Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 25, 2014; Ruling No. 2015-3931; 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 2015-3931
July 25, 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.

FACTS

The grievant was issued a Group III Written Notice for fraternizing with a former offender and terminated from employment with the agency on February 24, 2014. The grievant timely filed a dismissal grievance challenging his termination and EDR appointed a hearing officer on April 10, 2014. On April 15, the grievant submitted a request for documents to the agency. Among other things, the grievant submitted multiple requests for emails relating to the grievant and/or the incident for which he was disciplined. The requests at issue in this ruling seek the following documents from the agency:

> 2. Any emails, memorandums, or communications of any sort from any department of corrections employee[s] about this alleged incident involving [the grievant].
> 3. Any emails, memorandums, or communications of any sort from any department of community corrections employees about this alleged incident involving [the grievant].
> 4. Any emails or communications from [four agency employees] concerning [the grievant] in the last year.
> 5. Any emails or communications received by [four agency employees] concerning [the grievant] in the last year.[1]

On April 30, 2014, the agency provided the grievant with a choice of three different methods for conducting the search for relevant emails. The first option presented by the agency

[1] Although the hearing officer referred to the grievant's requests for emails as consisting of Requests 2 through 6, only Requests 2 through 5 specifically reference emails. It appears this was a typographical error in the hearing officer's order, and this ruling will address only Requests 2 through 5.

was to request that the Virginia Information Technologies Agency ("VITA") search the identified users' accounts for responsive emails. Using this method would result in the review of all emails that were stored in VITA's backup files, even if the emails had been deleted by the users. If the grievant selected this option, the agency explained that VITA charges approximately $400.00 to $500.00 per month of emails for each account searched, and that it would seek payment from the grievant for this cost.[2] As a second option, the agency offered to have an Information Security Officer take a "snapshot" of the identified users' email accounts and produce those emails responsive to the grievant's request. This type of search would discover all emails that were in the identified users' email accounts, but would not include any emails that had been deleted. The agency informed the grievant that it would only seek payment for this search if the cost exceeded $50.00. The agency's third option was to have the identified users search their own email accounts for all responsive emails, which also would not include any emails that had been deleted.[3]

On May 17, 2014, the grievant filed a motion to compel production of documents, arguing that the requested documents should be provided to him at no cost. The hearing officer issued an order on June 21, stating that the agency was required to provide the grievant with the requested emails at no charge. The parties and the hearing officer corresponded further about the method of production to be used by the agency. The hearing officer informed the agency that "the 'snapshot' option [was] not acceptable to the grievant," apparently concluding that the agency was required to have VITA conduct a search of its backup files for responsive emails.

The agency requested a compliance ruling from EDR on July 2, 2014, alleging that the hearing officer's determination that it was obligated to have VITA search the identified users' email accounts was not in compliance with the grievance procedure. The agency further asserts that Requests 2 and 3 are overly broad and asks that EDR order the grievant to revise those requests.

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."[4] 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.[5] 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

[2] Thus, by way of example, if VITA needed to review one year's worth of emails on one user's account, it would cost approximately up to $6,000.00 for that single user (twelve months of email at $500.00 per month).
[3] The agency did not provide the grievant with information about the possible cost of producing documents using this method.
[4] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[5] *Rules for Conducting Grievance Hearings* § III(E).

ordered to be produced is within the hearing officer's discretion.[6] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[7]

Method of Agency's Search for Emails

The agency asserts that the hearing officer's determination that VITA must conduct the search of its backup files for emails responsive to Requests 2 through 5 is not in compliance with the grievance procedure.[8] In response, the grievant argues that he possesses information to show that agency management issued the discipline as a form of retaliation and that, as a result, the agency cannot be relied upon to produce responsive emails without VITA's involvement. Specifically, the grievant claims that a member of agency management mistakenly sent him an email seeking information about him from other managers. The grievant appears to argue that this email is indicative of a retaliatory motive on the part of agency management and that it led to the issuance of the discipline and his termination. The grievant asserts that the agency's "proposal to not guarantee the delivery of deleted emails" without a search of VITA's backup tape is unacceptable. He argues that any agency employees who "engaged in retaliatory tactics" via email would have the motivation to "cover those actions up" and prevent the grievant from obtaining that information without paying the prohibitive cost imposed by VITA.

Having reviewed the information presented by the parties in this case, we find that there is no reason to conclude that the only method of ensuring complete production of responsive documents is to have VITA conduct a search of those users' emails accounts. While this ruling was pending, the agency searched the identified users' email accounts for responsive documents using the "snapshot" method described above. The agency has identified emails that are responsive to the grievant's requests, including some that relate to the message he received by mistake and which he argues is evidence of retaliatory information-gathering by agency management. EDR has reviewed the information provided by the agency and determined that there is no basis at this time to conclude that the "snapshot" search failed to capture the emails sought by the grievant or that agency employees have deleted or otherwise attempted to conceal evidence from the grievant.

While some of the grievant's concerns about the agency's production of documents are understandable, the grievance statutes state that, upon receipt of a request for documents, "a party shall have a duty to search its records" for relevant documents.[9] It is the agency's responsibility to assess the grievant's document requests, determine what documents are relevant to the challenged management actions, and disclose such documents accordingly. We are not

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[6] *See, e.g.,* EDR Ruling No. 2012-3053.

[7] *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 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." (citations omitted)).

[8] In the alternative, the agency appears to assert that the hearing officer's order that it was not reasonable for the agency to seek payment for any portion of the cost of production using this method was an abuse of discretion.

[9] Va. Code § 2.2-3003(E).

persuaded by the grievant's arguments that the email exchange identified establishes retaliatory animus, much less wrongful motives such that the agency is incapable of processing and responding to the document requests in a reasonable and appropriate way.

In this case, the agency has already searched its emails using the "snapshot" method. EDR has reviewed no information that would indicate that method of search is unreasonable in any way or unlikely to result in the production of responsive emails. Indeed, as stated above, the agency has identified documents responsive to the grievant's requests from the "snapshot" search and is prepared to provide the grievant with those documents. Based on this information, and for the reasons discussed above, we conclude that the hearing officer's directive to the agency that it must conduct the search for documents through VITA is not reasonable. The agency is free to search for and produce documents obtained using the "snapshot" search in response to the grievant's requests.

We further note that the grievance process provides procedural safeguards to remedy any issues that may arise if there is a dispute as to the extent of a party's document production because the search method may have been deficient or ineffective. For example, a hearing officer may order sanctions or draw an adverse inference against any party that fails to produce documents in response to an order from EDR or the hearing officer.[10] If there is an actual dispute between the parties as to the extent of the agency's production of specific responsive emails, that issue may be addressed by the hearing officer and/or EDR after the agency has produced emails in response to the grievant's requests.

With regard to the agency's request for payment for the cost of producing the requested documents, it appears that the hearing officer's June 21 order only addressed the reasonableness of the cost for a search using VITA, as that was the only option that the hearing officer and the grievant deemed acceptable at that time. While this ruling was pending, the agency informed EDR that it does not intend to seek payment for the production of emails obtained through the "snapshot" search. As a result, the hearing officer's order that the agency must provide the grievant with documents at no cost using VITA is effectively moot.[11] Should the agency wish to seek payment for the cost of collecting and producing documents using the "snapshot" search, that issue should be addressed if and when it arises.

Allegedly Overly Broad Requests

The agency further asserts that Requests 2 and 3 are overly broad. Specifically, the agency argues that it "must be able to identify the email boxes that are to be searched," because it is not able to "conduct a blanket search of all user inboxes." The agency requests that the grievant "specifically identify the users whose mailboxes are to be searched." While complying with these requests as they are currently written would require the agency to invest extensive time and resources, they clearly seek relevant documents consisting of "communications . . .

[10] *See Rules for Conducting Grievance Hearings* §§ III(E), V(B).

[11] Because this issue is moot, we need not address the VITA costs specifically in this ruling. We do note, however, that it is difficult to imagine a case in which it would be reasonable to pass on a cost of $400.00 to $500.00 per month per account searched to a grievant.

about this alleged incident involving [the grievant]." It does, however, appear that searching for documents that are responsive to these requests could require the agency to search the email accounts of every agency employee over a one-year time period. This would undoubtedly impose an undue burden.

Given that Requests 2 and 3 appear to be tailored to capture emails that are related to the management actions at issue, the question to be addressed is how the agency's search can be conducted in a manner that is efficient, cost-effective, and appropriately tailored so as not to review vast amounts of non-responsive information. In this case, we find that the agency's request for clarification from the grievant is reasonable in order to enable it to carry out an effective search for responsive documents. Accordingly, the grievant is directed to provide the agency with further descriptive information about the content of the emails sought in Requests 2 and 3, and/or information about the employees that he believes may possess responsive emails, **within five workdays of the date of this ruling.** The grievant may, for example, choose to identify specific employees, or a specific group of employees, who might be in possession of relevant documents. The grievant could also generally describe what he believes the content of responsive emails would be, thus allowing the agency to identify the specific employees whose accounts should be searched. We would encourage the parties to work together to identify the best way of clarifying the requests so the agency can move forward with collecting and producing documents.[12]

CONCLUSION

Based on the foregoing, the hearing officer's order must be vacated to the extent that it prohibits the agency from searching for documents using any search method that does not require VITA's involvement. The hearing officer's order that the agency must provide the grievant with documents at no cost is moot, as it only addressed the question of whether it was reasonable for the agency to request payment from the grievant for the amount charged by VITA and did not consider the other search methods offered by the agency. The agency may search for documents responsive to the grievant's requests using the "snapshot" search method. If there is any dispute as to the sufficiency of the agency's production of documents, that matter may be resolved by the hearing officer and/or by EDR as appropriate. Finally, the grievant is directed to clarify Requests 2 and 3 in the manner described above.

EDR's rulings on matters of compliance are final and nonappealable.[13]

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Office of Employment Dispute Resolution

[12] If the grievant does not clarify Requests 2 and 3, the agency is not obligated to produce documents in response to those requests because it would impose an undue burden, as discussed in this ruling.
[13] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).