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COMPLIANCE RULING

In the matter of the Virginia Department of Forensic Science
Ruling Number 2025-5828
March 7, 2025

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) in relation to the alleged noncompliance by the Virginia Department of Forensic Science (the “agency”).

FACTS

On or about October 21, 2024, the grievant initiated a grievance challenging alleged hostile and intimidating behavior by the Lab Director. The alleged behavior primarily stems from a meeting involving the Lab Director and the grievant, in response to a complaint that was made by a colleague. The grievant alleges that the Lab Director looked visibly agitated, spoke to him in a raised voice while pointing at him. The grievant also asserts that the Lab Director later told him that if he “caused any disruption in the workplace” by forwarding information about unethical behavior by the colleague to an outside department, “he would take actions against [him].” The grievant additionally alleges that the Lab Director has not made a good faith attempt to adequately address the safety concerns in his workplace related to the colleague.

Attached to his appeal to the third step, on December 23, 2024, the grievant requested additional documents from the third-step respondent, including communication between the Lab Director and the outside party that conducted the threat assessment for the colleague’s complaint, the Behavioral Threat Assessment and Management Team (“BTAM”). The grievant stated that he wished to not proceed with the grievance until he had received those documents, and that he “look[s] forward to meeting with [the respondent]” The grievant followed up with the third-step respondent on January 2, asking to also receive notes taken from any meeting “where [BTAM’s] official response was given” in relation to the threat assessment. The grievant followed up again on January 9 to ask for additional documents relating to meetings with agency management and the colleague that occurred after the Lab Director’s investigation was completed. On January 10, the agency asked the grievant to confirm that he wished to pause the grievance until he received the mentioned documents, to which he affirmed, but added that he wished to access the documents “before officially meeting for the third step.”

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On January 8, the agency's department counsel reached out to the grievant via email regarding his document requests, providing the Lab Director's one page of notes taken from his initial discussion with BTAM.¹ The department counsel also noted that there were no written reports or responses received from BTAM, and no notes were taken by other agency management personnel that were involved in conference calls with BTAM. The department counsel followed up with a formal letter dated January 16, stating that the agency has no records related to the grievant's January 9 request (those relating to other agency management documentation), and while two pages of notes taken by the Lab Director during a conference call with BTAM were found, the agency considers those notes exempt from mandatory disclosure under the Code of Virginia.

On January 14, the agency reached out to the grievant regarding the timeline of its third-step response, requesting that, "[a]lthough [his] grievance is temporarily on pause," he allow an extension on behalf of the third-step respondent of "no later than January 31st," to which the grievant agreed and requested that the respondent contact him when he returns. Despite this, before the grievant received the requested documents or heard from the third-step respondent regarding a meeting, the third-step response was issued on or about January 30.

On February 4, the grievant reached out to EDR to request a compliance ruling in regard to the documents requested and the lack of a meeting held with the third-step respondent. The grievant asserts that the withheld documents are relevant because his grievance pertains to "failing to maintain a safe working environment and misapplication of state and agency personnel policies" and that the requested documents he believes "contain critical information that will further validate [his] grievance." He further argues that the withheld documents do not apply to the Code of Virginia provisions cited by the agency, adding that one page of notes has already been provided by the agency without such provisions being cited. As to the requested meeting, the grievant asserts that the agency agreed to having such a meeting before the third-step response was issued. The grievant therefore asks EDR to rule on whether the agency is in noncompliance with respect to the withheld documents – specifically any and all notes taken by the Lab Director during meetings and/or conference calls with BTAM -- and the lack of a third-step meeting.

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."² 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."³ 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.⁴ 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

¹ The context of this initial discussion was the Lab Director informing BTAM of the complaint and subsequent investigation to take place.

² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

³ *Grievance Procedure Manual* § 9.

⁴ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

applicable legal privilege,⁵ 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.⁶ The grievance statutes further provide 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."⁷

EDR has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty 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 the 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.⁸

Document Disclosure

As of the date of issuing this ruling, the grievant has made clear to EDR that the only documents he is requesting are the remaining notes by the Lab Director written from any meeting/and or conference call with BTAM. The grievant appears to assert that the notes are relevant because they "contain critical information" related to his grievance involving allegations of an unsafe working environment and misapplication of policy. The agency's department counsel provided the grievant with notes taken by the Lab Director from his initial discussion with BTAM. Its counsel also found two pages of notes taken by the Lab Director during a conference call with BTAM and the law enforcement agency overseeing BTAM. The agency considered these documents exempt from mandatory disclosure under the Virginia Freedom of Information Act (FOIA), citing Virginia Code §§ 2.2-3706 (B)(2) and (9) "as a report submitted in confidence to a state law enforcement agency and an administrative investigation conducted by a state law enforcement agency made confidential by law."⁹

Va. Code § 2.2-3706(B)(2) states that "[r]eports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to Chapter 3.2 (§ 2.2-307 et seq.), and (iii) campus police departments of public institutions of higher education ..." are excluded from the mandatory disclosure provisions of FOIA.¹⁰ Further, Section 2.2-3706(B)(9)

⁵ 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).

⁶ *See, e.g.*, EDR Ruling No. 2010-2372.

⁷ Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

⁸ *Grievance Procedure Manual* § 8.2.

⁹ As the grievant has noted, the Code provision cited in the letter (Section 2.2-2706) appears to be a typo, and the agency is likely referring to Section 2.2-3706.

¹⁰ Va. Code § 2.2-3706(B).

states that “[r]ecords of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law” are also excluded from the mandatory disclosure provisions of FOIA.¹¹

It appears the agency is trying to argue that the notes taken by the Lab Director constituted reports submitted in confidence to BTAM. Similarly, the agency appears to argue that the investigation at issue was conducted by a law enforcement agency, and that all records related to such investigations are exempt. The grievant argues that the notes in question do not qualify under this provision as they were not submitted to BTAM. Further, he argues that the Lab Director’s notes were taken while serving in his official capacity as Lab Director and the agency is not a law enforcement agency. While we acknowledge these assertions, the Code provisions cited are not determinative for purposes of EDR’s determinations of compliance with the grievance procedure in this case and, thus, we need not reach any conclusions about these questions in this ruling.

In determining whether documents should be disclosed, EDR relies on a balancing test between the relevance of the documents to the actions grieved and the opposing party’s interest in not disclosing the documents. Based on information gathered from the agency, the two pages of notes in question relate to a conversation held between the Lab Director and BTAM about the ongoing threat assessment. Specifically, the conversation consisted of BTAM providing suggestions on how to handle the assessment, with some specific recommendations regarding the colleague in question. As the notes appear to contain confidential, personal information regarding the colleague, the agency has opted to not share any further details. The agency also noted that the conversation between the Lab Director and BTAM did not mention or involve the grievant in any way. Finally, the agency states that, other than the initial conversation with BTAM and the one at hand, there were no other conversations between BTAM and the Lab Director that involved any notes taken by the Lab Director.

Given this information, EDR cannot find that the potential materiality of the meeting notes to the actions grieved outweigh the confidentiality concerns expressed by the agency. The grievance at hand primarily concerns alleged civility violations and misconduct by the Lab Director towards the grievant. Given that the notes in question solely concern the threat assessment in response to the colleague’s complaint, and because the grievant was not mentioned in this conversation, it is hard to say how relevant the notes would be to the grievance at hand. Accordingly, EDR finds that protecting the confidentiality of such investigation-related documents is sufficient just cause to outweigh any limited relevance of this information. The agency need not produce the remaining available notes between the Lab Director and BTAM.

Third-Step Meeting

The grievant also asserts that the agency agreed to pause the grievance until the requested documents were provided and the grievant had a chance to meet with the third-step respondent, only for neither of those actions to take place before the third-step response was issued. However, upon a thorough review of the record, there does not appear to be any explicit response from the agency that mentions a third-step meeting being granted, and the agency has since contended that

¹¹ *Id.*

it was not aware of such an agreement. In addition, while the agency agreed to a temporary pause, the agency had notified the grievant via counsel that all requested documents were searched for and reviewed, and all documents that were not exempt from disclosure (based on the agency's position) were provided before the third-step response was issued. Because EDR cannot find that the agency has engaged in noncompliance by not fulfilling the outstanding document request or by holding a meeting that was not agreed to or required,¹² EDR finds that no material noncompliance has occurred.

CONCLUSION

For the foregoing reasons, EDR has no basis to find that the agency is in noncompliance with the grievance procedure. Should additional information become available suggesting that documentation withheld at this stage is material to the grievant's claims and should be produced at a later phase in the grievance, our determinations in this ruling do not prohibit such production if ordered -- for instance, at the hearing phase of this grievance -- if it advances that far.

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

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¹² The Grievance Procedure Manual only requires a second-step meeting to be held. *See Grievance Procedure Manual* § 3.2.

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