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COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2024-5703
May 10, 2024

The Department of Corrections (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) to challenge the hearing officer’s pre-hearing ruling regarding a motion to compel the production of documents in Case Number 12085.

PROCEDURAL AND FACTUAL BACKGROUND

The grievance at issue in Case Number 12085 challenges the grievant’s receipt of a Group III Written Notice with termination for allegedly being in possession of a controlled substance in an agency workplace. In response to the grievant’s motion to compel, the hearing officer issued a ruling addressing three categories of documents in dispute and requiring: 1) the grievant to “request . . . each and every document that is pertinent to the issue of mitigation found in Grievant’s personnel file from April 2009 to March 2024”; 2) the agency to send to the grievant’s attorney a redacted investigation report pertaining to the investigation of the charges brought against the grievant, which the attorney will keep in his office only; and 3) the agency to send to the grievant’s attorney video footage pertaining to the grievant from October 24, 2023 and November 6, 2023, which the grievant’s attorney will keep in his office only and return to the agency at the end of the hearing. The agency has challenged the hearing officer’s ruling as to each of these directives, which will be addressed further below.

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, in a timely fashion.”¹ EDR’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.”² For purposes of document production, examples of just cause include, but are not limited to, (1) the

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

² *Grievance Procedure Manual* § 9.

documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.³ In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well-established and applicable legal privilege,⁴ EDR will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party's particular interests in obtaining the document.⁵

The grievance statutes further state that “[d]ocuments pertaining to non-parties 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.”⁶ Documents and electronically stored information, as defined by the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form”⁷ While a party is not required to create a document if the document does not exist,⁸ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

Further, a hearing officer has the authority to order the production of documents.⁹ 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.¹⁰ For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.¹¹

Personnel File Information

The agency challenges the hearing officer's order for information pertaining to the issue of mitigation in the grievant's personnel file largely on the basis that “sifting” through fifteen years of the file for such information is unduly burdensome. While it is the hearing officer's role to determine matters of relevance initially, EDR would observe that it is unclear what information might be relevant to the issue of mitigation that goes back so many years. The agency cites to

³ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

⁴ Certain well-established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. See, e.g., EDR Ruling No. 2002-215 (discussing attorney-client privilege).

⁵ See, e.g., EDR Ruling No. 2010-2372.

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

⁷ Rules of the Supreme Court of Virginia, Rule 4:9(a).

⁸ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁹ *Rules for Conducting Grievance Hearings* § III(E).

¹⁰ See, e.g., EDR Ruling No. 2012-3053.

¹¹ 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.’” (citation and internal quotation marks 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.” (citation and internal quotation marks omitted)).

EDR's prior rulings addressing a three-year lookback period that we have generally applied to the issue of inconsistent discipline.¹² However, EDR has not applied a bright-line three-year relevancy period on all matters of mitigation. Although we would generally concur that looking to fifteen years of information in an employee's personnel file is unlikely to yield evidence relevant to the issue of mitigation in this case, this request is in a different category because it is specific to the content of the grievant's own personnel file. Per state policy, employees have access to information in their personnel file.¹³ There is no provision of policy that limits an employee's access to their personnel file based on how old the information is. Further, we interpret the hearing officer's order to require the grievant to identify those records in the file they feel are relevant to the issue of mitigation, rather than requiring the agency themselves to "sift" through the file to determine that question. To the extent the volume of content sought is extensive, state policy allows an agency to assess copying fees.¹⁴ Accordingly, because the subject of this ruling relates to content in the employee's personnel file, EDR does not have a basis to limit the employee's access to information to which they are guaranteed access.

Investigation Report

In the ruling request, the agency "notes its objection" to producing the redacted investigation report ordered by the hearing officer, noting that redactions are not "fail-safe" in protecting "private, confidential and privileged information." Beyond this statement, the agency does not explain any basis for its objection to producing the redacted report. Further, the agency states that it has already produced to the grievant the identity and statements of witnesses, including those contained in the reports. Thus, the basis for the continued objection is unclear. Further, the hearing officer has again utilized a measured approach by requiring the report to be maintained in the grievant's attorney's office. EDR has not been presented with a basis to intervene in the hearing officer's ruling on the matter of the redacted investigation report.

Video Footage

The agency presents different objections as to the hearing officer's ruling to produce the video footage. First, the agency indicates concerns for the further distribution of the video once it is disclosed to the grievant. However, the hearing officer's order attempts to address this concern by requiring the video to be held only by the grievant's attorney, prohibiting the copying of the information, and requiring the information to be returned at the conclusion of the hearing. The grievant's attorney, as a member in good standing of the Virginia State Bar, would have an ethical obligation to comply with these directives. In some circumstances, this approach may be an appropriate way to address disclosure of sensitive information and ensure its sole use for grievance purposes.

However, the agency has additionally identified certain content of the videos that could compromise the safety and security of the facility that would need to be redacted. For example, the agency claims the requested video shows information about the layout, entrances, and exits of a high-security prison facility.¹⁵ They argue it would be unduly burdensome to make such

¹² *E.g.*, EDR Ruling Nos. 2023-5502, 2023-5503.

¹³ DHRM Policy 6.05, *Personnel Records Disclosure*, at 8-9.

¹⁴ *Id.* at 10.

¹⁵ The agency also indicates that the video footage would need to be altered to protect the identities of other employees not involved in the grievance. While there may be certain circumstances in which the identities of others should be

alterations to the video files to omit these details, as contemplated by the hearing officer's order. The agency has indicated that, as an alternative, it will make the video footage available for review at its facility and that the footage will be available for the hearing. EDR has held in the past that providing a grievant access to review certain types of evidence and to make it available for the hearing satisfies the agency's responsibility to provide requested records under the grievance procedure, depending on the nature of the information. EDR has generally adhered to this principle due to safety and security concerns that we defer to the relevant agency to determine. Thus, EDR finds that the agency's offer of making the video evidence available for review at the facility¹⁶ and for purposes of the hearing will satisfy the directive to produce the information in this case. The agency will not be required to provide the video footage to the grievant's attorney's possession. To the extent such evidence is made an exhibit to the hearing, it is a part of the hearing record, and must, therefore, additionally be made available not only for the hearing officer's consideration, but also for any appeals, such as those by EDR and a circuit court. To the extent there are protections needed for video footage, for example, once the record proceeds beyond EDR's control, the parties would need to address such matters with the applicable forum.

CONCLUSION

Based on the foregoing, EDR finds the hearing officer's order to be compliant with the grievance procedure. Nevertheless, the agency's offer to make the video footage available for review at the facility and for use at the hearing meets the agency's production requirements under the grievance procedure in this case. EDR's rulings on matters of compliance are final and nonappealable.¹⁷

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protected in video footage depending on the nature of the video evidence, just the fact that other employees are depicted is not a basis to find that redactions are required, or at least the agency has not presented such a basis in this case.

¹⁶ Although nothing in the materials submitted indicates at what facility the video footage will be available, EDR presumes the facility is the one at which the grievant worked, unless a more convenient location can be agreed to between the parties. If a different facility has been offered by the agency, the determinations in this ruling may need to be reconsidered.

¹⁷ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).