

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: June 19, 2012; Ruling No. 2012-3367; Agency: Department of State Police; Outcome: Agency in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2012-3367
June 19, 2012

The Department of State Police (the agency) has requested a compliance ruling to address the hearing officer's pre-hearing order regarding the production of certain documents. For the reasons discussed below, this Department finds that the agency's proposal is in substantial compliance with the hearing officer's order to produce documents.

FACTS

In the grievance at issue in Case No. 9827, the agency reports that the hearing officer ordered that materials from the Internal Affairs' investigation, including interview notes and taped interviews, be produced to the grievant. The agency initially refused to provide this information. However, the agency has since represented that it will provide the grievant and his counsel access to these materials without releasing actual copies. The grievant's counsel objects to this approach, indicating that the grievant will be prejudiced, without indicating precisely in what manner such prejudice will occur.

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 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. 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."²

The primary concern the agency is attempting to address through its offer to make the materials available without providing a copy is having an unredacted copy in uncontrolled hands, which could result in further unnecessary, and potentially harmful, dissemination. The agency's proposal allows the grievant and his attorney to discover, review, and present evidence at hearing

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

² *Id.*

regarding the entirety of the investigation files requested.³ The agency's offer allows the grievant to do just about anything with the requested materials as a piece of evidence that he could if an unredacted copy was given to him, without actually giving him the unredacted copy.

In short, the agency's approach is a reasonable means by which to protect its concerns about the unnecessary dissemination of its sensitive documents.⁴ This Department finds there is just cause for withholding copies of the unredacted materials under these facts, given the agency's alternative approach to providing full disclosure and use of the information. We see no prejudicial impact on the grievant's ability to present his case at hearing as to these investigation files, and find the agency has substantially complied with the hearing officer's order to produce the materials. Assuming the facts are as the agency has presented them in its submission to this Department, which we have no basis to dispute at this time, there is no need for the agency to produce the unredacted copies to the grievant.

Additionally, if any of these materials are admitted into the record as exhibits and the agency insists that it must maintain sole custody of the materials, the hearing officer should ensure through an appropriate order that the agency provide full access to all reviewers of the hearing decision, including this Department, the Department of Human Resource Management, and the circuit court (and potentially Court of Appeals) if such access is requested by any of these reviewers.⁵ It will be the burden of the agency to make such access reasonable.⁶ Failure to adequately preserve the materials could allow any reviewer to draw an adverse inference against the agency concerning any factual dispute that could have otherwise been resolved through review of the materials.⁷

Finally, the grievant's attorney argues that due to the agency's "dilatory tactics" the charges against the grievant should be dismissed. There is no basis to grant such a request at this time. The agency sought a review of the hearing officer's order through proper grounds under the grievance procedure.⁸ As such, it was under no duty to produce materials pursuant to the hearing officer's order while this appeal was active.⁹ While the hearing officer has broad discretion to issue orders for the production of documents, such orders must be consistent with the provisions of the *Grievance Procedure Manual* and *Rules for Conducting Grievance*

³ In addition to being allowed access to these materials for review prior to hearing, the grievant and his attorney must have access to the materials at hearing and throughout the entire appeal period to be able to use them for appropriate reasons related to the hearing and any appeals, if necessary.

⁴ This type of approach was similarly upheld in other cases. See EDR Ruling No. 2012-3239; EDR Ruling Nos. 2010-2440, 2010-2447, 2010-2452.

⁵ See EDR Ruling No. 2012-3359.

⁶ "Reasonable" access for any reviewer would mean, for example, that the agency will make the materials available to any reviewer at the reviewer's normal business location and during the reviewer's normal business hours.

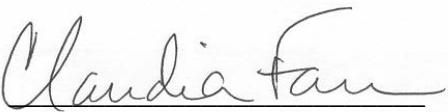
⁷ Cf. *Rules for Conducting Grievance Hearings* § V.B ("Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered.").

⁸ *Grievance Procedure Manual* § 6.4.

⁹ See *Grievance Procedure Manual* § 6.1 ("A challenge to EDR will normally stop the grievance process temporarily.").

*Hearings.*¹⁰ This Department has the final authority to determine whether such matters so comply.¹¹ Thus, there is no basis for the charges to be dismissed at this time. However, given the pendency of this Department's consideration of this ruling, there are sufficient grounds for an extension of the 35-day deadline and continuance of the originally scheduled hearing date, as the hearing officer may determine within his discretion.

This Department's rulings on matters of compliance are final and nonappealable.¹²



Claudia T. Farr
Claudia T. Farr
Director

¹⁰ E.g., *Grievance Procedure Manual* § 5.7.

¹¹ Va. Code §§ 2.2-1001(5), 2.2-3003(G).

¹² *Id.*