

Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 18, 2014;  
Ruling No. 2014-3926, 2015-3933; Agency: Department of Corrections; Outcome:  
Hearing Officer Non-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 Numbers 2014-3926, 2015-3933  
July 18, 2014

The grievant and the Department of Corrections (the “agency”) have both requested compliance rulings from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) to challenge the hearing officer’s pre-hearing order regarding the production of documents in Case Number 10356. For the reasons discussed below, EDR finds that the hearing officer’s order must be amended.

FACTS

The grievant was issued two Group III Written Notices for falsification of records and terminated from employment with the agency on March 14, 2014. The grievant timely filed a dismissal grievance challenging his termination and EDR appointed a hearing officer on May 6, 2014. On May 9, the grievant submitted a request for documents to the agency. He submitted a supplemental request for additional documents on May 12. The agency notified the hearing officer that it objected to several of the grievant’s requests. A pre-hearing conference was held on May 19, at which the hearing officer ordered the agency to produce documents responsive to those requests that were not in dispute. Also on May 19, the agency notified the grievant that it would be seeking payment for the cost of producing the documents and gave the grievant an estimate of the total charge for production. The grievant filed a motion to compel production of documents, arguing that the requested documents should be provided to him at no cost.

A second pre-hearing conference was held on June 13, 2014 to discuss these issues. The hearing officer issued an order June 23, resolving the remaining disputed document requests and addressing the parties’ arguments as to whether the agency’s charges were reasonable. The agency calculated its total cost of production for the document requests that were not in dispute at \$918.78. This charge consisted of \$351.78 for 37.75 hours of work at \$9.84 per hour and \$563.00 for 2,252 pages of documents at \$0.25 per page. In his June 23 order, the hearing officer concluded that the agency’s cost assessment was unreasonable. He determined that it was reasonable for the grievant to pay \$314.88 for 32 hours of work at \$9.84 per hour and \$180.16 for the documents at \$0.08 per page. The final amount to be paid by the grievant, as ordered by the hearing officer, is \$495.04.<sup>1</sup>

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<sup>1</sup> This ruling will only address those issues from the hearing officer’s June 23 order that have been specifically raised by the parties.

On June 29, 2014, the agency requested a compliance ruling from EDR, arguing that the hearing officer's determination as to the reasonableness of its request for payment is not in compliance with the grievance procedure. The agency asserts its original charge of \$0.25 per page of documents produced is reasonable and seeks reimbursement from the grievant for the per-page cost of the documents at that rate. The grievant submitted a compliance ruling request to EDR on July 6, 2014, arguing that all charges assessed by the agency are unreasonable in this case and that the documents should be provided to him at no cost.

### 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>2</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. Further, a hearing officer has the authority to order the production of documents.<sup>3</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>4</sup> For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.<sup>5</sup>

The grievance procedure further provides that a party may be charged “a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents.”<sup>6</sup> A party may be charged for documents ordered produced by a hearing officer in the same way that such charges may assessed during the management resolution steps.<sup>7</sup> However, the application of that rule must and should be subject to the considerations and discretion of the hearing officer, as reviewed by EDR. Whether a party may be charged for a particular document request during the hearing phase of a grievance depends on a variety of factors. In general, a party may be charged the reasonable costs to collect and produce such documents consistent with EDR's precedents under Section 8.2 of the *Grievance Procedure Manual*. However, the hearing officer has the authority to determine that those costs may not be collected in whole or in part for just cause.

In making such a determination, EDR and hearing officers apply a balancing test, weighing the reasons why charging would be appropriate with the relative importance of the documents requested. The more important the document, the less appropriate it would be to charge for obtaining it. In short, we must balance the interests of creating unreimburseable burdens on a party against the requirements of a fair hearing. For documents central and material to the case at hand, it is reasonable to assume that a party should have free access to such

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<sup>2</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>3</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>4</sup> *See, e.g.*, EDR Ruling No. 2012-3053.

<sup>5</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 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)).

<sup>6</sup> *Grievance Procedure Manual* § 8.2.

<sup>7</sup> *See* EDR Ruling No. 2012-3377; *Grievance Procedure Manual* § 8.2.

documents for purposes of a fair hearing.<sup>8</sup> On the other hand, where the documents sought entertain a potential fishing expedition, or one that requires extensive time and effort to collect, such as reviewing the files of a large number of employees, it would equally be reasonable to expect that an agency could recover the reasonable costs associated with that search.

#### *Charges for Hours Spent Collecting and Producing Documents*

The grievant asserts that it is unreasonable for the agency to recover the costs for the hours of work associated with the collection and production of documents. He has advanced several theories as to why this is the case, which will be discussed in turn. First, the grievant claims that the job responsibilities of the Human Resources Officer (“HRO”) at the grievant’s facility includes assisting employees with the grievance process, and that reimbursing the agency for that time is effectively “pay[ing] her again to simply do her job.”<sup>9</sup> That the job responsibilities of the individual(s) tasked by an agency with collecting and producing requested documents may contemplate the performance of such tasks, however, is immaterial to the issue of whether an agency may seek payment from a grievant for the time needed to produce the documents.

The grievant further argues that, because he “plans to use the documents he has requested to show that the Agency is not applying [] policy consistently” and will introduce some of the documents as exhibits at the hearing, it is unreasonable for the agency to seek repayment of the cost of production. The grievant relies on a footnote in EDR Ruling Number 2012-3377 in support of his position. However, the point of the cited footnote is not coextensive with the grievant’s argument. Rather, that ruling is meant to state that Party A cannot charge the opposing party (Party B) to produce documents that Party A intends to introduce as exhibits at the hearing, i.e., exhibits that Party A would have to exchange with Party B in advance of hearing anyway. On the other hand, the grievant’s position would essentially prevent parties from ever seeking repayment for the cost of producing documents as all documents requested by the parties to a grievance are presumably ones that could potentially be used as exhibits, or there would be no need to request them.

There appears to be no question that the documents sought by the grievant in this case required substantial time and effort to collect. While they may ultimately be material to the grievant’s case, that possibility does not require the agency to provide the grievant with the documents at no charge. Furthermore, it is unclear whether all of the grievant’s requests are narrowly tailored to capture only material information. Some of the requests, for example, seem broad and will likely capture a significant amount of information that is not relevant to the issues in the grievance.<sup>10</sup> While the agency is free to provide the grievant with these documents if it so desires, we see no reason to prevent the agency from recouping reasonable costs associated with

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<sup>8</sup> Such documents would include, for example, those that were the direct basis of a disciplinary action taken against an employee that is the subject of the current grievance. Similarly, there is no question that a party could not charge to produce those documents that it proposes to introduce as exhibits at the hearing.

<sup>9</sup> The HRO apparently coordinated the agency’s document production effort.

<sup>10</sup> For example, one of the grievant’s requests seeks the “28 day cycle sheets for all security employees from January 1<sup>st</sup>, 2014 to August 29<sup>th</sup>, 2013.” Two others seek “[c]opies of all duty rosters for the calendar year of 2013” and “[c]opies of all Captain and Lieutenant’s supervisor’s reports for the calendar year of 2013.” It is difficult to see how all, or even a significant portion, of the documents responsive to these requests would be relevant to the issues in this grievance.

the effort and time needed to produce the documents.<sup>11</sup> In short, we are not persuaded that the documents requested by the grievant are so material to his case that they must be provided to him at no cost.

Finally, the grievant asserts that he is unemployed and the “added burden” of paying the agency’s costs to produce the documents would “chill the discovery process” in this case. While we are sensitive to the grievant’s hardship, his current unemployment is not sufficient, by itself, to render the agency’s request for payment unreasonable. The hearing officer determined that \$314.88 was a reasonable charge for the time needed to produce the requested documents. The agency has gathered 2,252 pages of documents responsive to the grievant’s requests. The issue of the per-page cost will be discussed in more detail below, but an hourly cost totaling \$314.88 does not, on its face, appear unreasonable when considering the volume of documents to be produced. As noted above, a large number of the documents may well be immaterial to the issues presented in this case. The grievant is free to request such documents if he so chooses, but he must also be prepared to pay a reasonable charge for their production. There is nothing to indicate that the hearing officer has abused his discretion in finding the hourly rate reasonable in this case. For these reasons, we decline to disturb the hearing officer’s order that the grievant pay \$314.88 for the hours of work needed to collect and produce documents responsive to his requests.

#### *Charges per Page of Documents Produced*

Both the grievant and the agency assert that the hearing officer’s order for the grievant to pay the agency \$0.08 per page of documents produced is unreasonable. The grievant argues that \$0.08 per page is not an accurate reflection of the agency’s actual printing costs. As evidence, he cites to the amount charged by office supply stores for bulk printing, and claims a charge of \$0.025 per page would be reasonable. The agency, on the other hand, asserts that its original assessment of \$0.25 per page is reasonable because that amount “frequently” charged “by agencies . . . to duplicate documents under the Virginia Freedom of Information Act” (“FOIA”).

As stated above, a party requesting documents under the grievance procedure may be charged “a *reasonable amount* not to exceed the *actual cost* to retrieve and duplicate the documents.”<sup>12</sup> The question, then, is whether the \$0.08 per page cost ordered by the hearing officer is both reasonable and not in excess of the agency’s actual cost to print the documents. To determine whether the per-page charge for documents assessed by an agency is an accurate representation of its actual printing costs, the FOIA Advisory Council suggests that agencies determine the per-page cost for maintenance on the machine used for printing, the per-page cost for toner, and the per-page cost for each sheet of paper.<sup>13</sup> EDR finds this approach persuasive as a method of analyzing an agency’s per-page cost to produce documents under the grievance procedure. Further, the FOIA Advisory Council has previously opined that, while an agency

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<sup>11</sup> Furthermore, the agency did not assess the HRO’s hourly rate for the time spent on collecting and producing documents. Instead, the agency and the hearing officer calculated the cost of production using the hourly rate of the lowest-paid employee who could have performed the task, which amounted to \$9.84 per hour.

<sup>12</sup> *Grievance Procedure Manual* § 8.2 (emphasis added).

<sup>13</sup> See Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges for Record Production Under the Freedom of Information Act, <http://foiacouncil.dls.virginia.gov/ref/FOIACHarges.pdf>.

may charge \$0.25 per page for copies of records, it may only do so if that fee does not exceed the actual cost of producing the documents.<sup>14</sup>


The grievant has not presented any conclusive information to show how \$0.025 per page represents the agency's actual cost for printing. The cost to an office supply store for bulk printing is not necessarily the same as that of a state agency, and the grievant has not demonstrated that those costs would be comparable here. Likewise, the agency has not provided EDR with evidence to demonstrate that the actual cost of production was \$0.25 per page. Further, the hearing officer does not appear to rely on any information approximating actual costs to deduce the \$0.08 per page allowable charge.

Having considered this information, and applying the standard for determining the per page cost of duplicating documents as discussed above, EDR finds that it is reasonable for the agency in this case to seek payment from the grievant in the amount of \$0.10 per page for all documents produced. Such an amount would appear to be a more reasonable approximation of actual costs for the duplication of documents and the resources involved.<sup>15</sup> Accordingly, the hearing officer is directed to revise his order to state that the cost assessed by the agency may not exceed \$0.10 per page for each of the 2,252 documents produced, or a total of \$225.20.

#### CONCLUSION

For the reasons discussed above, the hearing officer is directed to revise his order regarding the agency's charges for the production of documents to state that the agency may assess a cost of \$0.10 per page for each document provided to the grievant. The parties should proceed with the production of documents, payment of costs, and other pre-hearing matters as directed by the hearing officer.

EDR's rulings on matters of compliance are final and nonappealable.<sup>16</sup>



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<sup>14</sup> Va. FOIA Council Adv. Op., AO-12-01 (Feb. 13, 2001).

<sup>15</sup> For example, DHRM uses a \$0.10 per page charge for producing documents under FOIA.

<sup>16</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).