

Issues: Compliance – Grievance Procedure (documents and second step meeting);
Ruling Date: May 25, 2017; Ruling No. 2017-4538, 2017-4539; Agency: Department
of Criminal Justice Services; Outcome: Agency in Compliance; Grievant in
Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

COMPLIANCE RULING

In the matter of the Department of Criminal Justice Services
Ruling Numbers 2017-4538, 2017-4539
May 25, 2017

Two compliance rulings have been requested from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to the grievant’s March 1, 2017 grievance.

FACTS

The grievant initiated a grievance on March 1, 2017, challenging her 2015-2016 performance evaluation, which she appears to have received on November 14, 2016.² On April 6, 2017, the grievant submitted a request that the agency produce the following documents:

1. “Copies of the agencies [sic] notice to all DCJS employees advising them of their rights and remedies under the short-term disability laws for the period January 1, 2013 through March 31, 2017, which includes, but is not limited to: [names of agency employees]”;
2. “Copies of the access records to the building for the above-referenced individuals, including those not specifically identified above but who were out on short-term disability for the period January 1, 2013 through March 31, 2017”;
3. “Copies of any [] disciplinary actions taken against DCJS staff members for the period April 1, 2014 through March 31, 2017”;
4. “A list of any and all DCJS employees that that [sic] have had their duties reduced for the period January 1, 2013 through March 31, 2017.”

On April 12, 2017, the agency hand-delivered to the grievant a letter responding to her request for documents. With respect to the first and third requests above, the agency asserted

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

² Pursuant to DHRM Policy 1.40, *Performance Planning and Evaluation*, the grievant appealed her evaluation to the agency director prior to the March 1 grievance; however, the agency director declined to modify the evaluation.

that such documents are protected personnel records under Virginia Code Section 2.2-3705.1(1). As to the second request, the agency asserts that it has no such documents in its possession, other than a document previously provided to the grievant about her own access to the building. Finally, as to the fourth request, the agency indicates that it has no such document in its possession, and, further, requiring the creation of such a document compiling this information would violate the provisions of Virginia Code Section 2.2-3705.1(1). The agency also raises a general objection that none of the documents requested are relevant to the grievance at issue. On April 27, 2017, the grievant requested a compliance ruling alleging that the agency's refusal to produce these documents does not comply with the grievance procedure.

The agency has also requested a compliance ruling, alleging that the grievant has failed to respond to its request to schedule the second resolution step meeting.³ It asserts that the meeting should have been scheduled by April 19, 2017. On April 20, 2017, the agency sent the grievant a letter of noncompliance for failing to schedule the second step meeting. On April 28, 2017, EDR received a request from the agency to administratively close the March 1, 2017 grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.⁵ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.⁶

³ Due to the grievant's role within the organization, the first and second steps appear to collapse for purposes of this grievance.

⁴ *Grievance Procedure Manual* § 6.3.

⁵ *See id.*

⁶ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

In this instance, both the grievant and the agency have requested rulings from EDR regarding alleged noncompliance with the grievance procedure.⁷ Both issues will be addressed below.

Document Request

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.”⁸ 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.”⁹ 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.¹⁰ The statute further states 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.”¹¹

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.¹²

As an initial matter, EDR must address the agency’s claims relating to the provisions of the Virginia Freedom of Information Act (“FOIA”). Regarding the first and third request submitted by the grievant, the agency cites to the FOIA exemption for “[p]ersonnel information concerning identifiable individuals . . .”¹³ While it appears that this FOIA exemption could apply to the information sought if requested pursuant to FOIA, such exemptions do not automatically protect records from disclosure under the grievance procedure. Thus, an agency

⁷ It appears that the communication process between the parties as anticipated by § 6.3 of the *Grievance Procedure Manual* has broken down. However, the parties appear to be in agreement that a ruling by EDR regarding the issue of alleged noncompliance is appropriate.

⁸ *Id.* § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁹ *Grievance Procedure Manual* § 9.

¹⁰ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

¹¹ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

¹² *Grievance Procedure Manual* § 8.2.

¹³ Va. Code § 2.2-3705.1(1).

may not withhold records based solely upon the fact that personnel information regarding other employees may be included therein, as EDR has long held.¹⁴

However, in this case, EDR is unable to determine how any of the documents sought by the grievant in her April 6, 2017 request relate to the subject matter of the March 1 grievance. Though the grievant raises arguments of harassment, retaliation, and hostile work environment in her grievance, the essential management action challenged is the grievant's 2015-2016 performance evaluation. Having reviewed the information submitted by the parties, EDR is unable to determine how any of the documents requested have any relevance to the challenged management action. EDR is unable to identify any facts, for example, to demonstrate that any reduction in job duties or disciplinary actions received by other agency employees would have any connection with or relation to the grievant's performance evaluation. Because it does not appear that documents responsive to these requests would be relevant to the grievance, the agency is not required to produce such information at this time.

Second Resolution Step Meeting

The agency has alleged that the grievant failed to schedule the second step meeting.¹⁵ However, Section 6.1 of the *Grievance Procedure Manual* states that a party's request for a compliance ruling from EDR "will normally stop the grievance process temporarily."¹⁶ In this case, the grievant requested a compliance ruling from EDR on April 27, 2017. It may be that the agency did not have knowledge of the grievant's request until after it had already sent in its own request to EDR on April 28, 2017; however, a pending ruling from EDR ordinarily stays the grievance process until the ruling is issued.¹⁷ Thus, EDR declines to find noncompliance on this basis.

Furthermore, EDR has reviewed the documentation submitted by both parties related to attempts to schedule the second step meeting and there is no basis to find the grievant noncompliant such that the agency would be permitted to close the grievance. There appear to have been impediments to scheduling the meeting by both sides, including a week-long vacation by the second step-respondent and the grievant's continued efforts to obtain the requested records in advance of the meeting. It is often understandable that a grievant would want to obtain documents, if they are obtainable under the grievance process, before a face-to-face meeting so they can be discussed at the meeting. Indeed, Section 8.2 of the *Grievance Procedure Manual* specifically allows a grievant to temporarily place a grievance on hold while a dispute over a document request is addressed by notifying human resources in writing. There is no indication that the grievant had done so in this instance, but the general point remains that it would be reasonable for a grievant to want to delay the face-to-face meeting until the document request matter was resolved. Thus, to the extent there is any noncompliance on the part of the grievant by not agreeing to a meeting date, it would be understandable here and would not support closure of the grievance. There has been no excessive delay by the grievant and no

¹⁴ See, e.g., EDR Ruling No. 2004-628.

¹⁵ See *Grievance Procedure Manual* § 3.2.

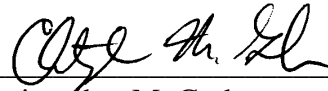
¹⁶ *Grievance Procedure Manual* § 6.1.

¹⁷ See also EDR Ruling No. 2007-1503 n.3.

prejudice has occurred to the agency. This ruling should now clear any procedural impediments to the grievance proceeding quickly to the meeting.

CONCLUSION

For the reasons set forth above, EDR declines to find noncompliance on the part of either the grievant or the agency. The parties are encouraged to make a good faith effort to resolve any disputes that may arise before seeking further rulings from EDR. **Within five workdays of receipt of this ruling**, the parties shall schedule the second resolution step meeting. EDR's rulings on matters of compliance are final and nonappealable.¹⁸



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁸ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).