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COMPLIANCE RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2021-5176
November 17, 2020

The Virginia Department of Transportation (VDOT or 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.

FACTS

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 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 initially 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 challenged the hearing officer’s order in this regard and sought EDR’s ruling on the matter. EDR addressed the agency’s challenge in EDR Ruling Number 2021-5164, finding no basis to contravene the hearing officer’s initial determinations, and redirected the matter back to the hearing officer to determine the relevance of the report. The hearing officer has since determined that the report is relevant to the grievance and subject to production. In doing so, the hearing officer provided a quotation from the report in his communication to the parties that supported the basis for his determination. The agency now challenges the hearing officer’s determinations and actions in this regard.

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,

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upon request from a party to the grievance, by the opposing party.”¹ 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.² 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.³ For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.⁴

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.”⁵ 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”⁶ While a party is not required to create a document if the document does not exist,⁷ 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. While the agency presents reasonable disagreement, the hearing officer has also reasonably determined that the report is relevant. Such determinations are within the discretion of the hearing officer. EDR can contravene the hearing officer’s determination if it is inconsistent with the grievance procedure or an abuse of discretion. EDR has not reviewed any indication that the relevancy determination violated the grievance procedure or that the hearing officer has abused his discretion in making this determination. In EDR Ruling Number 2021-5164, we stated that “EDR cannot determine that the report is wholly irrelevant.” Inasmuch as we cannot determine that there is no relevance of the report to the issues grieved, the hearing officer’s ruling is within the limits of his authority.

Relevant documents (or portions thereof) may nevertheless be properly withheld if there is just cause to do so.⁸ The agency argues that any relevance the report may have is outweighed by its “high prejudicial impact.” The prejudicial impact asserted is unclear as it does not appear to be potential prejudice to the agency in its case presentation. Rather, it appears the agency’s concern is that other agency employees who are subordinate to the manager who is a subject of the report

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

² *Rules for Conducting Grievance Hearings* § III(E).

³ *See, e.g.*, EDR Ruling No. 2012-3053.

⁴ *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)).

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

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

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

⁸ *Id.*

would become aware of the report. The agency states that “[a] subordinate employee should not be privy [to] this type of information about his supervisor.” Whether it would be appropriate for a subordinate employee to be aware of reports about their manager’s conduct is dependent on the nature of the matter and the type of record. EDR must make its determination based on the information presented by the parties here, which is limited. Accordingly, we cannot find that the agency has articulated a concern that warrants a finding that the hearing officer has abused his discretion. EDR nonetheless reminds the parties and the hearing officer that there may be portions of the report that could be redacted from either a party or witnesses if there is a basis to do so.⁹ EDR also reminds the parties of the following: “Documents obtained under the grievance procedure are to be used for grievance purposes only. Improper use of documents by a party could result in disciplinary action under the *Standards of Conduct*.”¹⁰

The agency’s final argument seeks the removal of the hearing officer because of alleged misconduct by quoting from the report in his communication to the parties determining that the report was relevant and subject to disclosure.¹¹ The agency’s basis for this argument appears to be the concern of the information potentially being shared with others at the agency, potentially “grossly impacting the reputation of VDOT’s HR leadership” and damaging the reputation of an HR manager. The agency’s submission does not describe how VDOT’s HR leadership will be grossly impacted or the HR manager’s reputation will be damaged by information about founded allegations in an agency investigation report.

If EDR had been asked by the hearing officer about whether quoting the disputed report in his communication was the best course of action, we would have recommended against it. However, the hearing officer’s communications appears to have been made in such a way to identify the basis for his determination about why the report is relevant and subject to disclosure. The hearing officer’s goal also appears to have been to encourage the parties to reach a settlement of the matter. Thus, while EDR may have preferred to have had the matter handled differently, we cannot find that the hearing officer has violated any significant grievance procedure rule or the authority and discretion given to him under the grievance procedure that would support his removal from this case as sought by the agency. Accordingly, EDR declines to remove the hearing officer from the matter. The agency’s remaining requests regarding a protective order and how the grievant may have shared the information should be directed to the hearing officer.

CONCLUSION

Based on the foregoing and at this stage of the proceedings, the arguments asserted by the agency do not provide a basis for EDR to intervene further. EDR joins the hearing officer in encouraging the parties to discuss a settlement of the issues that are the subject of this grievance. If the report will be produced, EDR again reminds the hearing officer and parties that any production by the agency must redact personally identifying information to protect the privacy of nonparties.¹²

⁹ See discussion in EDR Ruling No. 2021-5164 that addresses disclosing records in such a manner to protect the privacy of nonparties, such as another individual’s personnel information.

¹⁰ *Grievance Procedure Manual* § 8.2.

¹¹ The agency indicates that the hearing officer’s quotation in this regard disclosed “confidential findings” from the report the hearing officer was ordering the agency to produce. The agency has not identified a basis for determining what findings are confidential.

¹² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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).