Issue: Compliance – Grievance Procedure (documents); Ruling Date: October 3, 2014; Ruling No. 2015-4003; Agency: Department of Alcoholic Beverage Control; Outcome: AHO in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2015-4003
October 3, 2014

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 10378.

FACTS

The grievant was employed as a Special Agent by the Department of Alcoholic Beverage Control (the "agency"). On or about April 3, 2014, he was issued a Group III Written Notice for failing to follow agency policy by violating a complainant business owner's constitutional rights and terminated from employment with the agency. The grievant timely filed a dismissal grievance challenging his termination and EDR appointed a hearing officer on May 27, 2014.

There has been an extensive exchange of correspondence regarding document request issues in this case and the hearing officer has issued several orders regarding the agency's production of documents. In relevant part, the grievant requested that the agency produce "all emails, notes and communications taking place between handlers of this case to include but are not limited to [sic], [5 agency employees including Employee F and Manager C]." On July 28, 2014, the hearing officer ordered the agency to provide the grievant with documents responsive to this request that were "related to issuance of the Written Notice, the [issue] addressed in the Written Notice, the related complaints addressing Grievant's actions, and any Agency investigation thereto . . . ."

During the process of producing documents in response to the grievant's requests, the agency asserted that there was just cause to withhold emails sent from Employee F to agency management because those internal communications were protected by the attorney-client privilege. The agency further explained to the grievant that Manager C was no longer employed by the agency, and thus it did not have access to the entirety of his emails. It was able to search those emails stored in Manager C's inbox as of his last day of employment, but all other emails were "contained on backup storage units" that are saved each month and maintained by the Virginia Information Technologies Agency ("VITA"). According to the agency, VITA charges approximately $350.00 per user per monthly backup storage unit to restore emails to a searchable format.[1] The agency requested reimbursement from the grievant for the costs assessed by VITA to restore and search Manager C's emails.

[1] 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 $4,200.00 for that single user (twelve months of email at $350.00 per month).

On September 2, 2014, the hearing officer held a pre-hearing conference with the parties to discuss these and other document-related issues. At the pre-hearing conference, the grievant disputed the agency's assertion that communications from Employee F were protected by the attorney-client privilege. He further objected to the agency's request that the grievant pay for the cost to produce Manager C's emails. In an order dated September 16, 2014, the hearing officer ruled that Employee F's "internal communications [] regarding Grievant and/or [the complainant business] are privileged and confidential and need not be produced . . . ." The hearing officer also determined that the agency could "charge Grievant the actual costs to retrieve and duplicate" Employee C's emails, including the $350.00 per user per monthly storage unit charge assessed by VITA to search its backup files.

The grievant requested a compliance ruling from EDR on September 19, 2014, alleging that the hearing officer's order is not in compliance with the grievance procedure. He alleges that Employee F's internal communications "are not protected by attorney-client privilege" and that the hearing officer's decision "requiring the grievant to bear the costs of retrieval and duplication of [Employee C's] e-mails" is unreasonable.

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."[2] 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.[3] 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.[4] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[5]

Attorney-Client Privilege

The hearing officer concluded that there was just cause for the agency to withhold emails sent from Employee F to agency management because those communications are protected by the attorney-client privilege. The grievant asserts that Employee F's emails are not protected by the attorney-client privilege. The grievant further argues that, if any emails are privileged, the grievant and his partner, not the agency, should be considered to have been Employee F's clients at the time the communications were made because they requested assistance from Employee F in the case involving the complainant business. In effect, the grievant claims that any of Employee F's communications with agency management should not be considered privileged

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[2] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[3] *Rules for Conducting Grievance Hearings* § III(E).
[4] *See*, *e.g.*, EDR Ruling No. 2012-3053.
[5] *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.'" (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)).

because she "became involved in the . . . investigation" at the request of the grievant's partner, "met with the grievant on multiple occasions[,] and discussed detailed information" about the case with him.

Employee F is an attorney employed by the agency to "consult with supervisors about legal issues and case development as they arise in the course of investigations." According to the grievant, Employee F was involved in the investigation of the case involving the complainant business that ultimately led to the grievant's termination. The agency has already provided the grievant with all emails sent by Employee F of which the grievant was a recipient, as well as all communications between Employee F and any entities outside the agency. Only internal communications between Employee F and agency management about the case and/or the grievant have been withheld.

The purpose of the attorney-client privilege is to protect confidential communications between attorneys and their clients.[6] The attorney-client privilege "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'"[7] The privilege acknowledges that an attorney needs to know all information relating to the client's representation so that the attorney may carry out his or her professional mission.[8] In other words, the purpose of the attorney-client privilege is to "encourage clients to make full disclosure to their attorneys."[9] The protection of the privilege extends *only to confidential communications between attorney and client*, and does not extend to underlying facts or evidence.[10]

Due to the nature of Employee F's employment as an attorney and her role as a legal advisor within the agency, any confidential communications, written or otherwise, between Employee F and agency management are protected by the attorney-client privilege in this case. EDR has reviewed nothing to suggest that the agency's assertion of the attorney-client privilege with respect to Employee F's communications with agency management is inapplicable in this case.[11] Furthermore, the grievant's argument that he and his partner should be considered Employee F's clients for the purpose of assessing whether any attorney-client privilege exists is without merit. Employee F was hired by the agency to provide legal services for agency employees. The attorney-client relationship here is between the agency and Employee F.[12] Accordingly, we decline to disturb the hearing officer's order that internal communications

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[6] *E.g.*, Wells v. Liddy, 37 Fed. App'x. 53, 64 (4th Cir. 2002) (citing Upjohn Co. v. United States, 449 U.S. 383, 389(1981)).
[7] *E.g.*, Swindler & Berlin v. United States, 524 U.S. 399, 403 (1998) (citing *Upjohn*, 449 U.S. at 389).
[8] *Upjohn*, 499 U.S. at 389.
[9] *Id.* (citation omitted).
[10] *Id.* at 395-96.
[11] Any underlying facts or other information that may have been the subject of communications between Employee F and agency management, however, are not protected by the attorney-client privilege. *See Upjohn*, 449 U.S. at 395-96 (citation omitted). The grievant has presented no evidence to suggest that the agency may have improperly withheld factual information that may have the subject of the communications at issue here.
[12] *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992) (holding that the attorney-client privilege "exists between a corporation and its in-house attorney" (citing *Upjohn*, 449 U.S. at 389-90)); Gordon v. Newspaper Ass'n of Am., 51 Va. Cir. 183, 186 (Va. Cir. Ct. 2000) ("The communications protected are those between employees and in-house counsel which aid counsel in providing legal services to the corporation." (citing *Upjohn*, 449 U.S. at 395)).

between Employee F and agency management are protected by the attorney-client privilege and that there is just cause for the agency to withhold those documents.[13]

Request for Manager C's Email Communications

The hearing officer determined that it was reasonable for the agency to seek payment from the grievant for the cost of producing Manager C's emails. The grievant alleges that the hearing officer's order is not in compliance with the grievance procedure because Manager C's emails are "critical to [his] case" and "the importance of said e-mails outweighs any cost the Agency may incur" in producing them.[14]

Manager C was employed as a member of agency management. According to the information provided by the agency, the grievant has already received many, if not all, of Manager C's emails on the topics which are the subject his request. The grievant's request for "all emails, notes and communications taking place between handlers of" the grievant's case resulted in the production of emails of several other agency employees. These employees communicated with Manager C about the issues in this case. In complying with the hearing officer's order, the agency searched the email accounts of these employees and produced emails sent by Manager C. This email correspondence contains many of the emails sent and/or received by Manager C that would be saved in the backup files of his email account. While the agency cannot rule out the possibility that some additional responsive emails may not have been provided, it appears that a search of VITA's backup files from Manager C's email account would largely result in the production of documents that are already in the grievant's possession.

In weighing the burden on the agency to search Manager C's emails against the likelihood that any additional non-cumulative documents might be disclosed, as well as the relative importance they might have to the grievant's case, we find that it would impose an undue burden on the agency to comply with the grievant's request to produce Manager C's emails in this case from the VITA backup. The agency has already provided the grievant with a large volume of email correspondence about the grievant and the incident for which he was disciplined, including many emails sent by Manager C. While there appears to be no dispute that these emails could be material to the grievant's case, requiring the agency to produce those emails sent and/or received by Manager C that are already in his possession would be a duplication of effort. The grievant has presented EDR with no evidence to suggest that Manager C may have sent or received any emails other than those already in his possession that could be relevant to his case. To the contrary, it appears from EDR's review of the facts that many of the documents sought by the grievant would have already been provided in response to his many other document requests with which the agency has complied. In short, the possibility that

[13] We do not necessarily disagree with the grievant's contention that some of the withheld documents could be relevant to this case. That requested documents may be relevant, however, does not by itself overcome an appropriate assertion of just cause due to legal privilege.

[14] The grievant also claims that he "should not bear the burden of costs related to" producing Employee C's emails based on a provision of the Virginia Public Records Act which states that "[n]o agency shall destroy or discard a public record" without following the procedures set forth by the Library of Virginia. Va. Code § 42.1-86.1(A). The grievant asserts that Manager C "was not allowed to delete emails" and that it is inappropriate for the agency to seek payment for the cost of restoring emails that should have been retained by the agency. The information presented to EDR does not suggest that Manager C or the agency improperly deleted any public records. It appears instead that the agency deactivated Manager C's email account after his employment with the agency ended and transferred the data to VITA's "backup storage facility" for retention.

additional relevant information would be disclosed after a search of Manager C's email account is remote. Furthermore, considering the extensive production of documents in this case, it is unlikely that any additional documents provided to the grievant from Manager C's email account would be of central importance. However, the cost to the agency in time, effort, and expense to conduct a search of Manager C's emails would be great. Accordingly, we must conclude that it would impose an undue burden for the agency to withhold produce documents responsive to the grievant's request for Manager C's emails in this case.[15]

CONCLUSION

Based on the foregoing, the hearing officer is directed to amend his order for the production of documents to state that the agency is not required to produce email correspondence from Manager C's email account. As a result, any provisions of the hearing officer's order relating to the reasonableness of the agency's request for payment for the production of those documents are moot and must be vacated. There is no basis for EDR to modify the hearing officer's determination that Employee F's email correspondence may be withheld for just cause due to the agency's assertion of attorney-client privilege.

EDR's rulings on matters of compliance are final and nonappealable.[16]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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[15] 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 for an agency to pass on a cost of $350.00 per user per monthly backup unit searched to a grievant.

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