

Issues: Compliance – Grievance Procedure (Second Step Meeting and Documents);
Ruling Date: February 17, 2017; Ruling No. 2017-4490, 2017-4491; Agency:
Department of Criminal Justice Services; Outcome: Agency 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 2017-4480, 2017-4491
February 17, 2017

The grievant has requested two compliance rulings from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to 1) the revision and reissuance of the original second step response to her grievance and 2) an alleged failure of the Department of Criminal Justice Services (the “agency”) to produce requested documents.

FACTS

On or about November 7, 2016, the grievant received a Group II Written Notice for allegedly inappropriate actions in which she engaged when presiding over an informal fact finding conference. The grievant initiated a grievance challenging the Written Notice on or about December 7, 2016, in which she alleges improper motives underlying its issuance, including retaliation and harassment. The grievance proceeded through the management resolution steps, and, following the second step meeting on December 14, 2016, the grievant received the response of the second step-respondent on January 3, 2017. The second step response contained the following paragraph:

It is my understanding that your building access and internet access were temporarily suspended during the period of your short-term-disability following you coming to your office and accessing items in your office and on your computer during the period of your short-term disability when you should not have been at work or accessing your email. Employees should not be performing work during their period of short term disability.

The grievant asserts that this statement is “fictitious” and indicates that she attempted to follow up with the agency several times regarding the assertions in this paragraph. To this end, she sent an email to two agency human resource representatives requesting additional information that would support the agency’s statements in the second step response. On January 5, 2017, the

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.

agency issued a “Revised Second Resolution Step Response,” and by memorandum to the grievant indicated that “[t]he issues you questioned in the Second Resolution Step Response to your Grievance related to the Group II Written Notice received on November 7, 2016 are not significant to the actions that resulted in the Written Notice being issued to you. As such, I have revised and reissued the Second Resolution Step Response and have revised the reference related to building access during your absence last year.”

The grievant now disputes the agency’s revised response, to the extent that it indicates that the inclusion of the paragraph in question within the January 3 response was unintentional and not significant to the issues underlying her grievance. She states that the January 3 response further demonstrates retaliation and harassment on the part of the agency, and requests that EDR rule that the amended second step response of January 5 is “null and void.”

On January 5, 2017, the grievant submitted a request for documents to the agency. That request seeks information relating to the disputed paragraph in the January 3 second step response. EDR’s review of the information submitted by the parties indicates that the grievant has requested the following:

1. “[A]ny and all documentation . . . that reflects [she] accessed the building, came into [her] office and accessed items in [her] office and on [her] computer, and worked during the period of March 11, 2016 through April 25, 2016, including the date and time [her] computer was accessed, the date and time [she] accessed the building, and any and all items that [she] accessed and did on [her] computer, including accessing items in [her] office during the period of time [she] was on short-term disability”;
2. “[A]ny and all documentation reflecting the dates and times that [her] building access and internet access were temporarily suspended for the period March 11, 2016 through April 30, 2016, including emails, correspondence, supporting documentation, and requests to the Virginia Department of General Services that [her] building access be removed and reinstated”;
3. “[A]ny and all documentation reflecting that [she] refused assistance from Human Resources when [she] filed [her] complaint against [supervisor] in July 2015.”

On January 17, 2017, the agency hand-delivered to the grievant approximately 90 pages of documents collected pursuant to her request. On January 19, 2017, the grievant notified the agency that she had not received all of the documents responsive to her request. Specifically, she asserts that she did not receive information related to the items in her office she accessed while on short-term disability, or information relating to her accessing her assigned work computer or office building while she was on short-term disability. On January 20, 2017, the grievant sent another email stating that she did not receive any documents that reflect she was working while on short-term disability. Subsequently, the agency again checked its records, and on January 26, 2017, informed the grievant that it had determined that no additional records responsive to her

request exist. The grievant requested a compliance ruling from EDR on January 27, 2017, alleging that the agency's production of documents does not comply with the grievance procedure.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² 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.³ 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.⁴ In this instance, the grievant has requested two rulings from EDR regarding the agency's alleged noncompliance with the grievance procedure.⁵ Both will be addressed below.

Second Resolution Step Response

Here, the grievant asserts that the revised and reissued second resolution step response does not comply with the requirements of the grievance procedure. She argues that the original response, while false in her opinion, further demonstrates the ongoing retaliation and harassment alleged in her grievance. To that, the agency contends that the revised response was not issued for any improper motive, but rather, to correct terminology erroneously used in the initial response, since the grievant disputed it. Further, it argues that the wording used in the response is not significant to the actual issue being grieved, which is a Written Notice.

The *Grievance Procedure Manual* is silent on the matter of revising management's resolution step responses once issued. However, the Code of Virginia specifies that management's response to the merits of the grievance shall be subject to the agency head's

² *Grievance Procedure Manual* § 6.3.

³ *See id.*

⁴ 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.

⁵ 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.

approval.⁶ Thus, this provision implicitly indicates that revising a response may not be inappropriate, depending on the circumstances of the case. In this instance, the revised response was issued quickly, two days after the initial response, and does not appear to contain any changes in substance that would be detrimental to the grievant. EDR has thoroughly reviewed the documentation presented and cannot conclude that a material change has occurred that would prejudice the grievant in any way. Thus, EDR declines to find noncompliance on this basis.

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.”⁷ 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.”⁸ 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.⁹ 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.”¹⁰

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.¹¹

In this case, the documents sought by the grievant relate to statements made by the second step-respondent in his response of January 3, 2017. The grievant alleges that the response accused her of “committing a crime of moral turpitude” and appears to claim that no

⁶ Va. Code § 2.2-3003(D).

⁷ *Id.* § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁸ *Grievance Procedure Manual* § 9.

⁹ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

¹⁰ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

¹¹ *Grievance Procedure Manual* § 8.2.

documents that verify these statements exist. The agency asserts that no additional responsive documents exist beyond those that have already been provided to the grievant.

For the most part, the grievant's document requests relate to the question of whether she performed any work during a period of short-term disability. Responsive documents would presumably be easy to locate by the agency, if they exist. The agency has stated that it produced all documents responsive to the grievant's requests and no further documents exist. Under the grievance procedure, a party is not required to create documents that do not exist.¹² Furthermore, EDR considers the nonexistence of responsive documents to be just cause that excuses a party's failure to provide requested information.¹³ EDR has reviewed nothing to show that any documents responsive to the grievant's requests exist and have been improperly withheld by the agency. Accordingly, EDR finds no basis to conclude that the agency has improperly withheld documents from the grievant without just cause.

CONCLUSION

For the reasons set forth above, EDR concludes that the agency has complied with the grievance procedure with respect to both the second step response of January 5, 2017, and the grievant's request for documents. As the last step in this grievance appears to have been the issuance of the second step response, **within five workdays of receipt of this ruling**, for this grievance to continue, the grievant must check the appropriate box on the Grievance Form A and forward it with any appropriate attachments to the third step-respondent.

EDR's rulings on matters of compliance are final and nonappealable.¹⁴



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¹² Va. Code § 2.2-3003(E).

¹³ 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.

¹⁴ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).