

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 25, 2014; Ruling No. 2015-4001; Agency: Department of State Police; Outcome: AHO 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 State Police  
Ruling Number 2015-4001  
September 25, 2014

The Department of State Police (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 10434. For the reasons discussed below, EDR finds that the hearing officer’s order must be amended.

FACTS

On or about April 28, 2014, the grievant was issued a Group III Written Notice for “[e]ngaging in conduct, whether on or off the job, that undermin[ed] the effectiveness or efficiency of the Department’s activities” in violation of agency policy. The grievant filed a grievance challenging the disciplinary action on or about May 21, 2014. After proceeding through the management resolution steps, the agency head qualified the grievance for a hearing and a hearing officer was appointed on August 18, 2014. The grievant submitted a request for the production of documents to the hearing officer on or about September 4, 2014. On September 10, 2014, the hearing officer ordered the agency to produce documents the following documents:

1. “Administrative Investigations or Written Counseling Sessions (omitting nothing) concerning any and all Department Members accused of failing to be “professional” which may or may not have resulted in Group Offenses or disciplinary actions for the years 2011 through present. The request would include the initial action and the final action taken.”
2. “Administrative Investigations or Written Counseling Sessions (omitting nothing) concerning any and all Department Members accused of violating General ADM 11.00, Standards of Conduct which may or may not have resulted in Group Offenses or disciplinary actions for the years 2011 through present. The request would include the initial action and the final action taken.”
3. “Administrative Investigations or Written Counseling Sessions (omitting nothing) concerning any and all Department Members accused of violating General ADM 12.02, Standards of Conduct which may or may

not have resulted in Group Offenses or disciplinary actions for the years 2011 through present. The request would include the initial action and the final action taken.”

4. “Documents relating to any disciplinary or corrective action given to [Employee R] for engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department’s activities. This includes actions which might impair the Department’s reputation as well as the reputation or performance of its employees.”
5. “Documents relating to any disciplinary or corrective action given to [Employee G] for engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department’s activities. This includes actions which might impair the Department’s reputation as well as the reputation or performance of its employees.”

The agency requested a compliance ruling from EDR on September 17, 2014, alleging that complying with Requests 1 through 3 “would have a significantly negative impact on the manner in which administrative investigations are conducted . . . in the future” because any such documents that become a part of the hearing record will be publicly available.<sup>1</sup> The agency further alleges that the documents sought in Requests 4 and 5 “are not directly related to this grievance in anyway [sic].”<sup>2</sup>

### 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>3</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>4</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>5</sup> For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.<sup>6</sup>

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<sup>1</sup> The agency may be under the impression that it is required to produce documents as sought in the grievant’s request to the hearing officer rather than those the hearing officer ordered the agency to produce (i.e., the “Complete Personnel File[s]” of Employee R and Employee G rather than documents relating to discipline that may have been issued to them). This ruling will address the agency’s arguments with regard to the documents that the hearing officer ordered the agency to produce, not the requests initially submitted by the grievant.

<sup>2</sup> It appears that the agency’s arguments regarding Requests 4 and 5 contain a typographical error. The agency refers to these requests as 5 and 6. The hearing officer ordered the agency to produce five categories of documents.

<sup>3</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>4</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>5</sup> See, e.g., EDR Ruling No. 2012-3053.

<sup>6</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

The grievance statutes further state that “[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.”<sup>7</sup> Documents and electronically stored information, as defined by the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form . . . .”<sup>8</sup> While a party is not required to create a document if the document does not exist,<sup>9</sup> parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects that the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

### *Inconsistent Discipline*

In this case, the grievant’s requests for documents effectively amount to a request for information related to disparate or inconsistent discipline of other employees who may have engaged in misconduct similar to that for which she was disciplined. For example, her request for documents relating to certain “Administrative Investigations or Written Counseling Sessions” in Requests 1 through 3 is essentially a request for documents relating to other agency employees who may have been subject to investigation or counseling for “failing to be ‘professional’” or for violating the agency policy, regardless of whether the agency issued a Written Notice. Similarly, Requests 4 and 5 seek Written Notices issued to two employees who may have been disciplined for “conduct . . . that undermin[ed] the effectiveness or efficiency of the Department’s operations.”<sup>10</sup> EDR has addressed requests for documentation regarding inconsistent discipline under the grievance procedure in the past.<sup>11</sup> The hearing officer’s order requires modification in certain general respects.

### Similar Misconduct

Typically, records of disciplinary action are relevant only if they relate to similar misconduct committed by other employees.<sup>12</sup> 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.”<sup>13</sup> In this case, the Written Notice issued to the grievant states that she engaged in “conduct, whether on or off the job, that undermines the effectiveness or efficiency of

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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>7</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>8</sup> Rules of the Supreme Court of Virginia, Rule 4:9(a).

<sup>9</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>10</sup> Of course, if Employees R and G were not disciplined for conduct of that nature, then there would be no documents responsive to Requests 4 and 5 for the agency to produce.

<sup>11</sup> See, e.g., EDR Ruling No. 2014-3895; EDR Ruling No. 2012-3337; EDR Ruling No. 2010-2566.

<sup>12</sup> See, e.g., EDR Ruling No. 2010-2566.

<sup>13</sup> EDR Ruling No. 2010-2376 n.19.

the Department's activities," including "actions which might impair the Department's reputation as well as the reputation or performance of its employees," in violation of Section 13(b)(20) of General Order ADM 12.02, *Disciplinary Measures*. Specifically, the grievant is alleged to have made "inappropriate[]" statements to a member of the public and "failed to follow instruction given to her by her supervisor . . . to 'be professional' during [a] meeting" with a member of the public. Therefore, only documentation about that type of behavior, or other similar misconduct, by other employees is potentially relevant and, therefore, subject to production.

#### Scope of Production

In most cases involving a claim of inconsistent treatment of employees, a grievant may obtain relevant documents addressing the treatment of employees in the grievant's reporting line, division/department, and/or at the same office or facility. The hearing officer's order on Requests 1 through 3 contains no limitation on the scope of employees about whom responsive documents must be produced, but only states that documents relating to "all Department Members" must be provided to the grievant. Having reviewed the information submitted by the parties, EDR has not identified any reason why documents related to all agency employees should be produced. Accordingly, we conclude that there is just cause to limit disclosure of documents to the grievant because complying with the hearing officer's order would impose an undue burden on the agency. The hearing officer's order must be narrowed to those employees who are or were employed in the same area and/or reporting line where the grievant is assigned and also include employees of the grievant's office or work group.<sup>14</sup>

#### Investigative Files

The hearing officer's order appears to require production of the contents of investigative files relating to incidents in which other employees were potentially subject to similar disciplinary actions or counseling. For purposes of presenting evidence on the issue of inconsistent discipline, however, neither the content of an investigative file nor the details of how the investigation began (the "initial action") are normally relevant. It is not the hearing officer's role to take evidence on and re-litigate past disciplinary actions not at issue. To determine whether the agency has taken disciplinary action consistently and assess the similarity of the behavior to the instant case, all that is relevant is the final action (whether disciplinary or counseling) and some recitation of the misconduct that gave rise to the action. Thus, the agency is not required to produce the entire contents of investigative files. The only documents subject to disclosure would be redacted information reflecting the agency's final action and describing the misconduct in sufficient detail as is appropriate for the particular case.

The grievant's requests also appear to seek documents regarding incidents that may not have resulted in discipline or counseling. In such situations, there may be no document that shows the final action taken in response to the incident or even documentation about the incident. Indeed, gathering responsive information for incidents that did not rise to the level of

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<sup>14</sup> If the hearing officer finds that there are sufficient reasons to better define the scope of production with input from both parties, he has the discretion to do so.

disciplinary action is inherently difficult, especially considering there is no requirement under the grievance procedure for the agency to create a document if it does not already exist. However, if the agency determines that investigation files that resulted in no disciplinary action or counseling exist in the relevant scope and relating to misconduct of a similar character, it would only be obligated to provide documentation that contains a recitation of the misconduct that gave rise to the investigation.

The hearing officer's order must be modified to be consistent with the above parameters. However, further commentary is necessary as to each specific request.

#### *Request 1*

Request 1 seeks documents related to employees who were subject to discipline or counseling for "failing to be 'professional'" from 2011 to the present. Documents responsive to this request could clearly be relevant in this case as to the issue of inconsistent discipline, if, as discussed above, the conduct of the comparator employees is of the same character. However, it may very well be that there could be situations in which an employee engaged in unprofessional behavior that is not at all comparable to the current case, depending on the context. Documentation about dissimilar conduct would not be of the same character and could, therefore, be withheld.

#### *Request 2*

Request 2 seeks documents relating to violations of General Order ADM 11.00, *Standards of Conduct*, regardless of whether discipline was issued, dating from 2011 to the present. General Order ADM 11.00, *Standards of Conduct*, is intended "[t]o establish standards for honesty, integrity, impartiality, and conduct by Department employees" and sets forth types of behavior that are unacceptable to the agency and for which employees may be disciplined. The policy is not cited in the Written Notice issued to the grievant and describes a number of types of misconduct, many of which have no relation to the behavior for which the grievant was disciplined. Accordingly, we must conclude that Request 2 is overly broad. Requiring the agency to disclose all documents related to investigations of and counseling issued in response to violations of General Order ADM 11.00, *Standards of Conduct*, between 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 for violations of General Order ADM 11.00, *Standards of Conduct* would potentially result in the production of a large number of irrelevant documents. The hearing officer's order as to Request 2 must be rescinded.

#### *Request 3*

Request 3 seeks documents relating to violations of General Order ADM 12.02, *Disciplinary Measures*, regardless of whether discipline was issued, dating from 2011 to the present. General Order ADM 12.02, *Disciplinary Measures*, provides a "comprehensive

description of the types of actions that may result in removal or suspension from the Department . . . .” In part, it lists examples of misconduct categorized by the appropriate level of Written Notice to be issued. The Written Notice issued to the grievant states that she violated Section 13(b)(20) of the policy, which states that “[e]ngaging in conduct . . . that undermines the effectiveness or efficiency of the Department’s activities” may be punishable as a Group III offense. The policy, however, lists a number of other offenses and types of misconduct that have no relation to the behavior for which the grievant was disciplined. As a result, we conclude that, as written, Request 3 is overly broad. The hearing officer’s order that the agency produce documents related to violations of General Order ADM 12.02, *Disciplinary Measures*, would potentially result in the production of a large number of irrelevant documents.

We do, however, find that documents related to violations of Section 13(b)(20) of General Order ADM 12.02, *Disciplinary Measures*, could be relevant in this case because the grievant was disciplined for violating that section of the policy, if, as discussed above, the conduct at issue is of the same character as in this case. Such information might tend to show inconsistent discipline as to other employees for “[e]ngaging in conduct . . . that undermines the effectiveness or efficiency of the Department’s activities.” Accordingly, the hearing officer must modify the order on Request 3 consistent with this discussion.

#### *Requests 4 and 5*

The agency alleges that the documents sought in Requests 4 and 5 “are not directly related to this grievance in anyway [sic].” Requests 4 and 5 seek “[d]ocuments relating to any disciplinary or corrective action given to [Employee R and Employee G] for engaging in conduct, whether on or off the job, the undermines the effectiveness or efficiency of the Department’s activities,” including “actions which might impair the Department’s reputation as well as the reputation or performance of its employees.” Information responsive to these requests would consist of any disciplinary or corrective actions issued to two agency employees for violations of Section 13(b)(20) of General Order ADM 12.02, *Disciplinary Measures*, the same misconduct as that for which the grievant was disciplined. As a result, any such documents could be relevant to the question of whether the discipline issued to the grievant was consistent with its treatment of other similarly situated employees, provided such documents are within the other general parameters discussed in this ruling and Employees R and G are within the relevant scope.


#### *Alternate Format*

With regard to the agency’s concerns that providing the grievant with personnel records related to employee misconduct may jeopardize its operations, we note that the agency may elect to compile the information to be produced in a summary form to preserve employee privacy rather than providing the personnel documents themselves. While the grievance statutes do not mandate the production of a document that is not already in existence, if the agency chooses not to present the requested information in a compilation format, then it must instead provide to the grievant existing personnel documents, with personally identifying information redacted.

CONCLUSION

Based on the foregoing, the hearing officer is directed to amend his order for the production of documents to be consistent with the parameters and directives in this ruling. The agency may produce the ordered documentation in a compilation format or it may produce the relevant personnel documents themselves. The agency must redact personally identifying information in any documentation produced in response to these requests to protect the confidentiality of nonparties.<sup>15</sup>

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



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<sup>15</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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