

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: August 9, 2011; Ruling No. 2012-3053; Agency: Department of Corrections; Outcome: Hearing Officer in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Number 2012-3053  
August 9, 2011

By letter dated July 29, 2011, the Department of Corrections (the agency) requested a compliance ruling to challenge the hearing officer's pre-hearing order regarding the production of documents in Case No. 9646.<sup>1</sup> For the reasons discussed below, this Department has no basis to disturb the hearing officer's order.

FACTS

The grievance at issue in Case No. 9646 involves a Group III Written Notice with termination. As stated on the Written Notice itself, the grievant was disciplined for "'Actions Unbecoming State Employee' and failure to reasonably participate in an investigation." The investigation at issue concerned an incident where an offender allegedly was injured while lighting a propane grill allegedly used by the grievant for personal business. According to the agency's advocate, the hearing officer ordered the agency to produce "[a]ll documents relating to the grievance to include investigative reports, incident reports, recordings (rapid eye), receipts (such as letters sent through certified mail) and any other materials used in making the decision to terminate [the grievant]." The agency's advocate states she received the hearing officer's order by mail on July 27, 2011. The agency alleges the hearing officer's order requires the agency to produce irrelevant information. The agency also seeks a stay of the hearing, until this Department's ruling is complete.

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>2</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. Further, a hearing officer has the

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<sup>1</sup> Because the hearing was scheduled for August 1, 2011 in this case, this Department issued an initial response by letter to the parties on July 29, 2011, which denied the agency's request for a stay. This ruling provides the official determination that was made in that letter for the record.

<sup>2</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

authority to order the production of documents.<sup>3</sup> 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. The hearing officer has the authority to exclude, for example, irrelevant or immaterial evidence.<sup>4</sup>

The agency appears to argue that documents about anything other than the grievant's alleged failure to cooperate with the investigator are irrelevant and, as such, need not be produced. The agency's advocate states that the grievant was only disciplined for his failure to cooperate with the investigator, not for using the grill for personal business. Based on this Department's review of the Written Notice, however, the agency disciplined the grievant for an alleged failure to cooperate AND actions unbecoming a state employee. While it is not immediately clear what those actions are, it is reasonable to assume that they are separate factual matters from the failure to cooperate. Indeed, the Written Notice indicates that the grievant failed to cooperate with the investigation into the alleged actions unbecoming a state employee. Accordingly, the hearing officer's determination that the documents ordered produced were relevant appears reasonable and appropriate. As such, this Department has no basis to disturb the hearing officer's order.

The agency's advocate also requested a stay of the August 1, 2011 hearing date, which, on the surface, would make sense when requesting a compliance ruling from this Department on a Friday afternoon before a hearing scheduled for the following Monday. However, parties who request stays so close to the hearing date must have reasonably exigent circumstances for such a last minute request. Those circumstances do not exist here. The agency's advocate states that she received the hearing officer's order by mail on July 27, 2011. Yet, a compliance ruling was not requested until late on Friday, July 29, 2011. Further, the hearing officer's order was sent to the agency's advocate by e-mail on July 25, 2011. Consequently, waiting four days to submit a compliance ruling shortly before a weekend does not demonstrate reasonably exigent circumstances for granting a stay. As previously stated in this Department's letter to the parties on July 29, 2011, the request for stay is denied.

This Department's rulings on matters of compliance are final and nonappealable.<sup>5</sup>

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Claudia T. Farr  
Director

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<sup>3</sup> *E.g.*, *Grievance Procedure Manual* § 5.7.

<sup>4</sup> *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.'" (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>5</sup> Va. Code §§ 2.2-1001(5), 2.2-3003(G).