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COMPLIANCE RULING

In the matter of the Virginia Department of Health
Ruling Number 2024-5661
February 6, 2024

The Virginia Department of Health (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) in connection with EDR Case Number 12062. The agency contends that the appointed hearing officer has issued an order for the production of documents that is not consistent with the requirements of the grievance procedure.

FACTS

On or about December 13, 2023, the grievant filed a dismissal grievance with EDR. On the same day, EDR processed the grievance consistent with its normal practices, including transmitting the grievance and attachments to the agency. Included in the attachments in this case was the grievant’s request for “all documents . . . relating to [the grievant]’s dismissal” pursuant to section 8.2 of the *Grievance Procedure Manual*. Following receipt of the agency’s Grievance Form B, EDR appointed a hearing officer to the matter effective January 16, 2024. On that date, the grievant advised the hearing officer that the agency had refused his request for production and requested that the hearing officer rule on the issue. The hearing officer held a prehearing conference and, on January 24, 2024, issued an Order for the agency to “immediately produce” to the grievant “[a]ll documents, including electronically stored information, relating [to] the Agency’s dismissal of the Grievant.”

The agency objects to the Order on grounds that the description of documents to be produced is too broad. To the extent that the Order essentially requires the agency to immediately produce the documents it will use to prove its case, the agency contends this requirement is not consistent with the parties’ ultimate evidentiary exchange deadline, which the hearing officer set for March 11, 2024 (in anticipation of the hearing date of March 20, 2024). The agency requests that EDR require the Order to be more “specific as to the documents/information requested by the grievant.”

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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 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 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 provide 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

EDR has also long held that, upon a party’s request for documents, the grievance procedure requires the responsive party to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner. All such documents must be provided within five workdays of receipt of the request. If it is not possible to provide the requested documents within the five-workday period, the party must, within five workdays of receiving the request, explain in writing why such a response is not possible, and produce responsive documents no later than ten workdays from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or “just cause,” the withholding party must provide the requesting party with a written explanation of each claim, no later than ten workdays from receipt of the document request.⁷

In light of these standards, EDR cannot conclude that the Order exceeded the hearing officer’s authority under the grievance statutes, the *Grievance Procedure Manual*, or the *Rules for Conducting Grievance Hearings*. The *Manual* requires parties to make available requested documents “relating to the management actions or omissions grieved,” absent just cause.⁸ Hearing officers have authority to issue orders consistent with that requirement.⁹ As the party with custody of the documents relating to its management decision to terminate the grievant’s employment, the agency is best positioned to identify which documents relate to that decision. Accordingly, the agency bears a reasonable burden under the grievance procedure to identify such documents and

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

² *Grievance Procedure Manual* § 9.

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); see *Grievance Procedure Manual* § 8.2.

⁷ *Grievance Procedure Manual* § 8.2.

⁸ *Id.*

⁹ Va. Code § 2.2-3005(C)(3); *Rules for Conducting Grievance Hearings* § III(E).

make them available to the grievant upon his request – which he made more than one month before the hearing officer’s Order.

The agency appears to argue that the scope of the Order effectively imposes an unreasonable burden to search its records for any documents that could arguably be related to the grievant’s termination. EDR acknowledges that the grievant’s request, and thus the hearing officer’s Order, is broad. However, such orders are not unusual in grievance proceedings and typically do not cause prehearing disputes when parties seek to comply in good faith. As with the identification of documents in its custody, the agency is the party with control of its information systems. Therefore, where relevant documents may exist, the agency bears some burden to suggest what limits on a reasonable search might be practical in light of its particular operations.¹⁰ In this case, however, EDR has no indication that the issue of reasonable search has been explored before the hearing officer with any specificity.

As a general rule of practice, EDR would expect an agency in receipt of a broad production request (or order) to: (1) timely produce relevant documents discovered through *reasonable* search of its records; (2) identify just cause(s) for any relevant documents discovered through reasonable search and *not* produced; and, if the grievant objects to the scope of the agency’s search, (3) assert any undue burden that the agency would bear by additional search efforts. These are the practical requirements of section 8.2, and we do not interpret the Order given in this case to require more from the agency.

The agency suggests that the Order requires it to produce documents “encompassed in attorney work product.” However, we do not read the Order to prevent the agency from asserting just cause for any documents subsequently identified but withheld from production. EDR’s review of the proceedings thus far does not suggest that the hearing officer has denied any specific assertion of just cause by the agency, such that EDR could review the denial as a compliance matter. If just cause (*e.g.* legal privilege) exists to withhold particular relevant documents discovered through reasonable search, the agency should follow the instructions in section 8.2 of the *Manual* and “provide the requesting party with a written explanation of each claim.”¹¹ The requesting party may then challenge the assertion of just cause for the hearing officer’s resolution if necessary.

More generally, the agency objects that it must “surmise” which documents are related to dismissal and undertake efforts such as reviewing the grievant’s entire personnel file to assess relevance. As above, we do not interpret the Order to have resolved the extent of search efforts the agency is required to take on, nor is there any indication that such production efforts will be particularly burdensome in this matter. The management action at issue is the decision to separate the grievant from employment. In identifying which documents in its possession are related to its own decision, it is not clear why the agency would be required to carefully assess the grievant’s entire personnel file to comply with the Order.¹² Second, even if “relevance” were applied broadly enough to encompass such a burdensome review under the circumstances, the agency would have

¹⁰ See EDR Ruling No. 2023-5551 (“[W]here rigor or completeness would render a search unreasonably burdensome, a less formal search could satisfy the requirements of the grievance procedure.”).

¹¹ *Grievance Procedure Manual* § 8.2.

¹² To the extent there is a question of whether the grievant seeks to obtain his entire personnel file, clarification could presumably be sought directly from the grievant (or his advocate), as he would ordinarily be entitled to obtain his own file at a reasonable cost.

multiple options to mitigate that burden: it may (1) charge “a reasonable amount not to exceed the actual cost” of retrieval, including necessary review, and/or (2) assert undue burden and, if challenged, illustrate that burden for the hearing officer.

Finally, the agency argues that complying with production at this early date effectively moots the mutual evidentiary exchange date. Again, we disagree. This argument conflates the broader purpose of section 8.2 with the practical necessity of a prehearing evidentiary exchange. In this case, section 8.2 provides the grievant with an opportunity to review existing relevant documents in the agency’s custody to determine whether he ultimately wishes to present them as evidence at the hearing. By contrast, the exchange deadline set by the hearing officer is the *last* date for the parties to decide which documents they anticipate submitting as their respective exhibits. Therefore, a basic premise of prehearing grievance procedures is that a party may request relevant documents possessed by the other party in order to assess whether and how they wish to present such documents to the hearing officer *prior to* the deadline for evidentiary exchange.

For these reasons, EDR finds no basis to disturb the hearing officer’s Order. The agency should comply with the Order by undertaking a reasonable search for documents in its custody that relate to its decision to terminate the grievant’s employment. The agency should make such documents available to the grievant, absent just cause to withhold them. If just cause exists, such as an applicable privilege, the agency should notify the grievant of each instance of such cause in writing. If the grievant objects to the agency’s production and/or responses, he should present the basis for his objections to the hearing officer, who may rule on whether full compliance with the Order has occurred.

As additional guidance, we note that the grievant’s response to the agency’s arguments has identified certain categories of documents that would be within the scope of his request: namely, “witness statements, affidavits and declarations” collected in the course of any internal investigation of the grievant’s alleged misconduct, and emails exchanged between members of management “relating specifically to the reasons for [the] grievant’s dismissal.” As described, EDR would presume that such documents, if they exist, would be reasonably related to the grievant’s dismissal and should be produced, absent just cause. In addition, although we do not disturb the Order as issued, this ruling is not intended to determine issues of relevance or just cause with finality. Given the broad nature of the Order and absence of other specifics at this stage, the parties should be prepared to coordinate in good faith on any narrower requests that may result from the agency’s production of requested documents pursuant to the Order.

EDR’s rulings on matters of compliance are final and nonappealable.¹³

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¹³ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).