

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: March 10, 2010; Ruling #2010-2527; Agency: Department of Veterans Services; Outcome: Hearing Officer Not in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Veterans Services  
Ruling Number 2010-2527  
March 10, 2010

The Department of Veterans Services (the agency) requests a compliance ruling to challenge the hearing officer's orders for production of documents and appearance of witnesses in Case Number 9171. For the reasons discussed below, the hearing officer is directed to consider the parties' arguments regarding the relevance and/or materiality of the documents and witnesses sought by the grievant.

FACTS

The grievance in this matter primarily concerns the grievant's challenge to a Written Notice he received for leaving a resident in the lobby of the facility when taking other residents on an outing.<sup>1</sup> In the hearing decision for Case Number 9171, the hearing officer upheld the Written Notice.<sup>2</sup> However, the hearing decision did not address the presence or absence of mitigating or aggravating circumstances. The hearing decision also expressly noted that the hearing officer did not consider any evidence of retaliation on the basis that the grievant admitted to the underlying conduct. As such, in EDR Ruling No. 2010-2449, this Department ordered the hearing officer to reopen the hearing for presentation and consideration of relevant evidence as to mitigation, which included retaliation.<sup>3</sup>

On remand, the hearing officer has ordered the agency to produce documents requested by the grievant. The documents the hearing officer ordered produced are: 1) Copies of all activity logs, front and back, from [floor] from June 1, 2008 to June 30, 2009; 2) Copies of all of One-on-One visitation logs for [floor] from June 1, 2008 to June 30, 2009; 3) Computer logs for [another agency employee] for the period from June 1, 2008 to June 30, 2009; 4) Phone logs for [another agency employee] from June 1, 2008 to June 30, 2009.

The agency states that during a conference call with the hearing officer, the agency's representative was prevented from arguing that the requested documents were not relevant.

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<sup>1</sup> Decision of Hearing Officer, Case No. 9171, Sept. 22, 2009 ("Hearing Decision"), at 3.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> See EDR Ruling No. 2010-2449.

Instead, the hearing officer reportedly focused on whether the documents could be produced. The agency appears to assert that the documents the grievant is seeking are not relevant or material and requests a compliance ruling regarding this matter. The agency also appears to dispute the relevance of some or all of the witnesses the grievant has requested be made available for the reopened hearing.

## DISCUSSION

### *Documents*

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>4</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>5</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>6</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>7</sup>

Whether requested documents are relevant to the grievance is inherent in any consideration of a request for documents.<sup>8</sup> The question of relevance must be considered before it can be determined whether a party is required to produce documents.<sup>9</sup> Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue.<sup>10</sup>

Based solely on the agency’s ruling request, it is unclear whether the hearing officer considered the relevance and/or materiality of the requested documents.<sup>11</sup> Indeed, it would appear that there would need to be some initial indication from the grievant about why some of these documents are being requested and allow for the agency to respond. This case has been

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

<sup>5</sup> *Grievance Procedure Manual* § 9.

<sup>6</sup> *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

<sup>8</sup> For instance, the Code of Virginia grants hearing officers the authority to receive “probative evidence.” Va. Code § 2.2-3005(C)(5).

<sup>9</sup> *See* EDR Ruling No. 2009-2087.

<sup>10</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>11</sup> At an earlier stage of this grievance, the hearing officer had ruled that these documents were not material. Hearing Decision at 1-2. Nothing in EDR Ruling No. 2010-2449 necessarily reversed that finding. The only issue addressed in that ruling was that the hearing officer erred by refusing to consider mitigation at all, including retaliation.

remanded on the limited question of mitigation, to include evidence of retaliation.<sup>12</sup> For example, it may be unclear, at least initially, how documents about another employee's use of the phone and/or internet are relevant or material to the Written Notice the grievant received for leaving a resident behind at the facility during an outing. However, the parties must be permitted to raise those arguments and have them addressed by the hearing officer.

Because it is not clear that the hearing officer addressed these questions, the hearing officer must reconsider his order for the production of documents. The grievant should have the opportunity to explain the basis for his document requests and why the documents are relevant and material. Further, the agency should have the opportunity to respond to the grievant's assertions. The hearing officer must then determine whether the requested documents are relevant and material, i.e., probative, to the limited matters at issue on remand. Further, the hearing officer should consider whether there is just cause for not producing the documents.

#### *Witnesses*

A hearing officer has the authority to order the appearance of witnesses at hearing.<sup>13</sup> The determination of what witnesses are to be ordered to attend the hearing is within the hearing officer's discretion. The hearing officer has the authority to exclude, for example, witnesses who will not present any relevant or material evidence,<sup>14</sup> or who offer merely cumulative testimony.<sup>15</sup> For the same reasons as discussed above, it is unclear whether the hearing officer considered the relevance and/or materiality of the requested witnesses. Therefore, in reconsidering his order for the production of documents, the hearing officer is directed to determine the relevance and/or materiality of the witnesses based on the parties' arguments. Should such consideration necessitate changing any of the orders for the appearance of witnesses, the hearing officer has the discretion to do so.

#### CONCLUSION

Based on the foregoing, the hearing officer is directed to reconsider his orders for the production of documents and appearance of witnesses consistent with this ruling. It is likely that an additional conference call would need to be held for a discussion of these issues between the parties and the hearing officer. This Department's rulings on matters of compliance are final and nonappealable.<sup>16</sup>

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Claudia T. Farr  
Director

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<sup>12</sup> EDR Ruling No. 2010-2449.

<sup>13</sup> *E.g.*, *Grievance Procedure Manual* § 5.7.

<sup>14</sup> *See* Va. Code § 2.2-3005(C)(5).

<sup>15</sup> *See Rules for Conducting Grievance Hearings* § IV(E).

<sup>16</sup> *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).