

Issues: Qualification – Discipline (counseling memo), and Compliance – Grievance Procedure (documents); Ruling Date: August 3, 2016; Ruling No. 2017-4396, 2017-4401; Agency: VCCS; Outcome: Not Qualified, Agency in Compliance.



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

COMPLIANCE & QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Numbers 2017-4396, 2017-4401
August 3, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his April 28, 2016 grievance with the Virginia Community College System (the “agency”) qualifies for a hearing. The grievant has further requested a ruling regarding alleged noncompliance with the grievance procedure by the agency relating to the production of requested documents. For the reasons discussed below, this grievance does not qualify for a hearing and EDR finds that the agency has complied with the grievance procedure.

FACTS

On or about April 1, 2016, the grievant received a Notice of Improvement Needed/Substandard Performance (“NOIN”) to address a “verbal altercation” that occurred between the grievant and a customer on November 2, 2015. The grievant initiated a grievance to dispute the NOIN on April 28, 2016. In the grievance, the grievant claims the NOIN “contains inaccurate information, general vague language regarding the policies in question, and lacks specific detail to support the claim,” and requests that the NOIN “be removed from [his] personnel file(s)” After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

The grievant submitted a request for documents to the agency on June 19, 2016, during the management resolution steps. The grievant sought (1) information about and a copy of the “initial/original complaint filed” by the customer; (2) information about the “‘official’ complaint” filed by the customer with the agency employee who investigated the incident; (3) “[a] copy of the letters of notices . . . to be sent to [the customer] regarding [the] complaint’s status/completion;” (4) “a copy of the Internal Investigative Memo authored by” the investigator; and (5) “[a] copy of the LenSec video footage” of the incident (hereinafter “Request 1” through “Request 5,” respectively). On June 30, the agency produced a copy of the Administrative Investigation report. The grievant notified the agency that its production of documents did not comply with the grievance procedure on July 4. In response, the agency provided the grievant with a copy of the Personnel Complaint Form filed by the customer, and stated that no other documents exist that are responsive to the grievant’s requests. The grievant requested a compliance ruling from EDR on July 19, alleging that the agency’s production of documents does not comply with the grievance procedure

DISCUSSION

Compliance

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.”¹ 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.”² 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.³ 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.”⁴

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.⁵

In this case, the grievant disputes the NOIN and requested documents relating to the agency’s investigation of the incident that prompted its issuance. The parties do not appear to dispute that the agency has produced the documents sought in Requests 2 and 4 (i.e., the Personnel Complaint Form and the Administrative Investigation report). In his request for a compliance ruling the grievant alleges that the customer filed an “initial/original complaint” that the agency has not produced, that the agency should have provided the customer with notices “regarding [the] complaint’s status/completion,” and that the agency has improperly withheld “video footage” of the incident.

¹ Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

² *Grievance Procedure Manual* § 9.

³ *See, e.g.,* EDR Ruling Nos. 2008-1935, 2008-1936.

⁴ Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

⁵ *Grievance Procedure Manual* § 8.2.

With regard to Request 1, the agency has indicated that the incident in which the grievant was involved prompted two separate, though related, investigatory processes: an internal administrative investigation initiated by the agency, and an investigation of the complaint filed by the customer on the Personnel Complaint Form. An investigator was assigned to conduct the administrative investigation on or about November 6, 2015. The customer submitted the Personnel Complaint Form on November 13. The customer did not submit any other complaints in writing to the agency, and thus the agency possesses no documents responsive to Request 1.

The administrative investigation resulted in the issuance of the NOIN and has been concluded. The agency's investigation of the customer's complaint, however, is still pending. The agency states that the customer has not yet received any notices regarding the results of that investigation or the disposition of her complaint. As a result, no documents responsive to Request 3 currently exist.⁶

Finally, the agency has explained to EDR that the video footage requested by the grievant in Request 5 is no longer available because its recording system only stores such footage for thirty days. The incident took place on November 2, 2015, and the grievant submitted his request for documents to the agency on June 19, 2016. By that time, the recording of the incident had been overwritten by more recent footage. While the agency does have the ability to save video footage from its recording system, the recording of the incident was not saved in this case, and thus the agency has no documents in its possession that are responsive to Request 5.

In summary, the agency has provided information to show that no documents responsive to Requests 1, 3, and 5 exist. The grievant has presented nothing to show that any documents responsive to these requests exist and have been improperly withheld. Accordingly, we find that the agency has complied with the grievance procedure with respect to these requests. EDR's rulings on matters of compliance are final and nonappealable.⁷

Qualification

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.⁸ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁹ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.¹⁰

⁶ If the grievant wishes to request copies of any notices that may be sent to the customer in the future, he may do so pursuant to the Virginia Freedom of Information Act. *See* Va. Code § 2.2-3700 *et seq.*

⁷ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

⁸ *See Grievance Procedure Manual* § 4.1.

⁹ Va. Code § 2.2-3004(B).

¹⁰ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify to those that involve “adverse employment actions.”¹¹ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹² Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.¹³

The management action challenged in this grievance, a NOIN, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.¹⁴ Therefore, the grievant’s claims relating to his receipt of the NOIN do not qualify for a hearing.¹⁵

While the NOIN has not had an adverse impact on the grievant’s employment at this time, it could be used later to support an adverse employment action against him. Should the NOIN grieved in this instance later serve to support an adverse employment action against the grievant, such as such as a transfer, a demotion, a formal Written Notice, or a “Below Contributor” annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of NOIN through a subsequent grievance challenging the related adverse employment action.

EDR’s qualification rulings are final and nonappealable.¹⁶



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¹¹ See *Grievance Procedure Manual* § 4.1(b).

¹² *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

¹³ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

¹⁴ See *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

¹⁵ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the “Act”). Under the Act, if the grievant gives notice that he wishes to challenge, correct, or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

¹⁶ See Va. Code § 2.2-1202.1(5).