



EMILY S. ELLIOTT  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219

Tel: (804) 225-2131  
(TTY) 711

**COMPLIANCE RULING**

In the matter of the Virginia Department of Corrections  
Ruling Number 2022-5323  
December 17, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) in relation to the alleged failure of Virginia Department of Corrections (the “agency”) to produce requested documents. For the reasons discussed below, EDR declines to find that the agency has failed to comply with the grievance procedure.

FACTS

On or about August 12, 2021, the grievant submitted a grievance regarding an incident with a Major that took place on July 13, 2021. Around the time that the grievant filed the grievance, she stated that she spoke with the Assistant Warden and asked to view footage of the July 13, 2021 incident. On September 10, 2021, the grievant made a request in writing for “all documentation to include investigative reports, internal incident reports, witness statements and rapid eye video.” In response to the grievant’s written request, Human Resources advised her that she could “view the video at the 2<sup>nd</sup> step meeting” on September 16, 2021. The second step meeting occurred as scheduled and according to the Warden, the grievant “did not request to view the video.” When the Warden asked if the grievant wanted to provide more information regarding the relief she was seeking, the grievant said she was “not comfortable talking because [her] representative was not present.”

On September 29, 2021, the grievant sent an email alleging party noncompliance where she stated that the Warden “did not offer or suggest to [her] at the 2nd step meeting that [she] may view the Rapid Eye Video.”<sup>1</sup> At the bottom of the grievant’s email, she requested “camera evidence from [the facility] from 6:45 a.m. to 7:20 a.m. on date of July 13, 2021.” On September 30, 2021, the Warden replied via email stating that “[Human Resources] informed [her] in a previous email that [she] could review the video footage at [their] meeting” and that the grievant “indicated that [she] did not feel comfortable discussing anything without [her] advocate present.” The Warden concluded her email “that [they] have complied with all provisions of the Grievance

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<sup>1</sup> The grievant’s representative also sent a letter to the Director alleging that the agency was out of compliance with the grievant’s request for documents.

Procedure regarding [her] issue.” On October 4, 2021, Human Resources responded to the grievant and her representative regarding the non-compliance letter to the Director, stating that “[the grievant was] notified [she] would be granted the opportunity to review the Rapid Eye Video in the presence of management during the second step meeting . . . . At no time during [her] second step meeting with [the Warden] did [she] request to review the video.” Human Resources added that “no policy violation in regards to the handling of your grievance has been found.”

Before the third step meeting, the grievant and her representative scheduled a time with Human Resources to view the footage at headquarters on October 20, 2021. Upon viewing the video, they were “only shown 3 minutes of the approximately 35 minutes requested.” In a non-compliance letter to the agency, the grievant’s representative stated that despite the agency saying that this was an additional request, their “original request has never been met.” During the third step meeting, the grievant and her representative informed the respondent that they had not viewed the requested footage and only saw three minutes of the video. They asked if the third step respondent “could assist in [their] being able to view the footage.” The grievant has received the third step response, but has not viewed the full time period of the requested footage. As the grievant has not been provided the documents sought, she has requested this 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, in a timely fashion.”<sup>2</sup> 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.”<sup>3</sup> For purposes of document production, examples of just cause include, but are not limited to, the circumstances that (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>4</sup> The grievance statutes further provide 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>5</sup>

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

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<sup>2</sup> Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

<sup>3</sup> *Grievance Procedure Manual* § 9.

<sup>4</sup> *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936.

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

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>6</sup>

In this case, the grievant sought “camera evidence from [the facility] from 6:45 a.m. to 7:20 a.m. on date of July 13, 2021.” The agency provided three minutes of the video footage that the grievant requested. The agency stated that “an investigation revealed the only interaction between [the grievant] and [the Major] occurred at 6:59:00-7:01:59” and that “[t]he video footage is relevant as a result of the investigation that was connected to [the grievant’s] allegations; it was determined the captioned timeframe is when [the grievant] interacted with [the Major]; no other video footage can be obtained due to the max pro system capacity (it is a finite system).” When EDR asked for clarification on their “finite system”, the agency stated that “footage is only retained for a maximum of 90 days.” Therefore, no recording for the full time period requested by the grievant currently exists.

EDR generally considers the nonexistence of responsive documents to be just cause that excuses a party’s failure to provide requested information. However, the reason that the sought video footage does not exist now is that the agency did not take steps to preserve any additional portions of the recording for the full time period requested by the grievant. The agency appears to take the position that no additional video content existed that was relevant. The agency states the only interaction between the grievant and the Major was preserved. If that is the case, even though the agency did not take steps to preserve the full time period of the video recording requested, it is reasonable to surmise that no evidence was lost that would be relevant to this case. At this stage, the grievant has not presented information for EDR to find that relevant evidence was lost by the agency’s failure to preserve the video recording in full. Accordingly, EDR cannot find that the agency has failed to comply with the document request provisions of the grievance procedure at this time. To the extent this grievance proceeds to an EDR qualification ruling or a hearing, we will reassess this question, assuming it is raised by the grievant, based on any additional information that can be conveyed at that time, to determine any impact on the grievant’s case from the unavailability of the full video recording.

The grievant has additionally requested that a decision be made in her favor in this case due to the agency’s alleged noncompliance. The grievant asserts that the process has become so tainted as to prevent a fair outcome. Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure,<sup>7</sup> we favor 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.

The agency’s actions here do not rise to the level that would justify a finding of substantial noncompliance or the extreme sanction of EDR awarding substantive relief in favor of the grievant at this time. As described above, the agency did not preserve the full extent of the recording requested by the grievant. However, it is unclear at this stage whether that failure led to the loss of relevant evidence that has any impact on this case. As additionally discussed above, EDR will revisit this issue in a future step of this grievance as necessary.

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<sup>6</sup> *Grievance Procedure Manual* § 8.2.

<sup>7</sup> Va. Code § 2.2-3003(G).

CONCLUSION

For the reasons set forth above, EDR declines to rule that the agency has engaged in substantial noncompliance with the grievance procedure with respect to the grievant's request for documents. It appears that, when the grievant requested this ruling, the grievance process was temporarily halted after the grievant had received the third step response. The grievant is, therefore, directed to either request qualification of this grievance for a hearing from the agency head or conclude this grievance **within ten workdays of the date of this ruling**.

EDR's rulings on matters of compliance are final and nonappealable.<sup>8</sup>

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

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<sup>8</sup> *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).