Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 13, 2013; Ruling No. 2014-3708; 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 2014-3708
September 13, 2013

The grievant 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 10151. For the reasons discussed below, EDR finds that the hearing officer's order requires modification.

FACTS

The grievant was issued four Written Notices with termination on June 20, 2013, including one Group III Written Notice for excessive use of the internet at work in violation of agency policy. The grievant filed a dismissal grievance challenging his termination and a hearing officer was appointed on August 7, 2013. Also on or about August 7, 2013, the grievant submitted a request for documents to the Department of Corrections (the "agency"), seeking internet usage records of multiple agency employees. On August 28, 2013, the hearing officer ruled that the agency was not required to produce the internet usage records sought by the grievant. The grievant has requested a ruling from EDR, alleging that the hearing officer's order is not in compliance 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."[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

[1] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[2] *Rules for Conducting Grievance Hearings* § III(E).

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 grievant has requested internet usage logs of nineteen agency employees, eighteen of whom work at his facility and one of whom works at another facility.[5] The grievant argues that these documents are relevant because they may tend to show that the agency's disciplinary action against him for excessive use of the internet was inconsistent with its treatment of other employees who engage in the same behavior. Given the relatively low threshold of the relevancy standard, evidence regarding comparable conduct (here, internet usage) by similarly situated employees[6] at the grievant's facility cannot be viewed as wholly irrelevant at this stage. Rather, such evidence could be informative on any number of questions at issue in a case involving a disciplinary action for the precise conduct about which documents have been requested, including issues of notice, disparate treatment, and/or mitigation. Accordingly, we find that the hearing officer abused her discretion in denying as irrelevant the entirety of the grievant's request for internet usage logs of employees at the grievant's facility.

The agency's advocate has argued that the requested internet usage logs are not currently in existence in a readable format and that such documents would have to be created. The grievance procedure provides that a party is not required to "create" documents that do not exist in response to a request.[7] Documents and electronically stored information, as defined by the Supreme Court of Virginia, include "data or data compilations stored in any medium from which information can be obtained, translated, if necessary, . . . into reasonably usable form."[8] The agency has explained that it uses a system to log all employees' computer and internet use. A user may choose to either search for all employees' access of specific categories of websites, or a specific employee's internet use over a certain period of time. When a search of the records is initiated, the information is automatically downloaded into a spreadsheet, which is then presented to the user as the system's response to the search query. No employee is required to create a document in running such a search, nor is the system's data manipulated or modified by the user in any way. In other words, the information sought is directly translated by the agency's computer system into a readable format as part of the records search. It appears, therefore, that a search for the records of internet use requested by the grievant entails nothing more than a

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[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.'" (citations 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." (citations omitted)).

[5] While the grievant initially sought internet usage logs from the same time period for which he was disciplined in the Group III Written Notice, the agency has indicated that such information is saved only for a period of 60 days and is then automatically deleted. The grievant has stated that the records of internet use for the employees in question during the 60-day period preceding production will be sufficient. The agency has not objected to this revised request.

[6] See Conclusion *infra* for further discussion as to the determination of the relevant scope of similarly situated employees as to this document request.

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

[8] Rules of the Supreme Court of Virginia, Rule 4:9(a).

translation of the available and relevant data into reasonably usable form, and does not require the "creation" of documents by the agency.[9]

CONCLUSION

Based on the foregoing, the hearing officer's order must be modified to require production of certain internet usage logs. However, there has been no determination made yet by the hearing officer as to the relevant scope of employees about whom such documents should be produced. It should be the hearing officer who makes the initial determination on such questions of relevance. In determining the relevant scope of similarly situated employees, EDR would consider those employees in a grievant's work group or department, or those with comparable positions or levels of authority/management to a grievant to be similarly situated, dependent on the conduct at issue.[10] Further, only records regarding employees at the grievant's facility would appear to be relevant, absent strong factors indicating why employees at other facilities would be similarly situated. Based on these considerations, it could be that employees in the same department as the grievant and at high levels of management at his facility would be the limit of the relevant scope, rather than other members of security staff (absent factors indicating why such employees would be similarly situated). The hearing officer will be in a better position to make those determinations, perhaps, after receiving arguments from the parties as to the comparability of certain of those employees for whom internet usage records have been sought.

Accordingly, the agency is ordered to produce internet usage logs consistent with the provisions of this ruling (and any further adjustment ordered by the hearing officer as to the relevant scope of employees) **no later than the date of the hearing or within five workdays of receipt of this ruling (with consideration for any further order by the hearing officer), whichever is sooner.**

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

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[9] This determination would appear to be consistent with comparable considerations under the Virginia Freedom of Information Act, which states that for purposes of electronic information "the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of a new public record." Va. Code § 2.2-3704(G). We view the action required of the agency here as the equivalent of merely printing a report from an electronic data system, which should not be considered the "creation" of a new record.

[10] *See, e.g.,* EDR Ruling No. 2013-3639; EDR Ruling Nos. 2009-2272, 2009-2289; EDR Ruling No. 2009-2136; EDR Ruling No. 2009-2087.

[11] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).