

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: July 11, 2012;
Ruling No. 2012-3377; Agency: Department of Social Services; Outcome: Hearing
Officer Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Social Services
Ruling Number 2012-3377
July 11, 2012

In a letter dated June 14, 2012, received June 20, 2012, the Department of Social Services (the agency) has requested a compliance ruling to challenge the hearing officer's pre-hearing order regarding the production of documents in Case No. 9844.¹ For the reasons discussed below, the hearing officer is directed to modify his order.

FACTS

The facts of the grievance at issue in Case No. 9844 are not pertinent to this ruling. In this case, the hearing officer ordered the agency to produce documents requested by the grievant. The agency responded by providing a summary of costs associated with the collection and production of the documents for which the grievant would be responsible. The hearing officer has reportedly ruled that such costs may not be collected. The agency appeals the hearing officer's ruling on that issue and seeks EDR's review.

DISCUSSION

That a party may charge for reasonable costs associated with collecting and producing requested documents to the opposing party under the grievance procedure is well-established.² However, EDR has not yet ruled upon the issue of whether the language in Section 8.2 of the *Grievance Procedure Manual* that allows for such charges is equally applicable to those documents ordered produced by a hearing officer. Generally speaking, the answer to that question is, yes. A party may be charged similarly for documents ordered produced by a hearing officer as they are for those requested during the management steps. However, the application of that rule must and should be subject to the considerations and discretion of the hearing officer, as reviewed by EDR. In short, the answer to the ultimate question of whether a party may be

¹ The agency also sought postponement of the scheduled hearing date. Since requesting this ruling, however, the hearing officer continued the hearing date and the case is in pending status awaiting the result of this ruling. Consequently, there is no need to address the postponement request.

² E.g., EDR Ruling Nos. 2010-2628, 2010-2629.

charged for a particular document request during the hearing phase of a grievance is that it depends on a variety of factors.

While we cannot detail all the potential reasons why a party ought not be charged for requested documents in such situations, we will attempt to provide guidance to hearing officers in addressing current and future matters. The default should be that a party may be charged the reasonable costs to collect and produce such documents consistent with EDR's precedents under Section 8.2 of the *Grievance Procedure Manual*. However, the hearing officer has the authority to determine that those costs may not be collected in part or in whole for just cause.

In making such a determination, EDR and hearing officers, will ultimately look to a balancing test: the reasons why charging would be appropriate in relation to the importance of the documents requested must be considered. The more important the document, the less appropriate it would be to charge for obtaining it. We must balance the interests of creating unreimbursable burdens on a party against the requirements of a fair hearing. Without full and free access to the relevant facts, how can a fair hearing be had?

For instance, for documents central and material to the case at hand, it is reasonable to assume that a party should have free access to such documents for purposes of a fair hearing.³ An example of this might be documents that were the direct basis of a disciplinary action taken against an employee that is the subject of the current grievance. On the other hand, where the documents sought entertain a potential fishing expedition, or one that requires extensive time and effort to collect, such as reviewing the files of a large number of employees, it would equally be reasonable to expect that an agency could recover the reasonable costs associated with that search.

In making this ruling, we are aware that the time it takes to determine and collect appropriate charges will undoubtedly lead to some minor delays in the hearings process.⁴ However, there would be just cause to grant a continuance and extend the time period for issuing a hearing decision so that such matters can be addressed. Thus, time alone is not a sufficient ground to determine that a party should obtain documents at no cost. Yet, we are equally mindful that time could be of the essence in certain matters and charges should be appropriately waived. For instance, a material document could become known during the hearing and ordered produced by the hearing officer at hearing. Such a production should not be subject to any document charges. Further, it is feasible that a party could be required to produce records at no charge as a sanction as determined by the hearing officer.⁵

Hardship of costs could also potentially be an issue that arises with charges for documents. We see no way around the fact that a party's actual ability to pay should not prevent

³ Consequently, there is no question that a party would not be charged for receipt of documents that are proposed hearing exhibits.

⁴ If this new interpretation leads to untenable delays and/or improper denials of the appropriate production of documents in a widespread manner, EDR will revisit the rule. EDR is continually mindful of the general presumption of the Code of Virginia that essentially allows for the production of any relevant document. See Va. Code § 2.2-3003(E).

⁵ See *Rules for Conducting Grievance Hearings* § III(E), effective July 1, 2012.

him/her from obtaining relevant and material documents, especially where there is a job deprivation at issue in a hearing. Otherwise, a party might make a reasonable allegation of an unfair hearing and/or due process violation. Again, balancing the appropriate interests would need to take place. For instance, hardship may not be as strong a consideration to the collection and production of less material documents or those requiring extensive collection efforts.

Based on the foregoing, the hearing officer is directed to modify his order for the production of documents to take into account the guidance provided by this ruling. To the extent the hearing officer has ruled that no charges are appropriate during the hearings phase, that order is reversed. The hearing officer must modify the order for the production of documents to assess whether it would be appropriate to charge for some or all of the documents sought by the grievant. Any such ruling could be ultimately reviewable by EDR. In the alternative, the parties could come to an agreement on appropriate charges on their own without intervention by the hearing officer.

EDR's rulings on matters of compliance are final and nonappealable.⁶



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⁶ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).