

Issue: Compliance – Grievance Procedure (documents); Ruling Date: August 15, 2016; Ruling No. 2017-4395; 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 2017-4395
August 15, 2016

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 or about May 31, 2016, the grievant received a Written Counseling Memorandum (the “Counseling Memo”) regarding her “failure to report to work” on May 20, when she was apparently scheduled to attend a training event held by another agency on topics relating to emergency operations. The grievant initiated a grievance challenging the Counseling Memo on or about June 1, in which she alleges that it “is not aligned with the alleged infraction and past similar occurrences of absence from a non-mandatory [] training.”

The grievant submitted a request for documents to the agency on June 15, 2016. In her request, the grievant seeks information relating to her alleged failure to report to the May 20 training event as scheduled, as well as statements she claims were made by her supervisor during the second step meeting in support of the agency’s position. EDR’s review of the information submitted by the parties indicates that the grievant has requested the following:

1. Documents “used to notify” the grievant’s supervisor and other agency staff “of the mandatory trainings,” including the “attendance dates, the specific title of the training events, and the start times for each training event”;
2. The dates of any emergency operations training events the grievant has missed since June 1, 2015, as well as documents showing that the grievant “was aware of her required attendance for each date provided,” that the grievant “was addressed about her failure to attend these specific training events,” and how the grievant’s supervisor “was notified that [the grievant] did not attend the specified dates of required [] training”;
3. Documents showing that the grievant was directed to attend the May 20, 2016 training event, including “physical proof of receipt” by the grievant;
4. Any notices sent to the grievant’s supervisor to show that the grievant accessed an online training registration system;

5. Information about whether the grievant attended a training event held on October 8, 2015 and “documentation . . . of the response model” for that training event;
6. Documents showing that the grievant’s job duties included functions relating to emergency management and training;
7. Any dates since June 1, 2015 when the Governor declared a state of emergency, dates when the grievant “failed to provide required support during” a state of emergency, and dates when the grievant “was required to be in attendance” during a state of emergency “but did not attend”;
8. Documents to show that the grievant was directed to attend a meeting on April 5, 2016;
9. Documents showing that the grievant failed to report to work in the past when “she would have clearly known of the ‘expectation’ to attend through written communication or some other physical form of notice”; and
10. Documents to show that the grievant’s absence from any emergency operations training event “impacted her position.”¹

On June 30, 2016, the grievant notified the agency that it was not in compliance with the grievance procedure because it had not provided documents responsive to the above requests. On July 8, the agency produced “all records responsive to [her] June 15, 2016 request,” noted that documents responsive to Request 6 had been provided separately,² and stated that no records responsive to Request 4 exist. The grievant requested a compliance ruling from EDR on the same date, 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

¹ EDR has condensed the grievant’s requests to encompass the broad subject matter of the documents sought, as many of the grievant’s specific requests are too lengthy to recount in full.

² The agency provided the grievant with documents responsive to Request 6 on July 7, 2016.

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.

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 emergency operations functions are “voluntary and [are] in no way a part of [her] employment” and, therefore, her supervisor “cannot mandate [her] to attend the training or anything else relative to” emergency operations. In her compliance ruling request, the grievant alleges that the documents provided to her “represent a set of emails from a non-supervising peer [and] have no material relevance to the issue of the grievance” It also appears that many of the documents sought by the grievant relate to statements made by her supervisor during the second step meeting. The grievant alleges that her supervisor “made several false and inaccurate statements during the [] meeting,” and appears to claim that no 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 can be reduced to two general topics: 1) documents showing the grievant was previously directed or required to attend training events like those at issue in the Counseling Memo, and 2) documentation showing that the grievant had been held accountable (i.e., counseled) for previously failing to report to work and/or attend other training events and meetings. When distilled to that point, those requests for information are fairly reasonable and seek documents that are relevant to the actions grieved in this case. 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. As such, any information in the agency’s possession that would show that either 1) the grievant was required to attend the training events, or 2) the grievant was previously counseled for nonattendance, is included in the documents produced to the grievant. If the agency produced no records on those issues, then a reasonable conclusion would be that the agency has no such records.

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

⁷ *Grievance Procedure Manual* § 8.2.

⁸ Va. Code § 2.2-3003(E).


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. Accordingly, EDR finds no basis to conclude that the agency has improperly withheld documents from the grievant without just cause.¹⁰

In closing, additional information about instances when the grievant was allegedly counseled for failing to report to work and/or attend training events in the past, as well as information about her job description and assigned duties could be considered personnel records under DHRM Policy 6.05, *Personnel Records Disclosure*. To the extent the grievant wishes to review any documents in her personnel file or her supervisor's file, of which the grievant is the subject, that have not already been provided to her, the grievant is entitled to access that information, and may make arrangements with the agency to do so.¹¹

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. When the grievant requested this ruling, the grievance process was temporarily halted after the grievance had advanced to the third step. The agency is, therefore, directed to provide the grievant with the third resolution step response **within five workdays of the date of this ruling** if it has not done so already.

EDR's rulings on matters of compliance are final and nonappealable.¹²



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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 any of the documents sought in the grievant's request are relevant to the challenged management actions, but only determines that the agency has presented just cause for the nonproduction of documents in this case.

¹¹ See DHRM Policy 6.05, *Personnel Records Disclosure*.

¹² Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).