

Issue: Compliance – Grievance Procedure (documents); Ruling Date: December 30, 2014; Ruling No. 2015-4046; Agency: Department of Forensic Science; Outcome: Hearing Officer in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Forensic Science
Ruling Number 2015-4046
December 30, 2014

The grievant 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 order regarding the production of documents in Case Number 10480.

FACTS

The grievant was employed as a Forensic Trainee by the Department of Forensic Science (the “agency”). He was terminated for unsatisfactory performance on or about September 4, 2014. The grievant timely filed a dismissal grievance challenging his termination and EDR appointed a hearing officer on October 14, 2014. On or about October 24, the grievant submitted a request for documents to the agency. The agency notified the grievant and the hearing officer on October 27 that it would be seeking payment for the cost of producing the documents. The grievant requested a ruling from the hearing officer on October 29 regarding whether the agency could seek reimbursement for the cost of production. Following a pre-hearing conference on November 13, the hearing officer issued an order directing the agency to produce some of the requested documents at no cost and ordering the grievant to provide payment to the agency for other requests consistent with the agency’s estimated cost to produce those items.

The documents for which the hearing officer directed the grievant to provide payment to the agency are as follows:

1. “All records contained in ‘Master Training Folder’ located on the [agency] computer previously assigned to [the grievant],” at an estimated cost of \$1,000.00;
2. “All ‘correspondence that occurred between section supervisors during . . . [the grievant’s] times training in the other laboratories within the state,” at an estimated cost of \$100.00;
3. A portion of “[the grievant’s] ‘official’ training record maintained by [Manager S],” at an estimated cost of \$1,100.00¹;

¹ The agency initially requested payment for the entirety of the grievant’s official training record, at an estimated cost of \$1,600.00. After the hearing officer’s order was issued, the agency agreed to provide the grievant with some of the records at no charge and revised the estimated cost of producing the remaining documents to \$1,100.00.

4. The “training record” of another agency employee, Employee R, at an estimated cost of \$150.00; and
5. “Any and all documentation and correspondence existing regarding [the grievant’s] training between[] [various managers] and any member of the [agency’s] Human Resources Staff,” at an estimated cost of \$350.00.

Thus, the grievant was ordered to pay a total of \$2,700.00 to the agency for the production of documents in response to these five requests (hereinafter referred to as “Request 1” through “Request 5”).² On the following day, November 14, the grievant requested that the hearing officer order the agency to reimburse the grievant for the cost of production if he prevailed at the hearing. The hearing officer responded that he “is not expressly authorized to award costs (other than attorney’s fees) as part of a decision.”

The grievant requested a compliance ruling from EDR on November 19, 2014, asserting that the hearing officer should order “reimbursement of the costs if the grievance ruling is in [his] favor” and disputing the reasonableness of the agency’s request for payment for the documents listed above.

DISCUSSION

Reimbursement of Costs by the Agency

The grievant appears to argue that the hearing officer has the authority to order the agency to reimburse him for any cost he pays for the production of documents if he prevails at the hearing. There is no provision of the grievance procedure that would authorize a hearing officer to order that the grievant be reimbursed by the agency for any costs incurred in relation to the production of documents if the grievant prevails at hearing.³ Accordingly, the grievant’s request for such an order is denied.

Reasonableness of the Agency’s Request for Payment

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

² In his request for a compliance ruling from EDR, the grievant states that the estimated “amount of the deposit alone is \$2670.00.” It appears from EDR’s review of the hearing officer’s order that the total cost of production would be \$2,700.00. We will assume, for purposes of this ruling, that the grievant’s request contains a typographical error and address the reasonableness of the agency’s request for payment based on an estimated total cost of \$2,700.00.

³ See, e.g., Va. Code § 2.2-3005.1(A); see *Grievance Procedure Manual* § 5.9(a); *Rules for Conducting Grievance Hearings* §§ VI(D)(2), VI(E).

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

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

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 may 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 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 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.

In this case, the hearing officer determined that it was reasonable for the agency to seek payment from the grievant for the cost of producing documents responsive to Requests 1 through 5. The grievant appears to allege that the hearing officer's order is not in compliance with the grievance procedure. He asserts that the documents are relevant to show that his training was inadequate, that he requested assistance from management, and/or that his supervisor's reports about the grievant's training are inconsistent with the training records. As a result, he claims that requiring him to pay a total cost of \$2,700.00 for the disclosure of the documents would be unreasonable.¹¹

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 *Grievance Procedure Manual* § 8.2.

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 The grievant further asserts that he was prevented from retrieving some of the requested documents prior to his termination, which has resulted in a greater cost to produce the documents now. While we understand that he may have been able to search for, retrieve, and/or photocopy some of the documents on his own prior to his termination,

Having reviewed the information presented by the parties, we find that there is no basis to disturb the hearing officer's order in this case. The grievant argues that documents responsive to Requests 1 through 5 are central and material to his case. However, the training documents requested by the grievant also contain information related to criminal investigations and prosecutions, which cannot be released to the public. Producing many of the requested documents would, therefore, require the agency to undertake an extensive search, review, and redaction process.¹² The unique nature of the work performed by the agency carries, in this case, a correspondingly high cost in both time and labor because the agency must ensure that confidential information relating to criminal cases for which the agency provided forensic services is not disclosed.

The agency has further indicated that the "Master Training Folder" on the grievant's computer contains approximately 1,800 documents and that his training records consist of at least two Bankers Boxes of training materials. While Request 4 seeks only the training records of a specific employee, the agency is still under an obligation to review those documents for any confidential information prior to their disclosure. The cost estimate provided to the grievant is based primarily on the time required to review and redact any confidential information from the large volume of documents that would be responsive to Requests 1, 3, and 4. Given the particular circumstances of this case, we cannot find that either agency's decision to seek reimbursement for that expense or the resulting cost estimate provided to the grievant is unreasonable.

In addition, it is not apparent from EDR's review of the grievance record that all of the documents the grievant has requested would be relevant and material to his assertion that the training provided to him by the agency was inadequate. It seems likely that a significant portion of the training records sought in Requests 1 and 3, as well as much of the email correspondence in Requests 2 and 5, could have little or no connection to the grievant's work performance or the agency's decision to terminate the grievant. Requests 2 and 5, for example, do not distinguish between ordinary, work-related correspondence and communications specifically related to the claim that his training was inadequate. In short, it appears that complying with the grievant's requests could result in the disclosure a large volume of information with little or no relevance to the management actions at issue in the grievance.

Having weighed the burden on the agency to search its files against the likelihood that relevant documents might be disclosed, as well as the relative importance they might have to the grievant's case, we find that the hearing officer's order that the grievant must provide the agency with payment in the amount of \$2,700.00 for the production of all documents responsive to Requests 1 through 5 was reasonable. In making this decision, we note that the agency has agreed to provide the grievant with the training records it relied upon in making the decision to terminate the grievant at no charge, and that the hearing officer directed the agency to produce documents in response to the grievant's other requests without cost to the grievant. In addition,

the agency's decision to place the grievant on administrative leave upon receipt of his notice of the agency's intent to issue disciplinary action, with the result that he could not obtain a portion of the requested documents prior to his dismissal, was not unreasonable. See DHRM Policy 1.60, *Standards of Conduct*, § C(1) (discussing the circumstances in which an employee may be placed on pre-disciplinary leave with pay).

¹² Section 8.2 of the *Grievance Procedure Manual* allows the party producing documents to protect the legitimate privacy interests of third parties.

the grievant will have the opportunity to call agency employees as witnesses at the hearing and question them about the nature and extent of his training.¹³

The grievance procedure provides hearing officers with the discretion to consider a party's request for documents, the burden on the opposing party of producing those documents, and the reasonableness of any request for payment.¹⁴ While some of the documents sought in Requests 1 through 5 could be relevant to the grievant's case, the cost to the agency in time, effort, and expense to conduct a search of all the documents responsive to these requests would be great. In this case, then, it appears that requiring the agency to search for, review, and redact all documents responsive to Requests 1 through 5 at no cost would impose an undue burden, and that the agency's estimated cost of production is reasonable. As a result, there is no basis for EDR to conclude that the hearing officer's order is inconsistent with the document discovery provisions of the grievance procedure at this time.

CONCLUSION

For the reasons set forth above, we find that the agency's estimate of the cost of production of documents in this case is reasonable, and we decline to modify the hearing officer's order that the grievant must provide payment to the agency in the amount of \$2,700.00 if he wishes to proceed with those requests. The parties may proceed with this and any other pre-hearing matters as directed by the hearing officer.

In closing, we further note that the grievant may wish to consider submitting and/or working with the agency on revised requests for documents that are more narrowly tailored so as to capture only those documents that he believes will be relevant in proving the claims he intends to raise at the hearing. If the grievant were to submit such requests, the agency's estimate cost of production could be significantly reduced because it could minimize the need to review and redact confidential information prior to disclosure. Furthermore, to the extent that an alternative method of producing responsive documents may be possible and practicable, the parties are encouraged to explore any such options. For example, the agency may wish to consider providing the grievant with electronic files, rather than print copies, of the documents, which could reduce the estimated cost of production.

EDR's rulings on matters of compliance are final and nonappealable.¹⁵



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¹³ See *Rules for Conducting Grievance Hearings* § IV(A).

¹⁴ *Id.* § III(E); see *Grievance Procedure Manual* § 8.2.

¹⁵ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).