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COMPLIANCE RULING

In the matter of the Virginia Department of Taxation
Ruling Number 2020-5043
February 18, 2020

The Virginia Department of Taxation (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management¹ regarding the hearing officer’s orders for the production of information technology resources requested by the grievant in Case Number 11443.

PROCEDURAL BACKGROUND AND FACTS

This matter arises from the agency’s disciplinary action against the grievant, citing allegations that he falsified records of his hours worked. At a pre-hearing conference held on January 15, 2020, the grievant requested that the agency produce at the hearing access to certain items including (1) the grievant’s work laptop in order to show “what he was doing and what systems were attached,”² and (2) the software program that the agency had used to determine that his reported work hours were inaccurate.³ Over the agency’s objection, the hearing officer granted the grievant’s request on grounds that the requested access was relevant to the grievant’s defense and that no risk or other burden for the agency was apparent.⁴

At a hearing held on January 22, 2020, the agency produced a laptop computer, claimed to contain the requested monitoring software, with connections to one external monitor and a

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Pre-hearing Conference Recording, Jan. 15, 2020, at 4:25-4:35.

³ At the pre-hearing conference, the grievant explained that he was seeking the opportunity to “physically demonstrate” the work he was doing during the times the agency claimed he was not working. *Id.* at 7:20-7:45.

⁴ *Id.* at 9:55-11:21 (ordering the agency to provide the requested access “as if it was a re-creation of the events when the agency was monitoring the grievant’s behavior”). The agency had objected only on grounds that, given anticipated testimony and documentary evidence, the grievant’s requested computer set-up was not necessary to prove or disprove the allegations. *Id.* at 9:05-9:45. The hearing officer subsequently issued a written order for the agency to “make available during the hearing a laptop to be accessed by Grievant during the hearing” and to “make available during the hearing access to the software used to conclude Grievant failed to work as he represented.” Order of Hearing Officer, Jan. 16, 2020.

projector.⁵ The grievant objected that this arrangement failed to comply with the hearing officer's January 16, 2020 Order because (1) the laptop provided was not the grievant's work laptop, and (2) his workspace had consisted of a laptop and two additional monitors.⁶ At the hearing, the agency represented that the grievant's specific laptop was available and unmodified, but the grievant's work account maintained by the Virginia Information Technologies Agency (VITA) had been disabled by VITA pursuant to its policies.⁷ The agency further represented that the grievant's work account could be re-enabled by VITA, with the agency's approval.⁸ The hearing officer granted the grievant's request to reconvene the hearing after his laptop was made available as he had used it for his work for the agency.⁹

On January 28, 2020, the agency requested a compliance ruling from EDR.¹⁰ The agency explained that, despite its earlier good-faith belief that the grievant's VITA-maintained work account could be restored, VITA had since informed the agency that the grievant's account had been deleted pursuant to its policies and, thus, could not be restored.¹¹ The agency argued that (1) the hearing officer lacked authority to order a particular computer set-up at the hearing, and (2) the agency should not be required to re-create the grievant's workspace, given that doing so was impossible and, in any event, would "not tend to prove or disprove that the Grievant was actually working during the periods of inactivity that occurred in the Monitoring Period."¹² The grievant disagreed, asserting that the agency "intentionally destroyed" "vital evidence" for the grievant's defense.¹³ Accordingly, the grievant has requested an adverse inference against the agency as to evidence that would have been available via his deleted VITA account.¹⁴

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, in a timely fashion."¹⁵ 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."¹⁶ In this context, examples of just cause include, but are not limited to, the circumstances that (1) the

⁵ Recording of Hearing, Pt. 1, Jan. 22, 2019, at 2:37:00-2:39:10.

⁶ *Id.*

⁷ *Id.* at 2:39:25-2:40:01.

⁸ *Id.* at 2:42:50-2:44:45.

⁹ *Id.*

¹⁰ Agency Request for Compliance Ruling.

¹¹ *Id.* at 2-3; *see* Agency Additional Information, Att. 1.

¹² Agency Request, at 1-2.

¹³ Grievant's Response, at 3.

¹⁴ *Id.* at 5.

¹⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2; *Rules for Conducting Grievance Hearings* § III(E); *see* Va. Sup. Ct. Rule 4:9(a).

¹⁶ *Grievance Procedure Manual* § 9.

documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.¹⁷

A hearing officer has the authority to order the production of evidence.¹⁸ 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.¹⁹ 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, without just cause, to produce documents in response to an order from EDR or the hearing officer.²⁰

Thus, as an initial matter, EDR rejects the agency's contention that the hearing officer lacks authority to order a particular computer set-up at the hearing proceedings in this case. By statute, hearing officers may order the production of evidence relating to the actions grieved.²¹ There is no basis to exclude relevant electronic information from the hearing officer's general authority in this regard, to include the content that would normally be displayed on the screens at the grievant's workstation.

However, in its request for a compliance ruling and related submissions, the agency has presented new evidence not as yet presented to the hearing officer. The agency represents that, although its personnel attempted in good faith to have VITA restore the grievant's electronic work account pursuant to the hearing officer's most recent order, VITA has since advised the agency that such restoration is not possible. The hearing record presents no basis to dispute VITA's notice that the grievant's work account effectively no longer exists and, therefore, would not be feasibly produced at further proceedings.²²

The grievant argues that, if the agency cannot re-create the grievant's VITA account, then it "should be held liable for its actions and a favorable inference should be provided to" the grievant.²³ Where a party fails, without just cause, to produce relevant evidence ordered by a hearing officer, the hearing officer may "draw adverse factual inferences" against that party "with respect to any factual conflicts resolvable" by the evidence not produced.²⁴ Based on the hearing record to date, however, EDR perceives no basis to apply an adverse inference.

It appears that the agency has presented just cause for not complying with the hearing officer's order as modified at the hearing proceedings on January 22, 2020. As explained in VITA's notice, VITA (or its vendor) has deleted the grievant's electronic work account such that

¹⁷ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

¹⁸ Va. Code § 2.2-3005(C)(3); *Rules for Conducting Grievance Hearings* § III(E).

¹⁹ See, e.g., EDR Ruling No. 2012-3053.

²⁰ See *Rules for Conducting Grievance Hearings* §§ III(E), V(B).

²¹ Va. Code §§ 2.2-3005(C)(3).

²² See *Grievance Procedure Manual* § 8.2 ("A party shall not be required to create a document if the document does not exist.").

²³ Grievant's Response, at 5.

²⁴ *Rules for Conducting Grievance Hearings* § V(B).

it cannot be restored. Where documentary evidence does not exist, EDR generally recognizes just cause for a party not to produce it. Because it appears that the VITA account used by the grievant during his employment no longer exists, EDR recognizes just cause for the agency not to make it available here.

Nevertheless, the grievant essentially argues that the account *should* still exist because of the preservation notice his attorney sent to the agency on September 23, 2019. That notice requested that the agency preserve “all documents or other records related to [the grievant]’s employment,” including “memos, notes and e-mails that are stored on the commonwealth’s computers or state servers, and any and all records and communications regarding [the grievant].”²⁵ Generally, under the grievance procedure, an agency is obligated to produce only those relevant documents that are in its own possession or control.²⁶ Under certain circumstances, an agency may exercise sufficient control over evidence in another entity’s possession such that the agency may be ordered to produce it; however, there is no basis to conclude that such circumstances existed here. Further, it is not clear that the grievant’s VITA account, in itself, would be included in the preservation notice sent by the grievant’s attorney, which sought “documents or other records.” Thus, under the circumstances reviewed, the agency’s failure to preserve the grievant’s VITA account does not negate what would ordinarily constitute just cause for not producing the deleted (non-existent) account.

The grievant states that he requested that his computer be set up so that he could demonstrate to the hearing officer the work he was performing. However, the grievant has not explained why access to his now-deleted account is the only means by which relevant facts of his work performance could be conveyed or what specific “factual conflicts” would be “resolvable” by such access at the reconvened hearing.²⁷ For example, the grievant has not explained how access to his former VITA account would have called the monitoring system into question. Accordingly, it is unclear what adverse inference the hearing officer should draw, beyond what he may reasonably infer from witness testimony and other evidence.²⁸ Because the grievant has not explained with any particularity how he will be prejudiced without access to the VITA account, or what factual inferences would cure that prejudice, EDR perceives no basis to apply an adverse inference on this record.

For the foregoing reasons, EDR concludes that, the hearing officer’s prior orders notwithstanding, the agency’s failure to provide access to the grievant’s deleted VITA account does not constitute failure to comply with the grievance procedure. EDR recommends that the hearing officer consider convening a pre-hearing conference to address what technological evidence will be required at the reconvened hearing given that the grievant’s VITA account is

²⁵ The grievant also specifically requested that “the laptop that was assigned to [the grievant] not be reset for use by another employee and that his individual network drive not be removed or wiped clean.” Based on its representations at the hearing, the agency has maintained the grievant’s laptop and the information stored on it, as the grievant requested. Although the grievant maintains that the agency has intentionally destroyed evidence, EDR perceives no basis to conclude that the agency has acted in bad faith.

²⁶ See, e.g., EDR Ruling No. 2009-2087.

²⁷ See *Rules for Conducting Grievance Hearings* § V(B).

²⁸ See, e.g., EDR Ruling No. 2017-4572; EDR Ruling No. 2014-3812.

unavailable. The hearing officer may order the agency to produce such evidence as he deems relevant to the material issues of the case, not unduly burdensome, and otherwise consistent with the grievance procedure. The grievant should be free to present testimony and other evidence about his work performance. Nothing in this record reviewed by EDR prevents him from doing so.

EDR's rulings on matters of compliance are final and nonappealable.²⁹



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²⁹ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).