

Issue: Compliance – Grievance Procedure (documents); Ruling Date: June 20, 2017; Ruling No. 2017-4563; Agency: Virginia Department of Health; Outcome: Agency in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution<sup>1</sup>**

**COMPLIANCE RULING**

In the matter of the Virginia Department of Health  
Ruling Number 2017-4563  
June 20, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) regarding alleged noncompliance with the grievance procedure by the Virginia Department of Health (the “agency”) in relation to the production of requested documents.

FACTS

On March 24, 2017, the grievant initiated a grievance with the agency disputing the issuance of a Group II Written Notice for failure to follow instructions and/or policy, based on his submission of inaccurate travel reimbursement documents. The Written Notice states, in part, that the grievant’s failure to use a computer and printer while performing field work does not allow for “electronic accountability” to verify his time spent working at particular locations. On April 25, 2017, the grievant requested that the agency provide him with: (1) “copies of [Employee 1’s] travel reimbursement forms for the years 2014 and 2015”; (2) Employee 1’s performance evaluations for the years 2014 and 2015; and (3) Employee 2’s performance evaluations for the years 2011, 2012, and 2013.

The agency produced the requested travel reimbursement forms on or about May 12, 2017, and informed the grievant that performance evaluations for Employees 1 and 2 would not be disclosed because they constituted personnel records under the Virginia Freedom of Information Act (“FOIA”), and thus were not subject to disclosure. The grievant requested a compliance ruling from EDR on May 31, 2017, alleging that the agency’s failure to disclose the performance evaluations 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

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<sup>1</sup> 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.

upon request from a party to the grievance, by the opposing party.”<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</sup>

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.<sup>6</sup>

### *Virginia Freedom of Information Act*

As an initial matter, EDR must address the parties’ claims and arguments relating to FOIA. For example, the grievant appears to have notified the agency that he was seeking documents pursuant to FOIA, and the agency cited to the FOIA exemption for “[p]ersonnel information concerning identifiable individuals” as justification for withholding the performance evaluations that are the subject of this ruling.<sup>7</sup> However, the *Grievance Procedure Manual* provides that, “[o]nce a grievance has been initiated, an employee’s request for documents relating to his/her grievance, pursuant to [FOIA], shall also be treated by the agency as a request for documents under the grievance procedure.”<sup>8</sup> In interpreting the document disclosure provisions of the *Grievance Procedure Manual*, EDR looks to other analogous laws and regulations for guidance if needed, and principles and approaches arising under FOIA are an immediately

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<sup>2</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

<sup>3</sup> *Grievance Procedure Manual* § 9.

<sup>4</sup> See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

<sup>5</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

<sup>6</sup> *Grievance Procedure Manual* § 8.2.

<sup>7</sup> Va. Code § 2.2-3705.1(1).

<sup>8</sup> *Grievance Procedure Manual* § 8.2.

relevant and persuasive resource.<sup>9</sup> While it appears that the FOIA exemption for personnel records could apply to the performance evaluations sought by the grievant if requested pursuant to FOIA, such exemptions do not automatically protect records from disclosure under the grievance procedure. Thus, an agency may not withhold records based solely upon the fact that personnel information regarding other employees may be included therein, as EDR has long held.<sup>10</sup>

#### *Documents Requested by the Grievant*

Based on the information provided by the parties, the performance evaluations for Employees 1 and 2 are the only outstanding document requests. The management action challenged in this case, a Group II Written Notice for failure to follow instructions and/or policy, was based on issues with the grievant's submission of travel reimbursement information. The grievant relies on a statement in the Written Notice that he "refused to use the computer and printer in the field," thus limiting "electronic accountability" for his time spent performing field work, in support of his position that the evaluations should be disclosed. More specifically, the grievant argues that other employees, specifically Employees 1 and 2, were permitted to complete certain types of work reports by hand, while he was directed to complete such reports electronically. The grievant states that he requested the performance evaluations to determine whether the issue of the handwritten reports was addressed with either Employee 1 or 2. The grievant has further expressed that any other content in the performance evaluations other than discussion of the handwritten reports, if such discussion exists, could be redacted or otherwise protected from disclosure.

While this ruling was pending, the agency reviewed the performance evaluations sought by the grievant and confirmed to EDR that they do not contain discussion of the handwritten reports. EDR has not reviewed and the grievant has not presented anything to suggest otherwise. In other words, there is nothing to indicate that the handwritten reports referenced by the grievant, or any other information related to the grievance, are mentioned in the performance evaluations. As a result, EDR finds that the evaluations are not relevant to the grievance and need not be produced at this time. Accordingly, there is no basis for EDR to conclude that the agency's response to the grievant's requests was not in compliance with the grievance procedure.

#### CONCLUSION

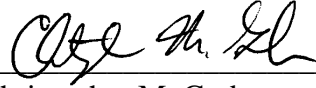
For the reasons set forth above, EDR concludes that the agency has complied with the grievance procedure with respect to the grievant's request for documents. It is EDR's understanding that, when the grievant requested this ruling, the grievance process was temporarily halted after the grievant received the second step response. The grievant is, therefore, directed to either conclude the grievance or advance the grievance to the third step **within five workdays of the date of this ruling.**

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<sup>9</sup> See, e.g., EDR Ruling No. 2014-3650; EDR Ruling Nos. 2012-3149 through 2012-3163; EDR Ruling Nos. 2012-3245 through 2012-3252; EDR Ruling Nos. 2012-3268 through 2012-3281; EDR Ruling Nos. 2010-2628, 2010-2629.

<sup>10</sup> See, e.g., EDR Ruling No. 2004-628.

EDR's rulings on matters of compliance are final and nonappealable.<sup>11</sup>



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<sup>11</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).