Issue: Compliance – Grievance Procedure (Documents); Ruling Date: June 2, 2014; Ruling No. 2014-3895; Agency: Department of Corrections; Outcome: Hearing Officer Not 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 2014-3895
June 2, 2014

The Department of Corrections (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 10329. For the reasons discussed below, EDR finds that the hearing officer's order must be amended.

FACTS

On or about February 24, 2014, the grievant was issued a Group III Written Notice with termination for fraternizing with an offender in violation of agency policy. The grievant filed a dismissal grievance challenging his termination, and a hearing officer was appointed on April 10, 2014. The grievant submitted a request for documents to the agency on or about April 15, 2014, seeking, in part, copies of "all employee written notices issued at [the grievant's facility] since 2010." On April 28, 2014, the hearing officer ruled that the agency was required to produce, with appropriate redactions, "copies of written notices issued to employees of [his] facility since August 10, 2011 for a violation of DOP 103.1 or DOP 135.1." The agency requested a ruling from EDR on May 23, 2014, alleging that the hearing officer's order is "overly broad and places an undue burden on the agency."[1]

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. Further, a hearing officer has the authority to order the

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[1] The grievant argues that the agency's request for a compliance ruling is untimely because it was submitted to EDR on May 23, 2014, twenty-five days after the hearing officer's order was issued. The grievance procedure provides that rulings on matters of a hearing officer's non-compliance must be requested from EDR "within 15 calendars days of the date of the hearing decision." *Grievance Procedure Manual* § 6.4. While the agency may not have requested a ruling from EDR as promptly as could be desired, the hearing decision has not yet been issued in this case. As a result there is no basis for EDR to conclude that the agency's request for a compliance ruling is untimely.

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

production of documents.[3] 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.[4] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[5]

The hearing officer ordered the agency to produce Written Notices issued between August 10, 2011 and the present for violations of DOP 130.1, *Rules of Conduct Governing Employee Relations with Offenders*, and DOP 135.1, *Employee Standards of Conduct*.[6] The agency does not dispute that Written Notices issued for violations of DOP 130.1 are relevant to the grievance.[7] It does, however, argue that "[a]ll written notices issued at [the grievant's facility] indicate a violation of DOP 135.1" because that policy "is the basis for all disciplinary actions taken . . . ." In effect, then, the agency claims that the hearing officer's order, as written, would require it to produce all Written Notices issued between August 10, 2011 and the present, and that such an order is overly broad.

Having reviewed the information submitted by the parties, we agree that the hearing officer's order is overly broad. Requiring the agency to disclose all Written Notices issued between August 10, 2011 and the present would effectively permit the grievant to audit the agency's records of disciplinary actions issued during that time period. There is nothing that authorizes such an investigation under the limited discovery set out in the grievance procedure. Furthermore, the hearing officer's order that the agency produce all Written Notices citing to DOP 135.1, *Employee Standards of Conduct*, would potentially result in the production of a large number of irrelevant documents.

Typically, records of disciplinary action are relevant only if they relate to similar misconduct committed by other employees.[8] In determining whether the misconduct of other employees is similar to a grievant's, EDR has further stated that "[t]he key is that the misconduct be of the same character."[9] In this case, the grievant was issued a Written Notice for fraternization. Therefore, only documentation about fraternization or similar misconduct by other employees is relevant. Accordingly, it would appear that the agency should only be

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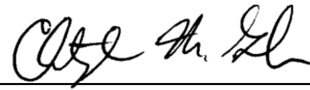
[3] *Rules for Conducting Grievance Hearings* § III(E).
[4] *See*, *e.g.*, EDR Ruling No. 2012-3053.
[5] *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 138, 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)).
[6] The agency noted in its ruling request to EDR that the Written Notice contains a typographical error. It refers to agency Policy 130.1, *Rules of Conduct Governing Employee Relations with Offenders*, by the number 103.1. In his order, the hearing officer also referred to the policy by the number 103.1. There does not, however, appear to be any dispute that the correct number of the policy is 130.1, and EDR has received no information that would suggest otherwise.
[7] Likewise, it does not appear that the agency disputes the hearing officer's determination of the relevant time period. As such, we will not address that question in this ruling.
[8] *See*, *e.g.*, EDR Ruling No. 2010-2566.
[9] EDR Ruling No. 2010-2376 n.19.

required to produce those Written Notices (or documents about) issued between August 10, 2011 and the present for fraternization with offenders in violation of agency policy or for misconduct of a similar character to the conduct charged in the Written Notice received by the grievant.[10]

CONCLUSION

Based on the foregoing, the hearing officer is direct to amend his order for the production of documents to require that the agency produce only those Written Notices that were issued to employees who were disciplined for misconduct that was similar to the conduct charged on the Written Notice issued to the grievant as described above.

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



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[10] This would include, for example, potentially similar instances of behavior by employees, whether or not it was characterized as "fraternization" or charged under that policy.
[11] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).