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**COMPLIANCE RULING**

In the matter of the Virginia Department of Transportation  
Ruling Number 2021-5164  
October 9, 2020

The Virginia Department of Transportation (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management to challenge the hearing officer’s pre-hearing order regarding the production of documents in Case Number 11571. For the reasons discussed below, the agency has not presented a basis on which EDR may disturb the hearing officer’s order. This ruling also provides further guidance to the hearing officer to ensure compliance with the grievance procedure.

FACTS

Without recounting its entirety, the grievance at issue in Case Number 11571 addresses the grievant’s allegation that he was subject to retaliation for reporting a concern to the agency’s Commissioner about the hiring of a wage employee. The grievant has requested a copy of an internal investigation report (“the report”) conducted by the agency. The subject of the report appears to be, at least in part, the circumstances surrounding the hiring of the wage employee, i.e., the same concern the grievant raised to the Commissioner that he argues led to retaliation against him. The hearing officer ordered the agency to produce the report to the grievant or provide it for *in camera* review by the hearing officer to determine its relevance. The agency challenges the hearing officer’s order in this regard and seeks a ruling from EDR on the matter.

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>1</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>2</sup> As long as a hearing officer’s order is consistent with the document

<sup>1</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>2</sup> *Rules for Conducting Grievance Hearings* § III(E).

discovery provisions of the grievance procedure, the determination of what documents are ordered to be produced is within the hearing officer's discretion.<sup>3</sup> For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.<sup>4</sup>

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.”<sup>5</sup> 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 . . . .”<sup>6</sup> While a party is not required to create a document if the document does not exist,<sup>7</sup> 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.

The agency first asserts that the report is not relevant. At this stage, EDR cannot determine that the report is wholly irrelevant. The report appears to reflect the agency's investigation into the topic of at least part of the concern brought forward by the grievant about the hiring of a wage employee. The grievant's raising of this concern to the Commissioner is the alleged protected activity that supports his retaliation claim. Given that the hearing officer will be assessing whether the grievant's reporting of this concern was protected activity and raised in good faith, the results of the agency's investigation into that concern cannot be said to be unrelated. EDR is also cognizant that the hearing officer has yet to rule on whether the report is relevant to the case before him. As this a determination properly for the hearing officer, EDR cannot find that the report is irrelevant in full at this stage.<sup>8</sup> EDR defers to the hearing officer to determine the relevance of the report or portions thereof.

Relevant documents (or portions thereof) may nevertheless be properly withheld if there is just cause to do so.<sup>9</sup> The agency argues that there is just cause to withhold the report because it is an internal investigation, the disclosure of which “will deter agencies from engaging in good-faith internal reviews if such reviews could be used against the agency.” EDR has not recognized an automatic exclusion from potential production of a record because the documentation sought is an

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<sup>3</sup> See, e.g., EDR Ruling No. 2012-3053.

<sup>4</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.’” (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)).

<sup>5</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>6</sup> Rules of the Supreme Court of Virginia, Rule 4:9(a).

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

<sup>8</sup> There could be portions of the report that are not relevant. Such determinations are properly within the hearing officer's discretion to determine as an initial matter here.

<sup>9</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

internal investigation.<sup>10</sup> Further, we do not agree with the agency's contention that production of such records as required by the ordinary requirements of the grievance procedure will cause agencies to refrain from investigating potential wrongdoing on their own. That being said, there may be internal investigation reports that are relevant but could be withheld based on their content or other factors. EDR will assess the other grounds for nondisclosure cited by the agency in this regard.

The agency asserts that the report contains personnel information that is exempt from disclosure under the Virginia Freedom of Information Act ("FOIA"). In interpreting the document disclosure provisions of the *Grievance Procedure Manual*, EDR looks to other analogous laws and regulations for guidance if needed, and principles and approaches arising under FOIA are an immediately relevant and persuasive resource.<sup>11</sup> However, as EDR has held, FOIA exemptions do not automatically protect records from disclosure under the grievance procedure. Thus, an agency may not withhold records based solely upon the fact that personnel information regarding other employees may be included therein.<sup>12</sup> Additionally, the grievance procedure contemplates that documentation about other individuals can be produced, as long as it is done in a manner to protect the privacy of nonparties.<sup>13</sup> For example, to the extent the report contains other individuals' personnel information, it may be appropriate to redact such information (depending on the content) and/or the individuals' identities before the document is produced (if the hearing officer determines production to be warranted) in such a manner to protect the privacy of the nonparties.

The agency additionally states that the report would be inappropriate for the grievant to obtain because it is allegedly, at least in part, about his supervisor. The agency's description of this concern in its submission does not demonstrate a basis to exclude the document from production fully at this stage. However, if the hearing officer determines there is a basis to withhold the document (or portions thereof) for such a reason, we do not prohibit him considering this as a factor here.

The agency also argues that the grievant's attempt to obtain the report is "only to perpetuate his continuing efforts to undermine his supervisor, and not for the purpose of proving or disproving retaliation." At this point, EDR has been presented with no information to substantiate such an allegation. It is additionally unclear how the grievant's attempt to obtain a copy of the report would contribute to such efforts, if indeed that was the grievant's goal. If the grievant is engaging in efforts to undermine his supervisor, we would hope that such conduct would be addressed properly under the *Standards of Conduct* just as any employee should be held accountable for attempts to undermine another colleague.<sup>14</sup> Consequently, EDR does not find this argument persuasive to demonstrate just cause for withholding the report.

### 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 there is just cause to

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<sup>10</sup> The agency has not cited to any other legal prohibition on the disclosure of the report because of its nature or who conducted the investigation.

<sup>11</sup> See, e.g., EDR Ruling No. 2017-4563; EDR Ruling No. 2014-3650.

<sup>12</sup> See, e.g., EDR Ruling No. 2006-1312; EDR Ruling No. 2004-628.

<sup>13</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>14</sup> See DHRM Policy 2.35, *Civility in the Workplace*; see generally DHRM Policy 1.60, *Standards of Conduct*.

withhold the report in full. EDR cannot find that the hearing officer has abused his discretion by requesting to review the report *in camera* to determine its relevance. Consequently, EDR has no basis to disturb the hearing officer's order in that regard. Absent further agreement between the parties and/or order by the hearing officer, it would appear that the next step is for the hearing officer to determine the relevance of the report and, if relevant, address whether portions should be redacted. Any production by the agency must redact personally identifying information to protect the privacy of nonparties.<sup>15</sup>

EDR's rulings on matters of compliance are final and nonappealable.<sup>16</sup>

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<sup>15</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>16</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).