

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: January 27, 2017; Ruling No. 2017-4458; Agency: Department of Game and Inland Fisheries; Outcome: Agency Not 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 Department of Game and Inland Fisheries  
Ruling Number 2017-4458  
January 27, 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 Department of Game and Inland Fisheries (the “agency”) in relation to the production of requested documents.

FACTS

The grievant is employed by the agency as a terrestrial biologist. On or about October 21, 2016, the grievant initiated a grievance challenging the agency’s failure to select him for a salary adjustment after a compensation study. In particular, the grievant asserts that the Northern Virginia (“NOVA”) salary differential should not have been a factor in the process to select those employees receiving the salary adjustment. In conjunction with his grievance, the grievant requested “all documents, emails, notes, etc. related to Agency compensation review of scientists, including, but not limited to “documents describing the process, how decisions are made and results.”

The agency provided the grievant with a number of documents in response to his request. After the agency advised the grievant that it would not be producing any additional documentation, the grievant sent a notice of noncompliance to the agency head on November 28, 2016, alleging that the agency had not produced documents responsive to all of his requests. After the agency failed to correct the alleged noncompliance, the grievant requested a ruling from EDR on December 11, 2016.

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.”<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

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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.

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

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

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>

In his request to EDR for a compliance ruling, the grievant indicated two specific objections to the agency’s document production: (1) that “no information has been presented as to the methodology of the compensation review” and (2) that the agency failed to provide a “a written explanation of each claim denied” and to advise the grievant of the nonexistence of requested documents. The grievant subsequently explained to EDR that in addition to his concern about documents regarding methodology, he believes that documents “exist that [] related to how scientist IIs ranked each other and the data that was used to create that ranking,” as well as information about “the source of that data.” In particular, the grievant notes that a calculation about his experience appears to be incorrect. He further indicated, however, that because the agency had not identified the documents being withheld or which were nonexistent, he was unable to identify any specific documents, or categories or types of documents, that he believed to be in existence but which had not been produced.<sup>7</sup>

Summarizing these statements by the grievant, it is EDR’s understanding that the following matters are in dispute in this case:

1. Production of documents relating to the methodology used for the compensation study;
2. Production of documents relating to the manner in which rankings were calculated; and
3. The agency’s alleged failure to respond in accordance with the grievance procedure.

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<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> The grievant also appears to dispute the accuracy of a summary document prepared for him by the agency, arguing that the document is factually incorrect, of questionable relevance, and was created in an attempt to support the agency’s position.

Each item will be addressed separately below.

*Item 1*

The grievant asserts that the agency has failed to produce documents related to, or explaining, the methodology used in conducting the compensation study. During the course of its investigation, EDR contacted the agency to ascertain whether it had any additional documents describing the study methodology that had not been produced to the grievant. In response, the agency identified three additional responsive documents—a presentation regarding the Classification and Compensation Review, a “Classification Analysis Report” for Land and Facilities Management Positions, and a “Compensation Audit Report” for Land and Facilities Unit Employees. Although the agency believes these documents may be, in part, of questionable relevance as they primarily involve the Lands and Facilities Unit, it has no objection to their production. As such, the agency is directed to produce these documents.

In addition to these three documents, the agency also provided EDR with an attachment to the Classification and Compensation Reviews, which contains salary information about Lands and Facilities Unit employees. Although information regarding Lands and Facilities Unit employees was specifically requested by the grievant, as he asserts the study of the Lands and Facilities Unit led to the study of “scientist employees,” the attachment does not contain information about any individuals employed as a terrestrial biologist or in the terrestrial section. As the salaries of individuals who are not direct comparators to the grievant can have little, if any, relevance to the grievant’s claims, the agency may withhold this document from production at this time.

The agency has advised EDR that with the exception of the documents discussed here, there are no additional documents in its possession that address the methodology for the compensation study. Under the grievance procedure, a party is not required to create documents that do not exist.<sup>8</sup> Furthermore, EDR considers the nonexistence of responsive documents to be just cause that excuses a party’s failure to provide requested information.<sup>9</sup> EDR has reviewed nothing to show that any additional documents responsive to the grievant’s request exist and have been improperly withheld by the agency.

*Item 2*

The grievant seeks information related to how rankings were calculated, including the underlying data used by the agency. In particular, he asserts that his own ranking does not appear to be factually accurate. Read broadly, the grievant’s arguments also appear to question the factual accuracy of the compensation study more generally. The agency states that the documentation used in preparing the compensation study were primarily employment applications, original hire resumes, and performance evaluations. The agency objects to the production of this data because the request is overly broad, would result in an undue hardship to the agency, and involves personal information about other employees.

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<sup>8</sup> Va. Code § 2.2-3003(E).

<sup>9</sup> 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.

It appears that the documents sought by the grievant may have little relevance to his claims in his grievance. In his grievance, he asserts that the agency erred by including the NOVA salary differential in its calculations for the compensation study. Because the NOVA differential is apparently added independently of the salary calculations, however, it is difficult to understand how information about the rankings process is related to the application of the NOVA salary differential. Further, given the rather limited scope of the grievant's claim, his request for documents relating to, in effect, all compensation decisions for all scientists appears to be unduly broad and unnecessarily invasive. Accordingly, we find that the agency need not provide the grievant with the requested documentation regarding the compensation study at this time.

The documents presumably needed by the grievant to determine whether the agency's calculations relating to him are accurate could be considered personnel records under DHRM Policy 6.05, *Personnel Records Disclosure*. Therefore, to the extent the grievant wishes to review any of his own personnel-related documents that have not already been provided to him, the grievant is entitled to access that information and may make arrangements with the agency to do so.<sup>10</sup>

This ruling in no way limits the grievant's ability to make additional, more narrowly focused document requests to the agency. In the event the parties are unable to reach a satisfactory resolution to any subsequent requests, either party may use the noncompliance process to seek review by EDR. In addition, in the event the grievance is qualified for hearing, the grievant may at that time ask the hearing officer to order the production of additional documents.

### *Item 3*

The grievant also challenges the agency's response to his document request, asserting that the agency failed to identify withheld and nonexistent documents in the manner directed in Section 8.2. In this case, the parties engaged in a great deal of back and forth communication prior to this ruling. During these communications, the agency appears to have generally advised the grievant that it would not be producing personnel information, given privacy concerns, and that it had provided him with all other responsive documents in its possession. While the agency certainly could have been more direct in explaining which documents or categories of documents do not exist or were being withheld, any failure on the agency's part is now moot. Based on representations made to EDR in the course of its investigation, it appears the agency has now produced or will soon produce all responsive documents in its possession, with the exception of those personnel records used to prepare the compensation study identified above. Accordingly, there is no basis for further findings of noncompliance at this stage.

## CONCLUSION

Based on the discussion above, **within 10 days of the date of this ruling**, the agency is directed to produce to the grievant the presentation regarding the Classification and Compensation Review, the "Classification Analysis Report" for Land and Facilities Management

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<sup>10</sup> See DHRM Policy 6.05, *Personnel Records Disclosure*.

Positions, and the “Compensation Audit Report” for Land and Facilities Unit Employees that have been provided to EDR. To the extent those documents contain any personally identifiable information, the agency must redact the records accordingly to protect the privacy of nonparties.<sup>11</sup>

EDR’s rulings on matters of compliance are final and nonappealable.<sup>12</sup>



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<sup>11</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>12</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).