

Issue: Compliance – Grievance Procedure (documents); Ruling Date: December 5, 2016; Ruling No. 2017-4440; Agency: Department of Alcoholic Beverage Control; Outcome: Agency 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 Alcoholic Beverage Control
Ruling Number 2017-4440
December 5, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) regarding alleged noncompliance with the grievance procedure by the Department of Alcoholic Beverage Control (the “agency”) in relation to the production of requested documents.

FACTS

The grievant is employed by the agency as a warehouse worker. On September 9, 2016, the grievant was issued a Group I Written Notice for disruptive behavior and using obscene or abusive language in relation to an incident that occurred on July 21, 2016. The grievant filed a grievance disputing the Group I Written Notice on or about September 21. In the grievance, the grievant argues that he did not engage in the conduct described in the Written Notice, alleges that other employees have not been disciplined for similar behavior, and claims the Written Notice was issued as a form of retaliation because he complained that other employees had engaged in such behavior in the past.

The grievant submitted a request for eleven different categories of documents to the agency on September 29, 2016. The agency provided documents in response to several of the grievant’s requests and asserted that documents responsive to the other requests were not relevant to the grievance or would result in the disclosure of personal information of nonparties, and thus would not be disclosed. The grievant sent a notice of noncompliance to the agency head on October 20, alleging that the agency had not produced documents responsive to all of his requests. After the agency failed to correct the alleged noncompliance, the grievant requested a ruling from EDR on October 28.

On November 4, 2016, while this ruling was pending, the agency provided the grievant with additional documents in response to some of his outstanding requests. The grievant asserts that the agency’s decision to withhold documents responsive to the remaining requests does not comply with the grievance procedure, and asks for a ruling from EDR to address these issues.

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. Just cause is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”² For purposes of document production, examples of just cause include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.³ The statute further states 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.”⁴

EDR has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner. All such documents must be provided within five workdays of receipt of the request. If it is not possible to provide the requested documents within the five workday period, the party must, within five workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than ten workdays from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or “just cause,” the withholding party must provide the requesting party with a written explanation of each claim, no later than ten workdays from receipt of the document request.⁵

It is EDR’s understanding that the following requests are still in dispute in this case:

1. “Copy of any blank ‘Written warning’ forms provided to the warehouse supervisors by [Manager S] during supervisor meeting or in emails, for the documentation of cell phone use violations.”
2. “Copy of all disciplinary actions administered to warehouse employees by [Manager S] or his supervisors for disruptive behavior and or obscene and abusive language in the last 24 months.”
3. “Copy of all disciplinary actions administered to warehouse employees by [Manager S] or his supervisors for the use of cell phones in the past 24 months.”
4. “Copy of all documentation of employees violating cell phone use policy, using obscene and abusive language (to include all cursing) and or having disruptive behavior, that has been reported for warehouse employees to [Manager H], [Manager S] and or any member of Va. A.B.C. human resources department in the past 24 months. Please include all documents, emails, recorded meeting minutes, video and audio recordings.”
5. “Any and all statements, emails and any recorded minutes from meetings, related to complaint filed by [the grievant] on April 7, 2015 pertaining to the

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

² *Grievance Procedure Manual* § 9.

³ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

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

⁵ *Grievance Procedure Manual* § 8.2.

- verbal attack and threats from [Employee K] and or pertaining to the write up issued to [the grievant] on April 14, 2015 by [Manager S]. Please include all witness statements and any and all disciplinary actions and documentation pertaining to this incident.”
6. “Any and all statements, emails and any recorded minutes from meetings, related to complaint filed by [the grievant] on August 22, 2015 pertaining to [Employee L] cursing and harassing [the grievant]. Please include all witness statements and any and all disciplinary actions and documentation pertaining to this incident.”
 7. “Any and all statements, emails and any recorded minutes from meetings, related to complaint filed by Miguel Cross on October 23, 2015 pertaining to [Employee P] cursing and harassing [the grievant] and [Employee S]. Please include all witness statements and any and all disciplinary actions and documentation pertaining to this incident.”⁶

Requests 1 and 3

The grievant asserts that Requests 1 and 3 are relevant to the grievance because he was “singled out for violating” the agency’s cell phone use policy and other warehouse employees were not disciplined for using their cell phones at work. The agency asserts that responsive documents are not relevant. The grievant is challenging the issuance of a Group I Written Notice for using obscene or abusive language and engaging in disruptive behavior. While it appears the grievant may have used his cell phone to record other employees’ behavior in the past, the Written Notice that is the subject of the grievance was not based on the grievant’s cell phone use. Accordingly, EDR finds that forms used to document cell phone use and disciplinary records relating to cell phone use are not relevant to the challenged management action and need not be produced.⁷

Requests 2 and 4

In Requests 2 and 4, the grievant effectively seeks information related to disparate or inconsistent discipline of other employees who may have engaged in misconduct similar to that for which he was disciplined. Specifically, the grievant requests records of disciplinary actions issued to warehouse employees “for disruptive behavior and or obscene and abusive language” and documents showing that warehouse employees had been reported to agency management for “using obscene and abusive language (to include all cursing) and or having disruptive behavior.” These are essentially requests for documents relating to other agency employees who may have been subject to investigation, counseling, or discipline for engaging in those behaviors,

⁶ For purposes of this ruling, EDR will refer to the grievant’s requests for documents as Requests 1 through 7. In addition, the agency provided some documents in response to another of the grievant’s requests, and asserted that additional responsive documents were not relevant and could not be produced in a manner that would protect the privacy of nonparties to the grievance. The grievant has provided no information or argument to suggest that the agency failed to comply with this request. In the absence of such information, EDR will consider the request satisfied.

⁷ While EDR finds that the agency is not required to disclose documents responsive to Requests 1 and 3 at this time, this ruling does not prevent grievant from requesting that a hearing officer order the production of these or other additional documents, should the grievance proceed to an administrative hearing. *See Rules for Conducting Grievance Hearings* § III(E).

regardless of whether the agency issued a Written Notice. The agency argues that producing documents responsive to these requests would impose an undue burden because it “would require the agency to manually search files” of warehouse employees for the documents. EDR has addressed requests for documentation regarding inconsistent discipline under the grievance procedure in the past in the context of a hearing officer’s pre-hearing order for the production of documents, and that reasoning is equally applicable to this type of request during the management steps.⁸

Typically, records of disciplinary action are relevant only if they relate to similar misconduct committed by other employees.⁹ 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.”¹⁰ In this case, the Written Notice issued to the grievant states that the grievant used “[o]bscene or abusive language” and engaged in “[d]isruptive behavior” during an incident with another employee. Therefore, only documentation about that type of behavior, or other similar misconduct, by other warehouse employees is potentially relevant and, therefore, subject to production. Accordingly, it would appear that the agency should only be required to produce records of corrective or disciplinary actions issued to warehouse employees to address, or other documents relating to reports of warehouse employees engaging in “[o]bscene or abusive language” and “[d]isruptive behavior” for the past twenty-four months.¹¹ Such records are relevant because they contain information that may tend to show whether the grievant was treated differently than other similarly situated employees, and accordingly they must be disclosed to the grievant, in an appropriately redacted form.¹² Specifically tailored redactions should be able to adequately protect the privacy interests of other employees identified in the documents.

Requests 5, 6, and 7

The grievant asserts that Requests 5, 6, and 7 are relevant to the grievance because he reported other employees for using obscene language and/or engaging in disruptive behavior, and those employees were not subject to disciplinary action for their conduct. The agency asserts that these documents are not subject to production in relation to the grievance because the grievant filed a complaint with DHRM’s Office of Equal Employment Services (“OEES”) in relation to the altercations described in the requests, and that as a result these claims “are no longer grievable”

The agency is correct that, under the *Grievance Procedure Manual*, an employee may not file both a grievance and an OEES complaint about the same management action or omission.¹³

⁸ See, e.g., EDR Ruling No. 2015-4001; EDR Ruling No. 2014-3895; EDR Ruling No. 2012-3337; EDR Ruling No. 2010-2566.

⁹ See, e.g., EDR Ruling No. 2010-2566.

¹⁰ EDR Ruling No. 2010-2376 n.19.

¹¹ With regard to the portion of Request 4 that seeks “documentation of employees violating cell phone use policy,” the grievant was not disciplined for use of his cell phone, as discussed above in relation to Requests 1 and 3. As such, the agency need not produce documents responsive to Request 4 relating to warehouse employees’ cell phone use.

¹² Section 8.2 of the *Grievance Procedure Manual* states that “[d]ocuments pertaining to non-parties 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.”

¹³ *Grievance Procedure Manual* § 1.6.

The grievant is not, however, attempting to grieve the underlying actions that were the subject of the OEES complaint; he instead appears to be seeking documents in the agency's possession about those confrontations to show that he may have been treated differently than other similarly situated employees. While documents pertaining to administrative investigations could, in some circumstances, be properly withheld, EDR finds that the existence of an OEES complaint does not automatically protect otherwise relevant records of disciplinary action issued to similarly situated employees from disclosure under the circumstances presented in this case.

The agency has informed EDR the employees involved in the incidents cited in Requests 5, 6, and 7 received corrective actions. As discussed above, EDR typically considers records of corrective or disciplinary actions issued to other similarly situated employees relevant to a grievance challenging disciplinary action where the grievant, as in this case, has specifically alleged that he was disciplined more harshly than the employees involved in these incidents. Records of disciplinary and/or corrective actions issued to those employees would, therefore, be relevant because they contain information that may tend to show whether the grievant was treated differently than other similarly situated employees. Accordingly, consistent with the analysis and determination addressing Requests 2 and 4 above, such records must be disclosed to the grievant, in an appropriately redacted form.¹⁴

However, in considering the totality of the circumstances in this case, EDR also concludes that the grievant's request for "any and all . . . documentation" relating to the incidents named in Requests 5, 6, and 7 would likely require extensive redactions to preserve the privacy of nonparties and potentially result in the disclosure of personal and personnel information that would either be irrelevant or provide little to no material value beyond what would be gained from production of the disciplinary records discussed above. Requiring the production of "[a]ny and all statements, emails and any recorded minutes from meetings" responsive to Requests 5, 6, and 7 would effectively permit the grievant to audit the agency's investigatory files relating to the cited incidents. There is nothing that authorizes such an investigation under the limited discovery set out in the grievance procedure. Further, while the treatment of similarly situated employees who were involved in these incidents may be relevant to show whether the grievant was treated differently than other similarly situated employees, the details underlying the incidents themselves are not the subject of this grievance and need not be produced at this time.¹⁵

Alternate Format

In producing the records of disciplinary and/or corrective actions discussed in this ruling, the agency may elect to compile the information about any such actions, along with any other relevant information, in a summary form to preserve employee privacy, rather than disclosing the records themselves. While the grievance statutes do not mandate the production of a document

¹⁴ Section 8.2 of the *Grievance Procedure Manual* states that "[d]ocuments pertaining to non-parties 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."


¹⁵ Although EDR finds that the agency is not required to provide all of the documents requested by the grievant at this time, the analysis of whether documents must be provided is potentially not the same when evaluating whether a party should have access to documents as a means of resolving a dispute during the management resolution steps as opposed to whether such documents may be necessary to prove a claim at a grievance hearing. Thus, this ruling does not necessarily serve as a prohibition on the disclosure of additional documents at a later time, should the grievance proceed to an administrative hearing.

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 the grievant with any responsive documents themselves, with appropriate redactions.

CONCLUSION

Based on the discussion above, the agency is directed to produce the requested records of disciplinary and/or corrective actions issued to warehouse employees, as well as the specific employees named in Requests 5, 6, and 7, or a compilation of the information contained in those documents, **within ten workdays of the date of this ruling**. The agency must redact the records accordingly to protect the privacy of nonparties.¹⁶

EDR's rulings on matters of compliance are final and nonappealable.¹⁷



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹⁷ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).