the hearing officer ordered the University to provide the grievant with the following:

1. *Emails from [grievant’s] account that were to and from [Employee C1] and [Employee J] (dates 8/1/2015 to 7/31/2016, including all attachments in color).*
2. *Emails from [grievant’s] account that were to and from [Employee B] (dates 8/1/2015 to 1/12/2017, this should be just a couple of emails).*
3. *Emails from [grievant’s] account that were to and from [Employee S] (dates 8/1/2015 to 7/1/2016).*
4. *Emails from [grievant’s] account that were to and from [Employee C2] (dates 8/1/2015 to 7/1/2016, this should be a couple of emails).*
5. *All emails from [grievant’s] account from 8/1/2016 to 1/12/2017.*
6. *P112 completed evaluation form that was distributed on 1/11/2017.*
7. *Last back-up copy from Tivoli backup system for [grievant] would contain documents in work folders stored on desktop directory. The folder name would contain the word "work".*

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<sup>1</sup> Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office’s name post-merger as the Office of Equal Employment and Dispute Resolution.

<sup>2</sup> See EDR Ruling No. 2017-4479.

<sup>3</sup> *Id.*

8. *Team Dynamics Ticket requests assigned to [grievant] from 8/1/2016 to 1/12/2017.*
9. *All Instant Messages logs from 10/24/2016 to 1/12/2017 ([grievant's] account).*

The grievant requested a compliance ruling from EEDR on July 20, 2017, stating that the University had produced some of the documents listed in the hearing officer's order but alleging that its production of documents was incomplete. The grievant specifically claims that the University has failed to produce all responsive emails to and from Employee B, Employee J, and Employee C1 about certain topics, as well as some documents that are allegedly responsive to Request 9. The grievant also generally argues that "there are other emails which should have been submitted with the documents," but that were allegedly not disclosed by the University. In addition, the grievant requests that EEDR continue the hearing to a later date to allow her additional time to prepare and review the documents that she claims have been withheld.

### 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>4</sup> EEDR'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>5</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>6</sup> For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.<sup>7</sup> Furthermore, the grievance process provides procedural safeguards to remedy any issues that may arise if there is a dispute as to the extent of a party's document production pursuant to a hearing officer's order. For example, a hearing officer may order sanctions or draw an adverse inference against any party that fails to produce documents in response to an order from EEDR or the hearing officer.<sup>8</sup>

While this ruling was pending, the University searched for and produced additional documents to the grievant that it alleges are responsive to her requests. The University has further offered the grievant the opportunity to conduct her own search of relevant University records should she wish to do so, and asserts that no additional documents exist beyond what has already been provided to the grievant. In response, the grievant claims that the agency has still not provided her with all responsive documents and disputes the agency's contention that no further documents exist.

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<sup>4</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>5</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>6</sup> *See, e.g.*, EDR Ruling No. 2012-3053.

<sup>7</sup> *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." (citations 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." (citations omitted)).

<sup>8</sup> *See Rules for Conducting Grievance Hearings* §§ III(E), V(B).

Under the grievance procedure, a party is not required to create documents that do not exist.<sup>9</sup> Furthermore, EEDR considers the nonexistence of responsive documents to be just cause that excuses a party's failure to provide requested information.<sup>10</sup> Having reviewed the information submitted by the parties, EEDR finds no basis to conclude that the University has improperly withheld any documents responsive to the grievant's requests at this time. Should there be any dispute as to the sufficiency of the University's production of documents at the hearing, the hearing officer may rule on that issue and, if appropriate, exercise the authority granted under the grievance procedure to draw an adverse inference against the University if it has failed to produce any documents listed in the order without just cause.<sup>11</sup> For example, the hearing officer may resolve any factual disputes related to the content of the email messages cited by the grievant in her favor.

Accordingly, EEDR declines to intervene in this case at this time such that the scheduled hearing date would need to be continued.<sup>12</sup> The hearing officer and the parties are directed to proceed with the hearing as scheduled. At the hearing, the hearing officer may address any disputes about the University's production of documents or the grievant's use of those documents in a manner consistent with the authority granted under the grievance procedure. To the extent either of the parties may disagree with the hearing officer's ruling in relation to the University's production of documents or any other document-related issue, if he is called upon to make such a ruling, that matter may be addressed by EEDR on administrative review.

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



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<sup>9</sup> Va. Code § 2.2-3003(E).

<sup>10</sup> Although not an issue in this case, there are circumstances under which some act of bad faith by a party could negate a claim of just cause based on the nonexistence of requested documents.

<sup>11</sup> See *Rules for Conducting Grievance Hearings* §§ III(E), V(B). In addition to offering any documentary evidence that is relevant, the grievant will also have the opportunity at the hearing to present her arguments about the University's evaluations of her work performance, call witnesses and question them as to their knowledge of her work performance during the relevant time periods assessed in the challenged performance evaluations, and also cross-examine any witnesses called by the University about those topics.

<sup>12</sup> Should the hearing officer determine that a continuance is necessary, this ruling does not prevent him from rescheduling the hearing. Similarly, if the hearing officer determines that additional opportunity needs to be provided to the grievant to submit additional argument or information after the scheduled hearing regarding documents provided or made available with limited time to consider prior to the hearing, that determination will also be within the hearing officer's discretion.

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