

Issue: Compliance/reconsideration of Ruling #2003-107/documents; Ruling Date:
November 5, 2003; Ruling #2003-419; Agency: Virginia Department of Transportation;
Outcome: agency must provide documents



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
No. 2003-419
November 5, 2003

By letter dated October 14, 2003, the Virginia Department of Transportation (VDOT or the agency) seeks reconsideration of ruling 2003-107. The agency disputes the relevancy of certain documents that this Department ordered the agency to provide to the grievant.

FACTS

VDOT claims that an audit of the grievant's usage of the Internet for four different weeks during the months of July, August, October, and November of 2002 indicates that he abused state time by using the Internet to frequently visit non-work related sites. Accordingly, on March 5, 2003, management issued the grievant a Group II Written Notice for abuse of state time, misuse of state equipment, and failure to follow established written policy. In response to the Group II Written Notice, the grievant initiated a grievance on May 3, 2002¹ alleging, among other things, that the Written Notice is unwarranted because it is the result of an arbitrary and capricious unfair application and misapplication of policies, procedures, rules and regulations.

Simultaneous with the initiation of his grievance, the grievant also requested documents which he claims are relevant to his grievance.² Among the documents requested by the grievant were:

All relevant documents, including but not limited to, all records documents, reports, emails, notes of discussion, policy statements, press releases, and explanations of methods, criteria, and/or data pertaining to any proposed and/or implemented discipline of any other VDOT

¹ The parties had mutually agreed to extend the 30 calendar day filing period to 60 calendar days.

² Grievance Form A, Attachment D.

employee for the calendar year 2002 resulting from or pertaining to investigation into (1) Abuse of State Time, (2) Misuse of State Equipment, and (3) Failure to Follow Established Written Policy.³

In Ruling 2003-107, this Department held that the above request was overly broad. However, we held that the agency must provide a more limited range of documents contemplated in the original request. This Department held that while the:

agency need not provide documentation concerning *all* proposed and/or implemented discipline involving Abuse of State Time, Misuse of State Equipment, and/or Failure to Follow Established Written Policy as requested by the grievant, VDOT must supply the grievant with documentation of such with respect to investigations of *Internet abuse* by other VDOT employees.⁴

Ruling 2003-107 further noted that in a previous ruling (EDR Ruling 2002-215) this Department held that: “disciplinary actions (or lack thereof) against other employees stemming from the same investigation by VDOT for possible Internet abuse *are* relevant to the overall issue of whether a grievant’s discipline was warranted and appropriate under the circumstances.”⁵ The agency has objected to this statement on the basis that the investigation at issue in EDR Ruling 2002-215 was not the same investigation that led to the grievant’s discipline in this case. The agency apparently concludes that the discipline imposed for misconduct confirmed through the earlier investigation is therefore irrelevant.

DISCUSSION

Reconsideration requests are granted at the discretion of this Department. The agency’s request was granted in this case because the objection raised by the agency indicates that this Department apparently did not adequately explain how documents pertaining to misconduct discovered through a prior investigation are relevant to a grievance challenging alleged misconduct *of an identical nature* discovered through a subsequent investigation.

It is well-settled law and widely-held management principle that one of the factors an employer may consider when deciding on the appropriate level of discipline in a given circumstance is how other similarly situated employees have been treated in like

³ This request was originally found in paragraphs 4-6 of the grievant’s Request for Documents.

⁴ EDR Ruling 2003-107 pages 6-7, (emphasis in original).

⁵ EDR Ruling 2003-215 page 4 (emphasis added).

circumstances.⁶ There is no requirement that purported misconduct in a given case be discovered through the same investigation that involved others in order for the agency's discipline of other employees to be relevant in the instant case. The focus should not be on whether the misconduct stemmed from the same facts or was discovered through the same investigation as the case in question. Rather, the focus should center on whether the *misconduct* in other instances was "similar" to that in the instant case.⁷ If the misconduct is similar, then the agency's responses in previous cases may very well be relevant to the instant case.⁸

It should be noted that this Department's determination of relevancy is a threshold finding subject to further consideration by the administrative hearing officer at the grievance hearing. Once this grievance proceeds to hearing,⁹ the hearing officer will make the ultimate determination of the relevancy of these documents as well as all other evidence presented at hearing.¹⁰ Moreover, the hearing officer's determination on the admission and relevancy of proffered evidence (including the discipline of others) can be

⁶ In *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305-06 (1981), the Merit Systems Protection Board (MSPB) established a dozen nonexclusive factors that should normally be considered by the employing agency before a disciplinary penalty is imposed. The Douglas factors include: (1) the nature and seriousness of the offense and its relation to the employee's duties; (2) the employee's job level and type of employment; (3) the employee's past disciplinary record; (4) the employee's past work record and length of service; (5) the effect of the offense on the employee's performance ability and its effect on the supervisor's confidence in the employee; (6) *consistency with penalties imposed on others for similar misconduct*; (7) consistency of the penalty with the table of penalties; (8) the notoriety of the offense; (9) whether the employee had been warned about the conduct; (10) the employee's potential for rehabilitation; (11) mitigating factors such as unusual job tensions, personality problems, mental impairment, harassment or provocation; and (12) the adequacy of alternative sanctions to deter future misconduct. *Douglas*, 5 M.S.P.R. at 305-06 (emphasis added).

⁷ *Id.*, Douglas factor #6.

⁸ EDR notes that Douglas cautions that "not all of these [the Douglas] factors will be pertinent in every case" and:

[i]n considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula. For example, the principle of "like penalties for like offenses" does not require mathematical rigidity or perfect consistency regardless of variations in circumstances or changes in prevailing regulations, standards, or mores. This consideration is redolent of equal protection concepts, also reflected in the merit system principle calling for "fair and equitable treatment" of employees and applicants in all aspects of personnel management.

⁹ Formal disciplinary actions automatically qualify for a grievance hearing. Assuming that the grievant requests such a hearing via the Grievance Form A, his grievance will advance to hearing. *Grievance Procedure Manual*, § 4.1(a), page 10.

¹⁰ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs. Va. Code § 2.2-3005(C)(5). Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. *See* EDR Rulings 2003-063, and 2002-037.

overturned only upon a showing that he abused his discretion (or exceeded the scope of his authority).¹¹

CONCLUSION

The agency is directed to provide the documents requested in paragraphs 4-6 of the original document request in accordance with the terms set forth in Ruling 2003-107 and this Ruling.

If either party fails to comply with the terms of this ruling, the opposing party may seek a ruling from the Director of this Department regarding the noncompliance. Failure to follow the directives of this ruling without just cause could be viewed as a violation of a substantial procedural requirement of the grievance procedure which could result in either closure of the grievance or a decision against the noncomplying party on any qualifiable issue. This Department's rulings on matters of compliance are final and nonappealable, and have no bearing on the substantive merits of this case.¹²

Claudia T. Farr
Director

¹¹ See EDR Rulings 2003-076, 2003-063, 2002-226, and 2002A & 2002B, which articulate the abuse of discretion/scope of authority standard.

¹² Va. Code § 2.2-1001 (5).