

Issue: Compliance – Grievance Procedure (documents); Ruling Date: March 30, 2018; Ruling No. 2018-4697; Agency Department of Behavioral Health and Developmental Services; Outcome: Hearing Officer in Compliance.



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

**COMPLIANCE RULING**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2018-4697  
March 30, 2018

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 11172.

FACTS

On December 29, 2017, the grievant was issued a Group III Written Notice with termination for alleged abuse or neglect of clients. The grievant timely filed a dismissal grievance challenging his termination and a hearing officer was appointed on February 19, 2018. The grievant submitted a request for documents to the Department of Behavioral Health and Developmental Services (the “agency”) on or about March 13, 2018, seeking, in part, information about disciplinary actions against Employee W. On March 27, 2018, the hearing officer ruled that the agency was not required to produce disciplinary records for Employee W because they were not relevant to the matters at issue in the grievance. The grievant requested a ruling from EEDR on the same date, alleging that Employee W’s disciplinary records are relevant and that the hearing officer’s order is not consistent with the grievance procedure.

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> 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>2</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>3</sup> For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.<sup>4</sup>

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

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

<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

The agency provided the hearing officer with copies of Employee W's disciplinary records for review to determine whether they should be provided to the grievant. The hearing officer determined that Employee W's disciplinary records were not relevant and need not be produced because the documents did not suggest Employee W engaged in "behavior similar to the behavior alleged of" the grievant. The only document responsive to the grievant's request appears to be a Written Notice issued to Employee W, which, based on EEDR's review as well, was issued for misconduct entirely unrelated to the misconduct the grievant is alleged to have committed.

Typically, records of disciplinary action are relevant only if they relate to similar misconduct committed by other employees.<sup>5</sup> In determining whether the misconduct of other employees is similar to a grievant's, EEDR has further stated that "[t]he key is that the misconduct be of the same character."<sup>6</sup> In this case, the grievant was issued a Group III Written Notice charging him with abuse or neglect for allegedly pushing a client. Therefore, only documentation about abuse, neglect, or other similar misconduct by Employee W would be relevant. The Written Notice was issued to Employee W for misconduct that is not similar to the misconduct for which the grievant was disciplined. Accordingly, EEDR finds that the hearing officer's determination that the agency is not required to produce the documents constitutes an appropriate exercise of discretion in this case.

#### CONCLUSION

Based on the foregoing, EEDR declines to disturb the hearing officer's order regarding the production of documents in this case. The agency is not required to produce the disciplinary records for Employee W requested by the grievant because they are not relevant to the matters at issue in the grievance.

EEDR's rulings on matters of compliance are final and nonappealable.<sup>7</sup>



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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> See, e.g., EDR Ruling No. 2010-2566.

<sup>6</sup> EDR Ruling No. 2010-2376 n.19.

<sup>7</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).