

Issue: Compliance – Grievance Procedure (documents); Ruling Date: February 14, 2017; Ruling No. 2017-4476; Agency: Department of Game and Inland Fisheries; Outcome: Agency Not in Compliance.



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

COMPLIANCE RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2017-4476
February 14, 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 November 2, 2016, the grievant initiated a grievance challenging the allegedly unfair manner in which he was treated during a salary study. In conjunction with his grievance, the grievant requested documents and data related to the study. The grievant asserts that the agency has failed to produce requested documents and has asked EDR for a compliance ruling.

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 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.”⁵

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

³ *Grievance Procedure Manual* § 9.

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

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

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.⁶

The grievant has indicated to EDR that he seeks two specific types of documents from the agency. First, he seeks documents that would show the methodology of the compensation study and the manner in which it was conducted. In addition, the grievant seeks information about the manner in which the agency calculated years of service. Each of these issues is addressed separately below.

Methodology

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. This attachment does not contain information about any individuals employed as terrestrial biologists 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 above, 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.⁷ Furthermore, EDR considers the nonexistence of responsive documents to be

⁶ *Grievance Procedure Manual* § 8.2.

⁷ Va. Code § 2.2-3003(E).

just cause that excuses a party's failure to provide requested information.⁸ EDR has reviewed nothing to show that any additional documents responsive to this request exist and have been improperly withheld by the agency.

Years of Service

The grievant also seeks information related to how years of service were calculated for the compensation study. The grievant indicates that he assumes there is some documentation that identifies how the agency categorized various activities (such as educational field work) for purposes of assigning years of service. The agency states that no such documents exist, other than those that have already been produced showing how years of service were calculated by the agency. While the grievant's assumptions regarding the ways in which the compensation study might have been conducted are understandable, as previously noted, under the grievance procedure, a party is not required to create documents that do not exist,⁹ and EDR considers the nonexistence of responsive documents to be just cause that excuses a party's failure to provide requested information. EDR has reviewed nothing to show that any additional documents responsive to this request exist and have been improperly withheld by the agency.

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 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.¹⁰

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



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⁸ 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.

⁹ Va. Code § 2.2-3003(E).

¹⁰ *Id.*; *Grievance Procedure Manual* § 8.2.

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