

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 26, 2014; Ruling No. 2015-4006; 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 Numbers 2015-4006
September 26, 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 (“DHRM”) to challenge the hearing officer’s pre-hearing orders regarding the production of documents in Case Number 10453.

FACTS

On July 17, 2014, the grievant was issued a Group II Written Notice for failing to perform assigned work and failing to follow a supervisor’s instructions and written policy. He was terminated based on his accumulation of two Group II Written Notices.¹ The grievant timely filed a dismissal grievance challenging his termination and EDR appointed a hearing officer on September 3, 2014. On September 10, 2014, the hearing officer ordered the agency produce the following documents:

1. “A complete copy of the content in Grievant’s "supervisor’s file" kept by [] his former direct supervisor.”
2. “A complete copy from any file the [grievant’s facility] has pertaining to Grievant.”

On September 17, 2014, the hearing officer issued a second order to the agency to provide the grievant with the following documents:

3. “All [facility] policies and procedures, and any departmental operating procedures (DOP's), as it pertains to the [grievant’s facility] Conference Planning. Also, include a relevant copy of the conference planning packet, and any new revisions pertaining to planning.”
4. “A complete copy of Grievant’s [facility] training transcript.”

¹ See DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of “[a] second active Group II Notice normally should result in termination”).

At a pre-hearing conference held to discuss the production of documents, the hearing officer declined the agency's request that the grievant be required to reimburse the agency for the cost of providing the grievant with the requested documents. The agency estimated its cost of production for Requests 1 and 2 at \$88.15. This charge consists of \$5.35 for thirty minutes of work at \$10.69 per hour and \$82.80 for 828 pages of documents at \$0.10 per page.² The agency estimated the cost of production for Requests 3 and 4 at \$41.45. This charge consists of \$5.35 for thirty minutes of work at \$10.69 per hour and \$36.10 for 361 pages of documents at \$0.10 per page.³

On September 25, 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 that its proposed charges are reasonable and seeks payment from the grievant for producing documents in response to Requests 1 through 4 in the amount of \$129.60.

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 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

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."⁸ A party may be charged for documents ordered produced by a hearing officer in the same way that such charges

² The agency's ruling request to EDR appears to contain an error. The agency states it assessed the cost of thirty minutes of labor at a rate of \$10.69 per hour, but its total cost of production for Requests 1 and 2 appears to have been calculated using the cost of one hour of labor. The agency's cost of production will be discussed in this ruling based on its representation that thirty minutes of work was required to compile and copy documents responsive to Requests 1 and 2, and will adjust the agency's calculation of charges accordingly.

³ The agency apparently offered to provide the grievant with all of the requested documents electronically, but he declined and chose to receive paper copies instead.

⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁵ *Rules for Conducting Grievance Hearings* § III(E).

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.'" (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)).

⁸ *Grievance Procedure Manual* § 8.2.

may be assessed during the management resolution steps.⁹ 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 uncompensated 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 documents for purposes of a fair hearing.¹⁰ 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.

Based on the hearing officer's orders and the information provided by the parties, we are unable to determine whether the hearing officer's finding that the agency could not seek payment for the cost of production was reasonable. For example, EDR has not identified anything to indicate whether and to what extent the hearing officer considered how relevant the requested documents are to the issues in this case. It seems likely, for example, that at least some of the documents about the grievant in the supervisor's file and in any other files maintained at the grievant's facility have little or no connection to the Written Notice at issue here. Likewise, it may be that some of the policies requested are of no relevance in this case. If so, it may be reasonable for the agency to seek payment for the cost of production of those documents that are of limited materiality. As a result, especially given the timing of the hearing discussed below, EDR is remanding this question to the hearing officer for further consideration of whether charging for production would be appropriate in this case. The hearing officer should examine such factors as the relevance of the documents requested by the grievant, the importance of those documents for the grievant to prove his case at the hearing, the relative time and effort required by the agency to comply with the request, and whether the requested documents amount to a fishing expedition.¹¹

We are mindful that the hearing in this matter is scheduled to take place on the next business day following the issuance of this ruling. The agency has already provided the grievant with all of the documents it was ordered to produce by the hearing officer. At this time, the sole


⁹ See EDR Ruling No. 2012-3377; *Grievance Procedure Manual* § 8.2.

¹⁰ 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.

¹¹ It may very well be that the hearing officer has already considered these and other factors. However, there is no written record of such consideration in the hearing officer's orders for production of documents.

dispute appears to be over the question of whether it is reasonable for the agency to seek payment for the cost of producing those documents. Because the grievant has access to all of the documents he has requested, there appears to be no prejudice in delaying EDR's final determination on the issue of charging for documents. It is more efficient in this case for the hearing to proceed without delay. The hearing officer is directed to reconsider the agency's request for payment in a manner consistent with the provisions of this ruling and issue an amended order for the production of documents or other written statement addressing the agency's request for payment. If there is further dispute on this question following the hearing officer's consideration, the parties may raise such issues in a compliance ruling request or as part of the administrative review process after the conclusion of the hearing.

EDR's rulings on matters of compliance are final and nonappealable.¹²



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¹² Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).