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COMPLIANCE RULING

In the matter of the Office of the State Inspector General
Ruling Number 2021-5285, 2021-5286
July 27, 2021

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 11687. The Office of the State Inspector General (“OSIG” or the “agency”) has also requested a compliance ruling to challenge the hearing officer’s pre-hearing order regarding the production of documents. Both parties have additionally raised issues regarding witness orders sought in this case. For the reasons discussed below, EDR concludes that the hearing officer’s determinations are not in compliance with the grievance procedure. The hearing officer must reassess his determinations consistent with the directives in this ruling.

FACTS

On March 22, 2021, the grievant was issued eight Group II Written Notices and terminated from employment with the agency. The misconduct cited in each Written Notice is the same: “confidential information was transmitted from your agency email account to your personal Gmail account which is in violation of state and agency policies.” Each of the eight Written Notices identifies certain offense dates, which appear to represent the dates on which the grievant is alleged to have transmitted confidential information to her personal email account. Each Written Notice also identifies one state policy and four agency policies allegedly violated by the grievant based on her conduct.

On or about March 31, 2021, the grievant filed a dismissal grievance with EDR to challenge her termination. The grievance identifies the following issues on her grievance form:

- (i) whether I was investigated in violation of Va. Code. Section 2.2-3011 of the Virginia Fraud and Abuse Whistle Blower Act for exercising my rights as a Whistle blower under the Act;
- (ii) whether I was terminated in violation of Va. Code. Section 2.2-3011 of the Virginia Fraud and Abuse Whistle Blower Act for exercising my rights as a Whistle blower under the Act;

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- (iii) whether the EIGHT Written Notices issued to me for the same basic conduct were excessive, disproportionate, arbitrary, and otherwise improper;
- (iv) whether I violated any of the State or Agency policies identified in the EIGHT Written Notices; and
- (v) whether any violations of such policies (if true) justified my termination from the Agency.

In the grievance, the grievant describes having allegedly submitted a “Confidential Whistle Blower disclosure to certain leaders of the General Assembly” on March 3, 2021, through her attorney. The grievant states that she was placed on pre-disciplinary leave two days later, leading to her termination on March 22. EDR has assigned the case to a hearing officer.

During the pre-hearing phase of this case, the parties submitted requests for records to each other. The grievant also asked the hearing officer to issue witness orders to compel the attendance at the hearing of certain identified witnesses. Each party objected to many of the other’s requests. The hearing officer ruled on those objections following a June 11, 2021 pre-hearing conference. The hearing officer issued a Second Amended Scheduling Order on June 14, 2021, which essentially overruled each party’s objections to the other’s document requests and witness orders, with some exceptions that are identified below. Both the grievant and the agency have requested compliance rulings to challenge the hearing officer’s determinations. The particular items requested will be discussed in further detail below.

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 In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well-established and applicable legal privilege,⁴ EDR will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party’s particular interests in obtaining the document.⁵

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

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

² *Grievance Procedure Manual* § 9.

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

⁴ Certain well-established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. *See, e.g.*, EDR Ruling No. 2002-215 (discussing attorney-client privilege).

⁵ *See, e.g.*, EDR Ruling No. 2010-2372.

individuals not personally involved in the grievance.”⁶ 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”⁷ While a party is not required to create a document if the document does not exist,⁸ 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.

A hearing officer has the authority to order the production of documents and issue witness orders.⁹ As long as a hearing officer’s orders are consistent with the document discovery and witness testimony provisions of the grievance procedure, the determination of what documents are ordered to be produced or witnesses are ordered to appear at the hearing is within the hearing officer’s discretion.¹⁰ For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.¹¹

Before addressing each of the document and witness issues raised by the parties, we must address certain matters of general applicability in this case. The most important topic is the scope of the matters at issue in this grievance. Under the grievance procedure, parties can only be required to produce records “relating to the actions grieved.”¹² The information presented to EDR does not detail any determinations made by the hearing officer as to the matters at issue, *i.e.* the actions grieved. The parties have apparently sought to stipulate to the matters at issue, but have not reached an agreement. In reviewing the hearing officer’s Second Amended Scheduling Order, it is apparent that the hearing officer has taken a broad view of the matters at issue. To the extent the hearing officer has made such a determination, it does not appear to be supported by the grievance record. The scope of matters at issue in a grievance is generally within the purview of the hearing officer; as with factual determinations, however, a hearing officer’s determinations regarding the matters at issue must be based on the grievance record.¹³ Further, to evaluate whether the documents sought by the parties in this case are related to the actions grieved, EDR must make determinations as to the matters at issue in this case. Accordingly, for purposes of this ruling we will consider the matters at issue to be:

1) The grievant’s termination resulting from eight Written Notices

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

⁷ Rules of the Supreme Court of Virginia, Rule 4:9(a).

⁸ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁹ Va. Code § 2.2-3005(C)(3); *Rules for Conducting Grievance Hearings* § III(E).

¹⁰ *See, e.g.*, EDR Ruling No. 2012-3053.

¹¹ *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)).

¹² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹³ *Cf. Grievance Procedure Manual* § 5.9 (stating that a hearing officer’s decision “must contain findings of fact on the material issues and the grounds in the record for those findings”).

- 2) The grievant's claim that the agency retaliated against her for alleged whistleblowing activities.¹⁴

We reach this conclusion based on the issues identified by the grievant on the Grievance Form A and the questions before the hearing officer for determination to resolve the matters grieved. Therefore, matters concerning OSIG's investigation of the Virginia Parole Board and/or the grievant's involvement therein is not at issue in this grievance. The hearing officer has no authority to rule on the propriety of conduct related to OSIG's investigation of the Virginia Parole Board, nor do such matters need to be determined to resolve the issues presented in the grievance. The grievant was not disciplined for any involvement in the investigation of the Virginia Parole Board. Instead, the disciplinary matters at issue are very narrow, concerning only the grievant's alleged misconduct in sending confidential information to her personal email account on multiple occasions.

The grievance also contains a claim of retaliation, which generally requires the grievant to present evidence that (1) she engaged in a protected activity;¹⁵ (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.¹⁶ Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.¹⁷ Thus, the contents of OSIG's investigation of the Virginia Parole Board and extraneous actions related thereto do not appear to be relevant to the hearing officer's determination of this issue. The appropriate inquiry on this claim is whether retaliation was the but-for cause of the agency's personnel action (eight Written Notices and the accompanying termination). Further, the only protected activity identified in the grievance is the grievant's March 3, 2021 notification to certain leaders in the General Assembly. As such, information sought about or to support the retaliation claim would not be relevant unless it is related to this cited protected activity.

The grievant has identified certain record requests as seeking basic public information subject to disclosure under the Virginia Freedom of Information Act ("FOIA"). However, EDR has no authority to enforce the provisions of FOIA. Rather, a person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA's provisions in a court of law.¹⁸ Therefore, this ruling only addresses whether the record requests and any resulting hearing officer order(s) for production are consistent with the grievance procedure. To the extent the grievant may have other rights to seek records under FOIA, that must be accomplished in a different forum.

The agency has identified in its objections certain issues that apply to multiple document requests that appear to seek records not normally subject to review by the public. For example, some requests seek files related to the Virginia Parole Board, which are not generally subject to

¹⁴ As the only protected activity identified in the grievance paperwork is the grievant's alleged March 3, 2021 notification to certain leaders of the General Assembly, EDR will assume for purposes of this ruling that the grievant's claim of whistle blower protection is based on that single alleged protected activity.

¹⁵ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the agency's grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

¹⁶ See *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

¹⁷ *Id.*

¹⁸ Va. Code § 2.2-3713; see EDR Ruling No. 2009-2173 n.22; EDR Ruling No. 2006-1172.

disclosure under FOIA.¹⁹ Some of the grievant's record requests seek OSIG investigative files, which also, with the exception of a final report, may generally be exempt from public disclosure.²⁰ While a FOIA exemption does not automatically render records protected under the grievance procedure,²¹ the public policies expressed in FOIA as to whether records are publicly available may constitute just cause under the grievance procedure.²² As will be described further below, most of the records related to the Virginia Parole Board and OSIG investigatory files are not relevant to this grievance. To the extent such records might be relevant, their limited relevance is outweighed by the general policies expressed in the above statutes that these records are to be confidential. Accordingly, while we will address the specifics of the parties' requests below in further detail, nothing in this ruling is meant to authorize disclosure of confidential OSIG investigatory files or records of the Virginia Parole Board.

The agency has also identified objections to certain record requests that may seek information that is subject to attorney-client privilege or work product protection. EDR recognizes claims of attorney-client privilege and attorney work product as just cause for withholding records under the grievance procedure.²³ Even if not identified in the discussion below, nothing in this ruling is meant to mandate disclosure of such information. Relatedly, the grievant has objected to the hearing officer's determination that a privilege log is not required. As the grievant has noted, EDR does not generally require the production of a privilege log.²⁴ EDR perceives no abuse of discretion in the hearing officer's determination in this regard.

Grievant's Requests for Documents

The grievant has requested that the agency produce certain records in this case. The agency appears to have objected to numerous of these requests, which are identified separately below. In the Second Amended Scheduling Order, the hearing officer indicated that he overruled the agency's objections, with the exception of Request 25, which will not be addressed in this ruling, and issued orders requiring the agency to respond to all of the grievant's record requests. The agency has sought this compliance ruling to challenge the hearing officer's order.

Requests 1 and 2 – The “complete ‘internal administrative investigation’” file and related emails

The March 17, 2021 due process notice issued to the grievant begins, “[a]s a result of an internal administrative investigation, it was discovered confidential information was transmitted from your agency email account to your personal Gmail account.” The grievant's Requests 1 and 2 seek the complete file for the “internal administrative investigation” and any related emails. The information presented to EDR does not describe the full nature of the investigation, but based on certain contents of the file identified by the agency, it appears that the investigation was broader than the grievant's behavior for which she was terminated. For example, the agency indicates that the file contains confidential documents associated with agency investigations and personally identifiable information from the Department of Corrections' Offender Case Management System. Thus, by overruling the agency's objections, the hearing officer has not properly applied the

¹⁹ *E.g.*, Va. Code § 2.2-3703.

²⁰ Va. Code § 2.2-3705.3.

²¹ *See, e.g.*, EDR Ruling No. 2006-1312.

²² *See, e.g.*, EDR Ruling No. 2009-2173 (applying Governor's working papers exemption).

²³ *Grievance Procedure Manual* § 8.2.

²⁴ *See, e.g.*, EDR Ruling No. 2014-3650.

grievance procedure to limit the discovery of documents to those that are “related to the actions grieved” or properly assessed considerations of “just cause.” The hearing officer is directed to reassess his determinations in this regard.

In EDR’s opinion and based on the information presented, only records in this investigation file that concern the conduct for which the grievant was terminated would be potentially relevant. To the extent that such records exist, they would still be subject to considerations of just cause to be addressed by the hearing officer. For example, the grievant was disciplined for sending confidential information to her personal email account. Presumably, the emails for which the grievant was disciplined should be properly discoverable as they will likely be exhibits at the hearing. The attachments to those emails (the alleged confidential information sent) may or may not be properly discoverable, depending on considerations of just cause, due to the nature of the documents and issues involved in this case. EDR understands and is persuaded by the concerns presented by the agency about providing confidential information to an individual who is alleged to have previously mishandled confidential information. In any event, the email attachments themselves may not be necessary to the resolution of the material facts at issue if there is no question that those documents are properly considered “confidential” for purposes of the alleged policy violations by the grievant.²⁵ As the parties have not identified any particular allegedly confidential documents, EDR cannot make an assessment of this matter in this ruling.

Request 9 – Communications between OSIG and DHRM regarding the Written Notices at issue

The subject of Request 9 appears to be directly related to the actions grieved and, thus, properly considered relevant. However, to the extent such communications are attorney-client communications or attorney work product, the communications can be properly withheld.

Request 10 – Documents “relied upon, reviewed, or otherwise used” by the agency in issuing the Written Notices

The subject of Request 10 appears to be directly related to the actions grieved inasmuch as it seeks records utilized by the agency in issuing the disciplinary actions to the grievant. Subject to the general discussion above about withholding otherwise privileged or protected records, these records are properly considered relevant and discoverable to the extent such records are related to the conduct for which the grievant was terminated.

Requests 11 through 16 and 19 – Communications from January 1, 2020 to the present between identified individuals/entities that reference or mention a) the grievant, b) the grievant’s Whistleblower lawsuit filed in the City of Richmond Circuit Court, c) the Virginia Parole Board, d) investigating, or the investigation of, the Virginia Parole Board, e) press coverage of OSIG’s investigation of the Virginia Parole Board, f) any criticism or complaints about the Virginia Parole Board from Virginia state legislators, and g) any concerns criticism, or complaints about OSIG or its investigation of the Virginia Parole Board by anyone in the Virginia Governor’s Office, Attorney General’s Office, or Office of Public Safety and Homeland Security

The hearing officer has not adequately assessed Requests 11 through 16 and 19 under the grievance procedure. These requests seek records about matters that are unrelated to the actions

²⁵ If there is a legitimate question in this regard, the hearing officer may be able to review the records *in camera*.

grieved. The requests are therefore overly broad and it would be unduly burdensome for the agency to respond to and determine whether any relevant information exists that should be disclosed, subject to other considerations of confidentiality, privilege, and other bases of protection. In short, these requests as stated would not be proper for the hearing officer to order the agency to produce. There may well be some documentation encompassed by these requests that relates to the actions grieved. However, a more narrowly-tailored request would be required before the agency should properly be ordered to respond.²⁶ The hearing officer is directed to sustain the agency's objections to these requests as stated.

Requests 17 and 18 – All documents and communications from January 1, 2020 to the present related to OSIG's investigation of the Virginia Parole Board

The hearing officer has not adequately assessed Requests 17 and 18 under the grievance procedure. The requests seek records that are not related to the actions grieved. OSIG's investigation of the Virginia Parole Board is not at issue in this grievance. The hearing officer is directed to sustain the agency's objections to these requests.²⁷

Request 22 and 23 – Documents related to discipline (formal or informal) issued to any agency employee from January 1, 2016 to the present that involve violations of any policy cited in the Written Notices issued to the grievant

The hearing officer has not adequately addressed Requests 22 and 23 under the grievance procedure. The requests seek information broader than what EDR generally requires to be produced concerning the issue of inconsistent discipline. Typically, records of disciplinary actions are relevant only if they relate to similar misconduct committed by other similarly situated employees.²⁸ 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."²⁹ In this case, the grievant was issued Written Notices for allegedly sending confidential documentation to her personal email account. Therefore, only documentation about how the agency has disciplined or counseled similar misconduct would be relevant. The hearing officer must limit any resulting order for the production of documents accordingly. Documentation produced must also protect the privacy of non-parties.³⁰

Further, the timeframe here is broader than would normally be considered relevant. EDR has reviewed nothing that would demonstrate why review of records going back to January 2016 is reasonable here. Generally speaking, the longer the time period between events, the less relevant they are to demonstrate potentially inconsistent disciplinary action. This is especially because many events could change an agency's approach to disciplining employees for certain misconduct over time, including a change in management. While EDR does not mandate a particular look-back period, in the past we have upheld orders for disciplinary records going back three years as

²⁶ See, e.g., EDR Ruling No. 2017-4522 (reaching similar result regarding a grievant's request for all emails referencing the grievant for a six-month period).

²⁷ See *supra* the discussion above about records related to the Virginia Parole Board and OSIG investigations generally not being open to review by the public.

²⁸ See, e.g., EDR Ruling No. 2010-2566.

²⁹ EDR Ruling No. 2010-2376 n.19.

³⁰ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

potentially relevant.³¹ Accordingly, absent a showing by the grievant as to why records dating from January 2016 are relevant (which has not been presented to EDR's awareness), the hearing officer should impose a look-back period of three years from the date of the grievant's termination. The only documents subject to disclosure would be redacted information reflecting the agency's final action and describing the misconduct in sufficient detail as is appropriate for the particular case.³²

Request 24 – All files about or on the grievant

The agency objects to Request 24 on various grounds, including that it is vague, overly broad, unduly burdensome, and seeks information that is immaterial to the actions grieved. In overruling these objections, the hearing officer has failed to adhere to the grievance procedure. As it is currently phrased, this request would result in a comprehensive search of all records that relate to the grievant. While there may be some records potentially relevant to the case encompassed by this request, the grievant has not demonstrated a reasonable basis for conducting a search of the entirety of the agency's records that would warrant the agency undertaking the burden of doing so.

The grievant indicates that this request is being made "to prevent the Grievant from being ambushed at the hearing by some unidentified 'file' that the Agency or its witnesses always knew about but did not produce." While we understand the grievant's argument, the concern is misplaced. First, the grievant will receive the agency's proposed exhibits in advance of the hearing. Second, if a witness appears at the hearing with records of which the grievant was previously unaware, the grievant could request a copy at that time and seek additional time to present rebuttal evidence or argument as necessary following the hearing. The type of file the grievant identifies as the target of this request essentially amounts to a supervisor's file on an employee. To the extent there is anything in a supervisory file regarding the grievant that is related to the actions grieved and/or is intended to be relied upon by the agency in this case, then it could properly be the subject of the hearing officer's order for production. Beyond such documents, however, it is EDR's determination that the agency need not produce records pursuant to the request at this time.

Request 28 – Cell phone records of usage for certain identified individuals

The agency objects to Request 28 on various grounds, including that it is overly broad, unduly burdensome, and seeks information that is immaterial to the actions grieved. In overruling these objections, the hearing officer has failed to adhere to the grievance procedure. The grievant suggests that the identified individuals are believed to have had conversations about the grievant and her alleged whistleblowing activities. The grievant indicates that cell phone records will demonstrate "whether such calls took place, when they took place, how long they lasted, and who was involved in such calls." However, even if the calls the grievant believes took place actually occurred, the cell phone records will not describe the content of the calls. That a call occurred or how long it occurred, without information about its content, has virtually no relevance to the actions grieved in this case. The phone records sought will not even confirm that conversations took place about the grievant at all. Any limited probative value of these records is outweighed by

³¹ EDR Ruling No. 2017-4522.

³² Accordingly, if the agency wishes to produce this information in a compiled format, such as a table, rather than the disciplinary documents themselves (if any exist), that would be appropriate as long as the relevant information identified above is conveyed.

the burden in gathering this information and constitutes just cause for nonproduction. Accordingly, it is EDR's determination that the agency need not produce records pursuant to the request at this time.³³

Request 29 – All daily planners, physical calendars, or electronic calendars for certain identified individuals

The agency objects to Request 29 on various grounds, including that it is overly broad, unduly burdensome, and seeks information that is immaterial to the actions grieved. In overruling these objections, the hearing officer has failed to adhere to the grievance procedure. The grievant suggests that these documents are being sought to “avoid troubles with lapses of memory and forgetfulness.” Similar to Request 28, we cannot understand what relevance such information has to the actions grieved. Even if calendar entries exist, the records will not describe the content of meetings or what was discussed. That a meeting occurred has virtually no relevance to the actions grieved in this case. Any limited probative value is outweighed by the burden in gathering this information and constitutes just cause for nonproduction. Accordingly, it is EDR's determination that the agency need not produce records pursuant to the request at this time.³⁴

Request 30 – All minutes of any meetings at or attended by OSIG from January 1, 2020 to the present where the grievant was discussed, referenced, or mentioned

The hearing officer has not adequately assessed Request 30 under the grievance procedure. The agency has identified numerous legitimate objections to this request that should not be overruled. Further, any minutes of meetings that involved a discussion related to the grievant are only relevant to the actions grieved if the discussion was related to the conduct for which the grievant was terminated or her alleged whistleblowing activity on March 3, 2021. Accordingly, the hearing officer must sustain the agency's objections to these requests with the following limited exception. To the extent records of meeting minutes concern the disciplinary actions at issue in this case or the grievant's alleged whistleblowing activity on March 3, 2021, they would be potentially relevant to the actions grieved and properly the subject of a hearing officer's order for production. To the extent any such relevant records contain other unrelated information or information that is confidential or privileged, they should be redacted accordingly.

Request 31 – All minutes of any meetings at or attended by OSIG from January 1, 2020 to the present where the Virginia Parole Board or the investigation thereof was discussed, referenced, or mentioned

The hearing officer has not adequately assessed Request 31 under the grievance procedure. The request seeks records that are not related to the actions grieved. OSIG's investigation of the Virginia Parole Board is not at issue in this grievance. The hearing officer is directed to sustain the agency's objections to this request.

³³ Cf., e.g., EDR Ruling No. 2013-3642.

³⁴ Cf., e.g., *id.*

Grievant's Requests for Witness Orders

The grievant appears to have requested numerous orders for witnesses from the hearing officer to direct their attendance at the hearing in this case. The agency objected to six of the requests for witness orders. The hearing officer upheld the agency's objections as to two witnesses, but overruled the agency's objections as to four other witnesses. The grievant seeks to have orders issued for the two witnesses for whom the hearing officer upheld the agency's objections. The agency seeks to have the hearing officer prevented from issuing witness orders to the six objected-to witnesses. EDR will address each request below without naming the witnesses for purposes of this ruling.

With regard to the two witnesses for whom the hearing officer upheld the agency's objections, EDR has no basis to dispute the hearing officer's assessment. The hearing officer appears to have determined that neither witness will provide probative testimony to the issues grieved. Nothing the grievant has submitted suggests that the hearing officer's determination was an abuse of discretion. Accordingly, we decline to disturb the hearing officer's order in this regard.

One of the agency's objections is that the grievant has sought to compel individuals not employed by the agency to appear at the hearing. This objection is not supported by the grievance statutes or procedure. As the grievant has correctly pointed out, nothing in the grievance statutes limits the hearing officer's authority to issue witness orders to only agency employees.³⁵ Both parties are correct that the hearing officer does not have subpoena authority. Consequently, the enforcement of the hearing officer's witness order is not the same as a court-issued subpoena. As the agency only has control over its employees, the agency is only responsible for directing its own employees to appear for grievance hearings.³⁶ Individuals who are not employed by the agency may decide to appear for the hearing at their discretion. As such, the agency's objection to any of the witness orders on the basis that the proposed witnesses are not employed by the agency is not a valid objection.

Witness #4

The agency objects to this witness as essentially irrelevant because she was not the grievant's supervisor or involved in the disciplinary actions at issue in this case. The grievant asserts that this witness provided positive comments on the grievant's evaluation, and thus her testimony is at least relevant to the issue of mitigation. The hearing officer appears to have determined that this witness's testimony is potentially relevant to the actions grieved. Based on the parties' submissions, EDR cannot find that the hearing officer's determination in this regard is an abuse of discretion. Accordingly, EDR will not disturb the hearing officer's determination regarding a witness order for Witness #4.

Witness #5

The agency's objections to this witness appear to be based on the fact that this individual is not an agency employee. As stated above, this is not a valid objection. Further, this witness is an employee of DHRM and the agency's human resources client manager who, presumably, was

³⁵ Va. Code § 2.2-3005(C); *Grievance Procedure Manual* § 5.7.

³⁶ *Rules for Conducting Grievance Hearings* § III(E).

involved in and/or aware of the disciplinary process at issue in this case. Accordingly, there appears to be a legitimate basis to consider this witness as having potentially relevant testimony. EDR will not disturb the hearing officer's determination regarding a witness order for Witness #5.

Witness #7

The agency objects to this witness on numerous grounds, most notably that the witness's testimony is immaterial to the case. The grievant asserts that this witness's testimony is relevant because 1) the witness was involved in a meeting on August 14, 2020 involving criticism of OSIG's investigation of the Virginia Parole Board, 2) the witness has knowledge about communications with OSIG about the grievant and alleged whistleblowing activities, and 3) the witness made "pointed public comments" about the grievant in March 2021. As has been stated in this ruling, OSIG's investigation of the Virginia Parole Board is not at issue in this grievance. As to this witness's opinion of the grievant or her alleged whistleblowing activities, we cannot find that such information would be material to the grievant's retaliation claim. The question for the hearing officer's determination in this regard is whether the agency would not have terminated the grievant but for her alleged protected activity. This matter is a question of the agency decision-makers' mindset and motivation, not that of individuals who had no involvement in or control of the grievant's termination.³⁷ Accordingly, nothing the grievant has submitted indicates that this witness would have any material information concerning the actions grieved or whether the agency took retaliatory action against the grievant.³⁸ Accordingly, the hearing officer is directed to sustain the agency's applicable objections and not issue an order for Witness #7.

Witness #8

The agency objects to this witness on numerous grounds, most notably that the witness's testimony is immaterial to the case. The grievant asserts that this witness's testimony is relevant to "the Governor's Office criticisms of OSIG's initial Virginia Parole Board report and its alleged slanted nature." In apparently determining that this witness has potentially relevant testimony, the hearing officer has abused his discretion. OSIG's investigation of the Virginia Parole Board is not at issue in this grievance. Nothing the grievant has submitted indicates that this witness would have any material information concerning the actions grieved or whether the agency took retaliatory action against the grievant.³⁹ Accordingly, the hearing officer is directed to sustain with agency's applicable objections and not issue an order for Witness #8.

Agency's Requests for Records

The agency has requested that the grievant produce certain records in this case. The grievant appears to have objected to four of these requests (Requests 1, 2, 3, and 8). In the Second Amended Rescheduling Order, the hearing officer has indicated he will overrule the grievant's

³⁷ Cf. Va. Code § 2.2-602 (providing that the heads of agencies are the appointing authorities of their respective agencies and responsible for personnel actions, and that the Governor's Office "shall exercise no authority with respect to the selection or tenure of any individual employed" by the agency, unless the Governor is the appointing authority).

³⁸ The agency states that this witness is not an agency employee and was not involved in administering the disciplinary actions at issue in this case.

³⁹ The agency states that this witness is not an agency employee and was not involved in administering the disciplinary actions at issue in this case.

objections and issue an order requiring the grievant to respond to all four requests. The grievant has sought this compliance ruling to challenge the hearing officer's determination in this regard.

One issue appears relevant to all of the requested records by the agency: after-acquired evidence. The agency asserts that it is seeking records, in essence, to determine if the grievant has engaged in any other misconduct of which the agency is not currently aware. The agency argues that such evidence is relevant to a determination as to whether the grievant would be due any back pay or should be reinstated based on such after-acquired evidence of misconduct (assuming the Written Notices themselves are not otherwise upheld). EDR has not had occasion to directly address the question of whether such after-acquired evidence affects the availability of relief in grievance hearings, or whether discovery about such evidence is appropriate. No provision of the grievance statutes or *Grievance Procedure Manual* expressly prohibits or permits such an inquiry. While both parties have cited cases in support of their respective positions, neither party has presented any authority that would suggest consideration of after-acquired evidence is mandated or prohibited in grievance hearings.

As to the particular facts of this case, EDR finds that the purpose for which the agency seeks certain records from the grievant do not overcome the grievant's objections. Indeed, consideration of after-acquired evidence in the manner contemplated by the agency could be inconsistent with the *Rules for Conducting Grievance Hearings*' description of the questions to be resolved by the hearing officer in assessing disciplinary actions. The proper inquiry at a grievance hearing is whether the record evidence supports the Written Notice(s) as issued.⁴⁰ If the grievant has engaged in other misconduct not charged on the Written Notice form, such matters are beyond the authority of the hearing officer to address as they would not be matters properly qualified for hearing as issues grieved.⁴¹ Furthermore, application of after-acquired evidence in employment litigation is different from a grievance hearing, in which available remedies are more limited.⁴² Lastly, an agency is not prevented from taking future action for additional misconduct by an employee should that agency be required to reinstate the employee following a grievance hearing. An agency could decide to issue disciplinary action, and, perhaps termination when warranted, for the additional misconduct following such a reinstatement. Consequently, EDR declines to extend discovery to the after-acquired evidence matters sought by the agency in this case.⁴³

⁴⁰ *Rules for Conducting Grievance Hearings* § VI(B).

⁴¹ *See id.* § V(C) ("Challenges to management actions or omissions that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied.").

⁴² As we need not resolve the issue in this ruling, we reserve for another time a determination as to whether consideration of after-acquired evidence to prevent an employee's reinstatement or limit back pay remedies would be consistent with considerations of due process.

⁴³ We reach this conclusion also in light of the warning noted by the U.S. Supreme Court of the "not . . . insubstantial" concern of employers undertaking extensive discovery into an employee's background as a routine matter. *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 363 (1995). As one court has noted, "the after-acquired evidence doctrine . . . is not intended to be used as a fishing expedition by employers to find wrongful conduct on the part of their terminated employees for the purpose of limiting their damages." *Miller v. AT&T*, 83 F. Supp. 2d 700, 706 (S.D. W. Va. 2000). We do not read the grievance statutes, as they are currently written, to have been intended to create a process for state agencies to gather this type of evidence in this manner.

Request 1 – All documents related to your communications with any Third-Party, including but not limited to any News Media, from January 10, 2020 through the present regarding your employment with OSIG.

The grievant has objected to this request on numerous grounds, primarily that the request seeks immaterial information and is overly broad and unduly burdensome. This request is far too broad for the hearing officer to order production of responsive documents under the grievance procedure. While there may be some information encompassed by this request that is potentially relevant, the request as stated seeks information that is not related to the actions grieved. Any limited relevance is outweighed by the burden it would take for the grievant to search all records of communications with any individual for the entirety of her employment with the agency that in any way related to her job there.

EDR will note one exception to this determination. The grievant has identified a March 3, 2021 “Confidential Whistle Blower disclosure” to certain leaders in the General Assembly. The grievant’s retaliation theory appears to be premised on this alleged protected activity. Accordingly, it would be difficult to argue that records related to this communication are not at issue in the grievance inasmuch as the grievant herself identified it in her grievance. Accordingly, while the grievant’s objections to Request 1 should be sustained by the hearing officer, the grievant should be required to produce records related to the communication for which the grievant alleges retaliation as a “Whistle Blower.”

The agency also suggests that the requested records relate to the grievant’s affirmative defense in this case and her apparent “repeated assertions that she is not responsible for the unauthorized and unjustified disclosure of confidential information related to her employment at OSIG to third-parties.” The agency also suggests that the sought communications “may be probative of Grievant’s objective and/or subjective belief that she was engaging in protected activity.” However, the grievant was not disciplined for disclosure of confidential information to third-parties. She was disciplined for sending agency records to her personal email address. Further, EDR does not perceive an argument in the grievance that the grievant’s conduct of sending agency documents to her personal email address was protected activity related to communication with a third-party. Rather, the grievant states that she sent the documents to her personal email to be able to print the records from her home printer.⁴⁴ Accordingly, we are unable to discern how records reflecting the grievant’s communications with third-parties, to the extent any exist, relate to the actions grieved. The hearing officer is directed to sustain the grievant’s objections to this request except for the “Whistle Blower” records noted in the previous paragraph.

Request 2 – All documents related to your communication with any Third-Party, including but not limited to any News Media, from January 10, 2020 through the present regarding your investigation of the Virginia Parole Board.

The hearing officer has not adequately assessed Request 2 under the grievance procedure. The request seeks records that are not related to the actions grieved. OSIG’s investigation of the Virginia Parole Board (and the grievant’s involvement therein) is not at issue in this grievance. The grievant was not disciplined expressly for any conduct in relation to her job performance

⁴⁴ EDR makes no determinations about whether such an explanation has a basis in fact or whether the explanation would present a valid excuse to any violation of policy by the grievant’s alleged misconduct.

related to that investigation. Further, as discussed in relation to Request 1, the grievant was not disciplined for disclosure of confidential information to third-parties. The hearing officer is directed to sustain the grievant's objections to this request. However, to the extent the grievant intends to rely on any documents responsive to this request in her grievance, they should be properly disclosed consistent with the hearing officer's orders regarding the pre-hearing exchange of documents.

Request 3 – All documents within your custody or control related to your investigation of the Virginia Parole Board.

The hearing officer has not adequately assessed Request 3 under the grievance procedure. The request seeks records that are not related to the actions grieved. OSIG's investigation of the Virginia Parole Board (and the grievant's involvement therein) is not at issue in this grievance. The grievant was not disciplined expressly for any conduct in relation to her job performance related to that investigation. The hearing officer is directed to sustain the grievant's objections to this request. To the extent the agency reads this request as seeking to obtain agency property (records) that may still be in the custody or control of the grievant, it may very well have a right to do so, but the grievance hearings process is not the forum in which to pursue such a right. However, to the extent the grievant intends to rely on any documents responsive to this request in her grievance, they should be properly disclosed consistent with the hearing officer's orders regarding the pre-hearing exchange of documents.

Request 8 – All documents and communications associated with any audio recording you took of the August 14, 2020 meeting

The hearing officer has not adequately assessed Request 8 under the grievance procedure. The request seeks records that are not related to the actions grieved. OSIG's investigation of the Virginia Parole Board (and the grievant's involvement therein) is not at issue in this grievance. The grievant was not disciplined expressly for any conduct in relation to her job performance related to that investigation or for any conduct related to recordings being made. The hearing officer is directed to sustain the grievant's objections to this request. However, to the extent the grievant intends to rely on any documents responsive to this request in her grievance, they should be properly disclosed consistent with the hearing officer's orders regarding the pre-hearing exchange of documents.

CONCLUSION

Based on the foregoing discussion, EDR finds that the hearing officer's determinations as to the parties' objections in the Second Amended Scheduling Order, as described in this ruling, were abuses of discretion and/or not compliant with the grievance procedure. The hearing officer is directed to amend his pre-hearing orders to be consistent with the directives in this ruling. The hearing officer must also consider any remaining objections or unresolved issues not directly addressed in this ruling. EDR has attempted to address all matters on which the compliance rulings were requested, but there could be additional outstanding matters that were not addressed in this ruling. For example, this ruling has not considered whether portions of any records that are to be produced would be subject to appropriate redaction for confidentiality or on other grounds. EDR is unable to address issues of redaction as there have been no particular records identified that the

parties sought to be addressed specifically. To the extent such questions arise following the hearing officer's revised orders, the parties should direct their respective positions to the hearing officer.

EDR's determinations in this ruling are made based on the information presented and available at this time. Should additional questions arise before or during the hearing that alters whether there may be additional material evidence that should be produced, this ruling does not limit the hearing officer's authority to adjust his orders accordingly and require further production of evidence.

EDR's rulings on matters of compliance are final and nonappealable.⁴⁵

Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁴⁵ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).