



EMILY S. ELLIOTT
DIRECTOR

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

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2021-5247
April 21, 2021

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 11653. For the reasons discussed below, the grievant has not presented a basis on which EDR may disturb the hearing officer’s order. To ensure compliance with the grievance procedure, this ruling also provides further guidance to the hearing officer as to related evidentiary issues that could arise later in the proceedings.

FACTS

The grievance at issue in Case Number 11653 addresses the grievant’s challenge to a Group II Written Notice received from his employer, the Department of Corrections (“the agency”). While the grievant has made numerous requests for documents, this compliance ruling has been requested only to address two of those requests: 1) “Copies [of] any investigations and all relevant documentation surrounding those investigations conducted by either the Special Investigations Unit, [the facility at which the grievant works], [the agency], The Commonwealth of Virginia, or any of its subsidiary agencies involving [the grievant] during the last five (5) years”; and 2) Copies of any emails that mention [the grievant] by name during the calendar years [2020] and 2021 sent from the accounts” of 16 agency employees. Regarding the first request, it appears that there is only one such previous investigation by the agency (and the agency has no information as to any investigations conducted by any other agency of the Commonwealth). The hearing officer has denied the grievant’s request for records regarding that previous investigation. The agency has agreed to stipulate that the grievant was involved in an investigation regarding drugs allegedly being brought into the facility and that the investigation was unsubstantiated. As to the second request, the hearing officer has determined that the agency must produce emails that relate to the incident for which the grievant received the Group II Written Notice at issue in the current grievance. However, the hearing officer determined that any other emails that mention the grievant’s name are not relevant and the grievant’s request is overly broad. The grievant challenges the hearing officer’s order on these issues and seeks a ruling from EDR on the matter.

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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

The grievance statutes further state 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.”⁵ Documents and electronically stored information, as defined by the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form”⁶ While a party is not required to create a document if the document does not exist,⁷ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects that the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

The hearing officer’s determinations as to what records the agency should produce appear to be based on determinations of relevancy. The grievant argues that the requested documents are relevant to prove that the agency had a discriminatory or retaliatory purpose in its drug investigation involving the grievant and, by extension, the disciplinary action at issue in the grievance. At this stage, EDR cannot determine that the grievant’s document requests as stated seek evidence that is clearly relevant and not overly broad. Thus, EDR cannot find that the hearing officer has abused her discretion or violated a grievance procedure rule in this evidentiary determination. Similarly, EDR cannot find that the hearing officer has abused her discretion in determining that the agency must review 16 separate employees’ email accounts for any and all emails related to the grievant from 2020 and 2021. The hearing officer has made relevancy determinations on these requests and we are unable to determine at this time that those determinations were an abuse of discretion.

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.’” (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)).

⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

⁶ Rules of the Supreme Court of Virginia, Rule 4:9(a).

⁷ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

EDR does note, however, that evidence demonstrating previous unfair or discriminatory treatment could be relevant to support a claim of discrimination or retaliation, which the grievant is entitled to raise; accordingly, he must be afforded the opportunity to present evidence to carry his burden of proof about these matters. To the extent evidence about the drug investigation could demonstrate that the challenged Group II Written Notice was motivated or influenced by such discriminatory or retaliatory treatment, it could be relevant to the material issues before the hearing officer, and we would therefore caution against any blanket prohibition on the presentation of evidence related to the investigation. That said, we do not read the hearing officer's order to indicate that the grievant is prohibited from, for example, questioning witnesses about the drug investigation. Ultimately, it is in the hearing officer's discretion to determine how far relevance might extend in this context. Based on the record to this point, EDR cannot find that the hearing officer has abused that discretion in determining that the grievant is not entitled to the entirety of the file related to the drug investigation.

CONCLUSION

Based on the foregoing discussion and at this stage of the proceedings, the arguments asserted by the grievant do not provide a basis for EDR to determine that the hearing officer's order for production of documents was an abuse of discretion or violated a grievance procedure rule. Consequently, EDR will not disturb the hearing officer's order.

EDR's rulings on matters of compliance are final and nonappealable.⁸

Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁸ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).