

Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 20, 2015;
Ruling No. 2016-4192; Agency: Department of Corrections; Outcome: Agency 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 2016-4192
July 20, 2015

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 10620.

FACTS

The Department of Corrections (the “agency”) employed the grievant as a Corrections Sergeant. On April 21, 2015, the grievant was issued a Group III Written Notice for failure to follow instructions and/or policy and terminated. The grievant timely filed a dismissal grievance challenging his termination and EDR appointed a hearing officer on May 27, 2015. Upon request by the grievant, the hearing officer issued an order to the agency to produce certain documents. Specifically, the hearing officer ordered the agency to provide the grievant with the following:

- 1) *All documentation concerning Grievant’s dismissal.*
- 2) *All Investigative Reports concerning the investigation and Grievant’s dismissal.*
- 3) *Any Rapid Eye footage used or considered in Grievant’s dismissal.*
- 4) *Any inmate statements in any form used or considered in Grievant’s dismissal.*
- 5) *Any officer statements in any form used or considered in Grievant’s dismissal.*
- 6) *Any audio used or considered in Grievant’s dismissal.*
- 7) *The past institutional disciplinary records of any the inmates involved in the investigation while in the custody of the Department of Corrections.*
- 8) *Any pictures of inmate injuries concerning Grievant’s dismissal.*
- 9) *Any inmate medical records concerning Grievant’s dismissal.*

10) Grievant's past annual reviews/employee evaluations since the beginning of employment.

11) Any and all past Disciplinary Reports, Topic of Discussions, etc. of Grievant since his employment.

The grievant requested a compliance ruling from EDR on July 15, 2015, stating that the agency had produced some of the documents listed in the hearing officer's order but alleging that its production of documents was incomplete. The grievant claims that the agency has failed to provide "institutional disciplinary records" pertaining to certain offenders who are in the agency's custody, as well as the grievant's performance evaluations while he was employed by the agency.

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."¹ 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.² 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.³ For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.⁴ Furthermore, 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 pursuant to a hearing officer's order. 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.⁵

The grievant claims that he requested the offenders' disciplinary records because he believes those documents may show that the offenders who were involved in the incident have a history of filing false complaints against other officers.⁶ The grievant's performance evaluation history would undoubtedly be relevant to show that the grievant's work performance was satisfactory while he was employed by the agency. In response to the grievant's request for a ruling from EDR, the agency has indicated that it already sent the grievant copies of his performance evaluations. It further stated that the requested offender disciplinary records have

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

² *Rules for Conducting Grievance Hearings* § III(E).

³ *See, e.g.*, EDR Ruling No. 2012-3053.

⁴ *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)).

⁵ *See Rules for Conducting Grievance Hearings* §§ III(E), V(B).

⁶ It appears several offenders were possibly involved in the incident for which the grievant was disciplined.

either been disclosed to the grievant after this ruling was requested, or that they will be turned over to him prior to the hearing.⁷

Should there be any dispute as to the sufficiency of the agency's productions of documents or the grievant's proposed use of those documents at the hearing, the hearing officer may rule on those issues and, if appropriate, exercise the authority granted under the grievance procedure and order sanctions or draw an adverse inference against the agency if the agency has failed to produce any documents listed in the order without just cause.⁸ For example, the hearing officer may resolve any factual disputes related to the grievant's performance evaluations or the offender disciplinary records in the grievant's favor by concluding that the grievant received prior satisfactory performance evaluations and that the statements or other information given by the offenders about the incident for which the grievant was disciplined are not credible.

Because the agency appears to have resolved the alleged noncompliance with the hearing officer's order, we decline to intervene in this case at this time such that the scheduled hearing date would need to be continued. Accordingly, the hearing officer and the parties are directed to proceed with the hearing as scheduled. At the hearing, the hearing officer may address any disputes about the agency's production of documents or the grievant's use of those documents in a manner consistent with the authority granted under the grievance procedure. To the extent either of the parties may disagree with the hearing officer's ruling in relation to the agency's production of documents or any other document-related issue, if he is called upon to make such a ruling, that matter may be addressed by EDR on administrative review.

EDR's rulings on matters of compliance are final and nonappealable.⁹



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⁷ Though the agency did not object to the hearing officer's order that offender disciplinary records must be produced, we are not necessarily persuaded that these documents must be provided to a grievant upon request. For example, there may well be issues of offender confidentiality that would constitute just cause for them to be withheld, they may be irrelevant as they could relate to matters outside the scope of the grievance, and/or their material value may be so slight that production would impose an undue burden on the agency. Indeed, the agency noted in its response that it believes that some of the offender records are not relevant to the grievance. If the agency objects to the introduction of any documents on the basis that they are not relevant, the hearing officer may rule on that issue at the hearing. *See* Va. Code § 2.2-3005(C)(5); *Rules for Conducting Grievance Hearings* § IV(D).

⁸ *See Rules for Conducting Grievance Hearings* §§ III(E), V(B). In addition to offering any documentary evidence that is relevant, the grievant will also have the opportunity at the hearing to present his arguments about the credibility of the offenders and his past work performance, call witnesses and question them as to their knowledge of the offenders' past disciplinary history and his performance evaluations, and also cross-examine any witnesses called by the agency about those topics.

⁹ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).