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**RECONSIDERED COMPLIANCE RULING**

In the matter of the Department of Corrections  
Ruling Number 2024-5715  
June 27, 2024

The grievant has requested the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) to reconsider EDR Ruling Number 2024-5703, which addressed the Department of Corrections’ (the “agency”) challenge of 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. With respect to the third item (video footage), in EDR Ruling Number 2024-5703 (the “prior ruling”), EDR determined “that the agency’s offer of making the video evidence available for review at the facility and for purposes of the hearing will satisfy the directive to produce the information in this case.”<sup>1</sup> The grievant seeks reconsideration of this portion of the prior ruling.

**DISCUSSION**

Pursuant to this ruling request, EDR sought additional clarification from the parties regarding the requested video footage. The grievant explained that there are three categories of video footage being sought: 1) video footage the agency contends shows misconduct by the grievant, 2) video footage of the grievant at the facility on November 6, 2023, and 3) video footage

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<sup>1</sup> EDR Ruling No. 2024-5703 at 4 (citations omitted).

of the grievant at the facility on October 24, 2023. Based on the agency's concession of the relevancy of the video footage on the morning of November 6, 2023, for purposes of this ruling, EDR deems categories one and two as essentially the same video evidence. Therefore, the video footage will be addressed based on the dates indicated above.

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,<sup>2</sup> 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.<sup>3</sup> Although nondisclosure is not at issue in this case, but rather the method of disclosure, EDR still utilizes the same approach to weigh the parties' competing interests and concerns.

### *Method of Disclosure*

The grievant argues that requiring him and his counsel to travel to the agency's facility to view the video footage would incur "upwards of \$4000.00 in attorney fees" to the grievant. According to the grievant's counsel, this estimate represents approximately 20 hours of work at his normal hourly billing rate. However, the majority of this estimate appears to be the amount of time it would take to view the two days of video footage, which would be an expense incurred regardless of the manner in which the video footage is made available. While grievant's counsel argues that the time and cost would be reduced if the footage was reviewed at his own office with the assistance of his paralegal and appropriate software, EDR cannot find, without more explanation, that such a change in circumstances would significantly alter the amount of time needed to review the footage. Additionally, allowing the footage to be reviewed by a paralegal could be inconsistent with the hearing officer's order to limit access of the footage to the attorney and the grievant. EDR also acknowledges that there is an additional burden to scheduling time and traveling to the facility to view the footage, but it is not the extensive cost argued by the grievant.

The grievant argues that the protections put in place by the hearing officer's order adequately address the agency's concerns in this case such that a copy of the video footage can be released to the grievant's attorney under these restrictions. Additionally, the grievant dismisses the agency's concerns about facility security by noting the grievant's extensive knowledge of the facility and its procedures. However, as the agency is making video footage available to the grievant for review and use at the hearing, the agency's concern is not that the grievant views the footage, but rather disclosure beyond this case. The agency is concerned about a copy of the video footage being shared with others, a copy made by another recording device (like a cell phone), or otherwise made public. As this video footage would not presumably be public information, the agency's concerns are understandable. As discussed in the prior ruling, however, the hearing officer's order attempts to address the concerns by requiring the video to be held only by the grievant's attorney, prohibiting the copying of the video footage, restricting review of the video footage to only the grievant and his attorney, and requiring the footage to be returned to the agency at the conclusion of the hearing process.

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<sup>2</sup> 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).

<sup>3</sup> *See, e.g.*, EDR Ruling No. 2010-2372.

The grievant disputes EDR's ruling as ignoring "years of previous precedent." While the grievant's counsel's experience may have been that he has routinely received copies of video footage for review in his office (something the agency has not disputed), EDR's approach to having sensitive evidence only available at the agency's location is not a new approach. EDR has utilized this option, when appropriate to the given circumstances, for many years<sup>4</sup> and recently.<sup>5</sup> Further, technology has changed significantly over the years to enable videos to be recorded and shared much more widely and easily than ever before. To the extent that the agency is exercising heightened concern about the potential for improper disclosure of such content, especially when the agency's concerns are related to facility security, this factor is significant and warrants a stricter focus on how sensitive information is handled.<sup>6</sup>

Lastly, the grievant expresses his concern that the agency will "weaponize" this ruling in future cases and only permit future grievants to review video footage at the agency's location rather than producing a copy. The grievant argues that this burden will "handicap" grievants from being able to "effectively defend[] their cases." If that were to become the standard practice, EDR will evaluate such situations in the future and determine whether a change in approach is needed. At this time, however, we do not share the grievant's concerns of a prejudicial impact that unnecessarily inhibits the grievant's ability to review and utilize the video evidence sought in this particular case.

#### *Substance of Disclosed Evidence*

Also necessary for EDR's consideration of this matter is what evidence is sought and why it is relevant and important to the case. The video footage from November 6, 2023 would seem to be directly relevant to the facts at issue as this footage presumably depicts the circumstances that led to the grievant's termination. In addition, this video footage should be relatively easy to identify in terms of its location and what camera footage to obtain, and relatively limited in the amount of time depicted as this situation apparently occurred during the grievant's arrival to work. These factors demonstrate the importance of the potential evidence and the ease by which it can be obtained, reviewed, used, and produced.

There are questions that are not resolved by the parties' submissions regarding the video footage of October 24, 2023. The grievant states that there is indication that the grievant was exposed to an unknown substance during that week and the grievant believes he was taken to the facility's medical department on October 24. Thus, the grievant seeks to review video of the grievant in the medical department on that date (if such video footage exists). It is not clear why video footage of the grievant on the rest of that day is relevant or needed. It is possible that the grievant is trying to determine when he was exposed to such an unknown substance – though EDR has been presented with no information to suggest that any video footage indicates such an exposure. Without providing explanation, the grievant notes that the video footage is relevant to show that the grievant was exposed to the pen at issue prior to November 6, 2023. The agency states that the grievant has contended that he confiscated the pen at issue from an inmate, but the grievant has been unable to provide a date on which such a confiscation is alleged to have occurred. Although the grievant has provided no other detail, EDR posits that the grievant *may* be surmising

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<sup>4</sup> E.g., EDR Ruling No. 2012-3367 (citing previous EDR ruling from 2009); EDR Ruling No. 2012-3239.

<sup>5</sup> E.g., EDR Ruling Nos. 2023-5502, 2023-5503 at 3.

<sup>6</sup> See also *id.*

that if the grievant was exposed to an unknown substance on October 24, 2023, that may be the day that he confiscated the pen from an inmate. The reasonableness or persuasiveness of such a theory need not be addressed at this stage. However, in consideration of these issues, there is a question as to how relevant such video footage is to the case, whether it exists, and how it can be isolated for review and/or production.

#### *Reconsideration of Disclosure Requests*

Pursuant to the grievant's request for reconsideration, EDR has reassessed the questions at issue in consideration of the above assertions and factors. We are modifying the result of the prior ruling to the following extent. It does not appear to be a question that the video footage of the grievant's time at the facility on November 6, 2023 is both relevant and important in this case. Though EDR acknowledges that the agency does not agree, we also believe that the limitations established in the hearing officer's order adequately address the agency's concerns of dissemination of the footage beyond use at this particular grievance hearing. Thus, because the November 6, 2023 video footage is relevant, material, and hopefully easily identified, EDR finds that the agency should produce a copy of that footage to the grievant subject to the limitations in the hearing officer's order. 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. Should there be evidence that the limitations are not followed by the grievant's attorney or that the grievant's attorney allows the grievant (his client) to violate the limitations, the hearing officer should consider sanctions that are appropriate to the circumstances. EDR would also take such evidence into account as to whether sensitive information may be released to the grievant's attorney in future matters.

As currently stated, the hearing officer's order does not permit the grievant's attorney or the grievant to show the video footage to anyone beyond those two individuals, including any other witnesses (other than at the hearing itself). The grievant has requested that the hearing officer's order be modified so that he can show the video footage to witnesses. EDR has not found any basis for modifying the hearing officer's order in this case. To the extent the grievant wishes to present evidence from other witnesses as it relates to the video footage, he will have the opportunity to do so at hearing. In the absence of a compelling need, nothing in the grievance statutes or procedure would require the grievant to have the ability to show the video footage to witnesses pre-hearing under these facts.

As to the video footage of October 24, 2023, EDR does not find that that applicable factors weigh in favor of requiring the agency to produce that information to the grievant as opposed to making it available at the agency's facility (and for hearing). EDR is still unclear how such video footage will be collected and isolated for all of the grievant's movements for that day, whether such video footage exists, and whether any of the video footage is relevant or material. Consequently, as significant portions of any such video footage will likely be irrelevant to this case, and in light of the overriding security concerns presented by the agency, there is not a sufficient basis to require the agency to produce a copy. Rather, the agency's offer to provide the grievant with the opportunity to review the video footage at the agency's facility satisfies the agency's responsibility to provide the requested information under the facts of this case. If relevant evidence is located within the October 24, 2023 video footage, the agency will additionally make such evidence available for use at the hearing. EDR maintains the original outcome in the prior ruling as it relates to the October 24, 2023 video footage.

CONCLUSION

Based on the foregoing, EDR modifies the outcome addressed in EDR Ruling Number 2024-5703 to the extent discussed above. To the extent there are any further issues or outstanding questions related to these matters, the parties should direct their concerns to the hearing officer. EDR's rulings on matters of compliance are final and nonappealable.<sup>7</sup>

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<sup>7</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).