

Issue: Compliance – Grievance Procedure (documents); Ruling Date: May 12, 2017;
Ruling No. 2017-4543; Agency: Virginia Information Technologies Agency; Outcome:
Agency in Compliance.



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

COMPLIANCE RULING

In the matter of the Virginia Information Technologies Agency
Ruling Number 2017-4543
May 12, 2017

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the alleged failure of the Virginia Information Technologies Agency (the “agency”) to produce requested documents.

FACTS

On January 24, 2017, the grievant was issued a written counseling memo (the “Counseling Memo”) to address an alleged failure to follow her supervisor’s instructions arising out of an incident that occurred on November 4, 2016. In the Counseling Memo, the agency noted that, after the grievant received a notice of due process on November 10, 2016, informing her that the agency was considering disciplinary action, the grievant “advised a[n agency] employee that [she was] about to be terminated which caused a disruption in the workplace.” The grievant initiated a grievance challenging the issuance of the Counseling Memo and raising other issues relating to her employment on February 23, 2017.

The second step response was issued to the grievant on or about April 4, 2017.¹ In his response, the second step-respondent wrote that he reviewed a “written statement” from the agency employee whom the grievant allegedly “told that [she] was about to be terminated” On April 10, the grievant submitted a request for documents to the agency, seeking the written statement referenced in the second step response. The agency provided the grievant with an email sent by one of the grievant’s co-workers to the grievant’s supervisor discussing the grievant’s actions after she received the notice of due process on November 10, 2016.

The grievant notified the agency that it was not in compliance with the grievance procedure on April 18, 2017, because it had not provided “a written statement from the co-worker that [the grievant] allegedly told that she ‘was going to be terminated’ on November 10, 2016”² On April 28, the agency notified the grievant that no additional documents

¹ It appears the grievant did not attend the second step meeting.

² In her notice of noncompliance to the agency, the grievant appears to dispute the agency’s redaction of names and other identifying information from the document that was disclosed because she “has a right as the grievant to know with whom she allegedly held a conversation with that resulted in a counseling for disruptive behavior”

responsive to her request existed beyond that which had already been produced. The grievant requested a compliance ruling from EDR on May 8, alleging that the agency's production of documents does not comply with the grievance procedure.

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.”³ 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.”⁴ 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.⁵ 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.”⁶

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.⁷

In this case, the grievant disputes the issuance of the Counseling Memo. In support of her position, the grievant argues that she “did not tell a co-worker that she was being terminated,” but instead “shared her feelings regarding a matter in which she had a right to express.” In her compliance ruling request, the grievant alleges that the agency “does not have a written statement from a co-worker that she allegedly told she was being terminated,” and that the document produced in response to her request does not contain “a statement of confirmation that

However, the grievant did not challenge the redaction of the document in her request for a ruling from EDR; accordingly, EDR will not address this issue.

³ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁴ *Grievance Procedure Manual* § 9.

⁵ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

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

⁷ *Grievance Procedure Manual* § 8.2.

[she] told the writer . . . that she was being terminated . . .” As a result, the grievant alleges that “the agency has provided false account [sic] or misrepresented facts” in the Counseling Memo. The agency asserts that no additional responsive documents exist other than what has already been provided to the grievant.

Under the grievance procedure, a party is not required to create documents that do not exist.⁸ Furthermore, EDR considers the nonexistence of responsive documents to be just cause that excuses a party’s failure to provide requested information.⁹ EDR has reviewed nothing to show that any documents responsive to the grievant’s requests exist and have been improperly withheld by the agency. The grievant may challenge the agency’s alleged reliance upon the statements she disputes through the management resolution steps. Accordingly, EDR finds no basis to conclude that the agency has improperly withheld documents from the grievant without just cause.¹⁰

CONCLUSION

For the reasons set forth above, EDR concludes that the agency has complied with the grievance procedure with respect to the grievant’s request for documents. It appears that, when the grievant requested this ruling, the grievance process was temporarily halted after the grievant had received the second step response. The grievant is, therefore, directed to either advance her grievance to the third step or conclude her grievance **within ten workdays of the date of this ruling**, if she has not done so already.

EDR’s rulings on matters of compliance are final and nonappealable.¹¹



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⁸ Va. Code § 2.2-3003(E).

⁹ Although not an issue in this case, there are circumstances under which some act of bad faith by a party could negate a claim of just cause based on the nonexistence of requested documents.

¹⁰ Because the agency has asserted that no additional responsive documents exist and EDR finds no basis to conclude otherwise, this ruling does not address whether the document sought in the grievant’s request is relevant to the challenged management actions, but only determines that the agency has presented just cause for the nonproduction of additional documents in this case.

¹¹ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).