

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: June 4, 2013;  
Ruling No. 2013-3619; Agency: Department of Corrections; Outcome: Hearing  
Officer in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**COMPLIANCE RULING**

In the matter of the Department of Corrections  
Ruling Number 2013-3619  
June 4, 2013

The Department of Corrections (the agency) has requested a compliance ruling from the Office of Employment Dispute Resolution (EDR) regarding a hearing officer's order to produce documents relevant to a dismissal grievance hearing.

FACTS

The grievant was issued a Group III Written Notice with termination on February 21, 2013, for alleged theft from an "Employee Funds" account between August 9 and August 24, 2012. The agency reported the matter to the county's Commonwealth Attorney's office, which elected to pursue criminal charges against the grievant. A criminal case is presently pending in the county's Circuit Court.

The grievant filed a dismissal grievance, challenging the Group III Written Notice and termination. The matter is scheduled for a hearing soon. On May 17, 2013, the hearing officer issued an order for the production of documents relating to the grievance. The agency objected to the hearing officer's order on the grounds that "[t]urning over the requested documents will jeopardize the Commonwealth's Attorney's case." Of a list of ten document production orders, the agency agreed to produce certain records, but maintains that a possibility of compromising a pending criminal matter constitutes just cause for not producing others. Consequently, the agency seeks a ruling from EDR on this matter.

DISCUSSION

The grievance statute provides 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, in a timely fashion."<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. "Just cause" is defined as "[a] reason

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

sufficiently compelling to excuse not taking a required action in the grievance process.”<sup>2</sup> 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.<sup>3</sup> The statute further states 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>4</sup>

In this case, the agency has withheld requested documents due to an alleged impact on a pending criminal prosecution. Those documents include files on the disciplinary action at issue, the full investigation report, Employee Fund Committee documentation, the front entry log and duty roster for the date of the alleged theft, and communications regarding the investigation of the grievant.<sup>5</sup> The grievant’s counsel asserts that the requested documents are necessary to properly prepare her defense.

The agency has provided no explanation of how the criminal prosecution would be “jeopardized” by the grievant having access to the requested documents. As part of its investigation for this ruling, EDR requested additional explanation from the agency. It is EDR’s understanding that input from the Commonwealth Attorney’s Office was sought by the agency, but nothing more has been provided in support of the agency’s ruling request. Because there has been no basis presented to substantiate the claimed harm or prejudice to the criminal prosecution, we are unable to find that the agency has just cause to withhold documents determined to be relevant and ordered produced by the hearing officer. We therefore decline to intervene in this document issue or otherwise alter the hearing officer’s order. The agency’s ruling request is denied.

EDR’s rulings on matters of compliance are final and nonappealable.<sup>6</sup>



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Director  
Office of Employment Dispute Resolution

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<sup>2</sup> *Grievance Procedure Manual* § 9.

<sup>3</sup> *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

<sup>5</sup> The agency has not contested the relevance of these documents in its ruling request.

<sup>6</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).