

Issue: Compliance – Grievance Procedure (documents); Ruling Date: October 18, 2017; Ruling No. 2018-4626; Agency: Department of Corrections; Outcome: Agency in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**COMPLIANCE RULING**

In the matter of the Department of Corrections  
Ruling Number 2018-4626  
October 18, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management regarding alleged noncompliance with the grievance procedure by the Department of Corrections (the “agency”) in relation to the production of requested documents.

FACTS

The grievant is employed by the agency as an education coordinator. In July 2017, the grievant requested an in-band salary adjustment, based on his understanding that he is paid less than a comparator employee who works in a similar position in another region. In response to the grievant’s request, the agency apparently determined that an in-band adjustment was not warranted. The grievant initiated a grievance on or about August 10, 2017, alleging that the agency’s decision not to approve an in-band adjustment is inconsistent state and/or agency policy regarding compensation. On August 11, 2017, the parties agreed to temporarily place the grievance on hold while the agency conducted a compensation review of the grievant’s position. Based on the results of the compensation review, the agency determined that an in-band adjustment was not justified for the grievant.

On October 3, 2017, the grievant submitted a request for documents to the agency, seeking the state employment application of the comparator employee. The agency notified the grievant that it would not produce the requested document because the grievant knows the identity of the comparator employee and redaction would not be sufficient to preserve that individual’s privacy. The agency further noted that the information in the comparator employee’s state employment application is not relevant to the grievance. The grievant requested a compliance ruling from EEDR on October 4, 2017, arguing that the requested document is relevant to the issues in the grievance and may be appropriately redacted to preserve the privacy of the comparator employee.

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>1</sup> EEDR’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>2</sup> 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.<sup>3</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>4</sup>

EEDR 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>5</sup>

In this case, the grievant seeks the comparator employee’s state employment application. The grievant alleges that information in the application is relevant to show that his education and experience are similar to that of the comparator employee, yet the comparator employee’s salary is greater than his. In response, the agency asserts that the document contains personal information that cannot adequately be redacted to preserve the comparator employee’s privacy, and that it is not relevant to the issues in the grievance. DHRM Policy 3.05, *Compensation*, enumerates thirteen pay factors that agencies should consider when making pay decisions such as in-band adjustments.<sup>6</sup> Information in the comparator employee’s application would likely contain some information that is relevant to the grievance, as it could tend to either establish or disprove the grievant’s arguments that he is similarly situated to the comparator employee.

However, internal salary alignment is just one of the factors to be considered by an agency when evaluating employee compensation.<sup>7</sup> It is likely that other pay factors could have played a role in the agency’s decision, and information relating its consideration of those factors

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

<sup>2</sup> *Grievance Procedure Manual* § 9.

<sup>3</sup> See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

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

<sup>5</sup> *Grievance Procedure Manual* § 8.2.

<sup>6</sup> DHRM Policy 3.05, *Compensation*.

<sup>7</sup> *Id.*

would not necessarily be discerned through a review of the comparator employee's application. While the grievant's knowledge of the comparator employee's identity would not necessarily preclude production of the document,<sup>8</sup> the agency's contention that the comparator employee's application contains a significant amount of personal and personnel information that is confidential and irrelevant to the management actions at issue in the grievance is also valid. Redaction could mitigate some of the agency's concerns, but much of the information about the comparator employee sought by the grievant—for example, education and prior work history—would not be readily susceptible to redaction. In other words, the agency has articulated legitimate privacy interests that weigh against production of the document.

Accordingly, under the circumstances presented in this case, the agency's interest in protecting the privacy of the comparator employee is more compelling than the grievant's interest in having access to the document as a means of supporting his arguments about his own compensation. Having balanced the respective interests of the parties, EEDR finds that there is just cause for the agency to withhold production of the comparator employee's employment application at this time.<sup>9</sup>

#### CONCLUSION

For the reasons set forth above, the agency has not failed to comply with the grievance procedure because there is just cause for withholding the document requested by the grievant at this time. The party responsible for taking the next action as required by the grievance procedure is directed to do so **within ten workdays of the date of this ruling**.

EEDR's rulings on matters of compliance are final and nonappealable.<sup>10</sup>



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<sup>8</sup> EEDR has previously held that Va. Code § 2.2-3003(E) specifically contemplates the exchange of documentation related to nonparties in a redacted format, and that state or agency policies that require otherwise are overridden to the extent that such protected materials are sought by a grievant in conjunction with the grievance process. *See, e.g.*, EDR Ruling No. 2014-3651; EDR Ruling No. 2007-1402; EDR Ruling No. 2006-1199.

<sup>9</sup> Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2. This ruling only determines that the agency need not produce the document at this time. The analysis to be conducted is potentially not the same when evaluating whether a grievant should have access to documents as a means of resolving a dispute during the management resolution steps as opposed to whether such documents may be necessary to prove a claim at a grievance hearing. Thus, this ruling does not necessarily serve as a prohibition on the disclosure of the document should the grievance later proceed to a hearing.

<sup>10</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).