

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: September 30, 2008; Ruling #2009-2087; Agency: Department of Corrections; Outcome: Hearing Officer Not in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2009-2087  
September 30, 2008

The Department of Corrections (the agency) requests a compliance ruling to challenge a hearing officer's orders for production of various documents.

FACTS

The grievance in this matter primarily concerns the grievant's challenge to two Written Notices he received related to alleged misuse of state property (state computer) and an alleged failure to follow policy regarding internet access and computer use. As a result of these disciplinary actions, the grievant was demoted, transferred to another facility, and received a reduction in salary. The grievant challenges these actions on various grounds. One of these grounds is that he was subjected to retaliation because he supported a subordinate employee with her grievance against the agency. The grievant also raised other issues, including the agency's alleged 1) misapplication of the Standards of Conduct, 2) improper investigation (for instance, without approval or "just/probable cause"), and 3) locking out of the grievant from his computer files and e-mail account. The grievance proceeded through the management steps and was qualified for a hearing by the agency head.

The grievant has made various requests for documents during the hearing stage. The hearing officer issued three separate orders for production of documents in relation to the grievant's requests. The agency now objects to the orders and seeks a compliance ruling.

The agency objects to the hearing officer's orders because they require the disclosure of 1) Special Investigative Unit reports, 2) "personnel information which is protected by [Department of Human Resource Management (DHRM)] policy," and 3) records from the Virginia Information Technologies Agency (VITA). The agency also asserts that these documents are not relevant to the grievance and that the orders are overly broad.

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.”<sup>1</sup> This Department’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.”<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

### *Agency-wide Scope*

The agency argues that the hearing officer’s orders are overly broad because they require the production of documents regarding other employees agency-wide, which, the agency argues, are not relevant.<sup>5</sup> Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue.<sup>6</sup> While some of these documents could be relevant to the question of consistent treatment,<sup>7</sup> relevancy becomes almost nonexistent, and the burden of production becomes excessive, if the scope of the review is too broad. In determining whether just cause exists for nondisclosure of relevant documents under the grievance procedure, this Department will weigh the interests expressed by the party for nondisclosure (here, undue burden) against the general presumption under the grievance statutes in favor of disclosure and the requesting party’s particular interests in obtaining the document. In this case, the scope of the hearing officer’s orders regarding agency-wide documents must be narrowed.

In the past, EDR has permitted the discovery of certain records of other employees agency-wide. For instance, in EDR Ruling No. 2003-107, this Department required that an agency provide documents pertaining to discipline against agency employees concerning internet abuse. However, that case involved an ongoing agency-wide investigatory effort to eradicate internet abuse throughout the agency.<sup>8</sup> That situation is distinguishable from the present case.

In most cases involving a claim of inconsistent treatment of employees, a grievant can obtain related documents addressing the treatment of employees in the grievant’s reporting line, division/department, and/or at the same facility. In this case, there appears to be an absence of

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

<sup>2</sup> *Grievance Procedure Manual* § 9.

<sup>3</sup> See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

<sup>4</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>5</sup> See First Supp. Order for Produc. of Docs. ¶¶ 2-3.

<sup>6</sup> 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.’” (citations 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.” (citations omitted)).

<sup>7</sup> Based upon the grievant’s requests for production of documents, this is the basis upon which the grievant seeks to utilize these documents.

<sup>8</sup> See EDR Ruling No. 2003-107.

any indication why a broader request should be granted.<sup>9</sup> Further, the agency argues that production of these types of documents agency-wide would be unduly burdensome. In weighing the minimal relevance of agency-wide documents in this case (beyond the normal scope described above), this Department concludes that there is just cause to limit discovery because of the burden to the agency. As such, in this case, the hearing officer's orders must be narrowed to the mental health unit/division and also include employees of the facility at which the grievant previously worked. If there are sufficient reasons presented later to broaden the orders, the hearing officer will have the discretion to do so. However, at this stage, this Department does not find sufficient reason to order an agency-wide production of the documents requested in the First Supplemental Order for Production of Documents in paragraphs 2-3.<sup>10</sup>

### *Personnel Information*

The agency objects to providing certain personnel information because it is protected by DHRM policy. It appears that the agency is objecting to the hearing officer's order to produce records of disciplinary action taken against other agency employees for charges similar to those made against the grievant.<sup>11</sup> As this Department has held in prior rulings, the restrictions on personnel document disclosure provision in DHRM Policy 6.05 are overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.<sup>12</sup> Therefore, the agency's argument is unpersuasive. Documents related to the personnel information of other employees must still be provided.

When providing copies of the documents, however, including disciplinary actions taken against non-parties, any non-relevant personal information may be redacted, which would include an employee's social security number, telephone number, or home address.<sup>13</sup> Furthermore, it would appear that an employee's name could be redacted in the case of the documents presumed to be at issue here (written notices, etc.). The employee's name would not appear to be relevant here to the issue of inconsistent treatment.<sup>14</sup> In addition, the parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative

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<sup>9</sup> It appears that the grievant is alleging that certain employees located at the facility at which he used to work may have been treated inconsistently. As stated, discovery of the documents facility-wide, in addition to unit-wide, appears to be relevant in this case. The grievant has not presented any further information to support an agency-wide scope of discovery.

<sup>10</sup> This Department acknowledges the hearing officer's statements regarding the unique position the grievant previously held. *See* Third Decision Concerning Order for Docs. However, it does not appear, based on the information provided by both parties, that the involvement of Central Office personnel, i.e., those managers of the mental health unit/division, necessitates an agency-wide scope of production. The appropriate boundaries of the order would appear to be the mental health unit/division and the facility at which the grievant worked, similar to, as acknowledged by the hearing officer, the "targeted" requests for other documents.

<sup>11</sup> *See* First Supp. Order for Produc. of Docs. ¶¶ 1-3.

<sup>12</sup> *E.g.*, EDR Ruling No. 2007-1437; EDR Ruling No. 2006-1199; EDR Ruling No. 2004-853; *cf.* EDR Ruling No. 2004-683 (an agency may not deny a grievant access to otherwise relevant documents relating to a selection process on the ground that such disclosure is prohibited by DHRM Policy No. 2.10, Hiring).

<sup>13</sup> *See* Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>14</sup> Based upon the grievant's requests for production of documents, this is the basis upon which the grievant seeks to utilize these documents.

form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents.<sup>15</sup>

### *Special Investigative Unit*

The agency has not presented sufficient evidence to support its contention that the specific nature of the Special Investigative Unit reports at issue prevents their discovery in the context of grievance hearings. Therefore, to the extent the hearing officer's orders require the production of such reports, there is no basis to protect documents regarding the Special Investigative Unit from disclosure based on the evidence provided at this time.<sup>16</sup> Redaction may be appropriate, however, if there are any such reports subject to the hearing officer's orders that relate to investigations and/or discipline of other employees. In such a case, consistent with the discussion above, non-relevant personal information can be redacted, including the names of the subject of the investigation and the investigator.<sup>17</sup>

### *VITA Records*

The agency objects to providing certain documents from VITA because that agency "is not under [their] purview." This objection is reasonable given that the grievance statutes only require an agency to search "its records" to ensure relevant documents are provided to a requesting party.<sup>18</sup> Therefore, generally speaking, an agency must only produce relevant documents in its possession or control. As such, if the agency has documents generated by VITA within its possession or control, such documents would properly be subject to the hearing officer's orders for production.

Additionally, in some circumstances, there may be documents not in the possession of the agency that could potentially be subject to disclosure, depending on the relationship between the agency and the third party holder of the documents and the nature of the documents themselves. For instance, if, in an agency's relationship with a contractor or with another agency relied upon for service, the agency regularly requests and receives certain documents as a matter of course, such documents might be deemed sufficiently within the control of the agency to be considered a part of its own records. No evidence has been presented on either side of this issue at this juncture to make a determination on discoverability in this case as to any specific VITA

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<sup>15</sup> *E.g.*, EDR Ruling No. 2006-1312.

<sup>16</sup> It must be noted that it appears that a Protective Order has been entered, or is being considered for entry, in this case. If there are documents either party believes ought to be kept confidential, the provisions of this Protective Order should provide such protections.

<sup>17</sup> However, the name of the investigator could still be relevant if it were the grievant's supervisor or the grievant's supervisor's supervisor. As the grievant has alleged that these individuals have retaliated against him, knowing that they were involved in a particular investigation and a decision about the applicable facts could be relevant in this case.

<sup>18</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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document potentially within the control of the agency.<sup>19</sup> Such inquiry will be left to the hearing officer.<sup>20</sup>

This Department's rulings on matters of compliance are final and nonappealable.<sup>21</sup>

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Claudia T. Farr  
Director

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<sup>19</sup> The grievant has asserted that because VITA is a contractor and agent of the agency, the agency "should be able to access the requested documents." There has been insufficient evidence submitted to support this assertion.

<sup>20</sup> We are compelled to note that the parties proceeded to hearing prior to the issuance of this ruling. Typically, when parties advance to hearing prior to the issuance of a requested ruling, the parties are viewed as having waived their right to receive a ruling on any matter that is the subject of the pending ruling request. *See Grievance Procedure Manual* § 6.3. ("By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time.") Thus, this Department will generally not issue a ruling following the completion of a grievance hearing when parties proceed to hearing prior to the issuance of a requested ruling. However, under the particular facts of this case, including most notably a pending continuance of the hearing, we have an unusual window of opportunity to provide guidance to the parties and hearing officer on several unique document issues *without* requiring a re-opening of the hearing solely on the basis that the parties did not await the issuance of a requested ruling. Accordingly, we provide that instruction now.

<sup>21</sup> Va. Code §§ 2.2-1001(5), 2.2-3003(G).