

Issue: Compliance – Grievance Procedure (documents); Ruling Date: March 5, 2013;
Ruling No. 2013-3530; Agency: Department of Social Services; 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 Department of Social Services
Ruling Number 2013-3530
March 5, 2013

The grievant has requested a ruling regarding the agency's alleged noncompliance with the grievance procedure involving requests for documents.

FACTS

On October 25, 2012, the grievant initiated a grievance challenging the method and means by which the agency conducted an internal investigation regarding the grievant. On October 31, 2012, the grievant requested all copies of Weekly Reports, and any subsequent e-mail chains regarding each Weekly Report, provided by Mr. M to Ms. M from the time of Mr. M's employment until October 31, 2012. The grievant also requested all copies of Weekly Reports, and any subsequent e-mail chains regarding each Weekly Report, provided by Ms. W to Ms. M from the time Ms. W became supervised by Ms. M until October 31, 2012. On November 7, 2012, the agency produced documents responsive to the request at no charge.

Upon review of the agency's produced documents, the grievant realized the agency had not provided a complete record. As such, on December 10, 2012, the grievant e-mailed the agency's human resource compliance coordinator and informed her that she was missing several documents, including Mr. M's weekly reports from March 1, 2012 through October 31, 2012. The grievant also made a new document request for twelve additional documents and requested that her grievance be temporarily halted until the requested documents were produced. On December 17, 2012, the agency responded that it would produce all of the requested documents to the grievant, but due to the scope of the request, the grievant would be required to pay for the cost of the electronic data mining and account analysis, which was estimated at \$2,314.80.

On January 16, 2013, the grievant e-mailed the agency's human resource compliance coordinator, alleging that the agency should not charge the grievant for any of the documents pertaining to her October 31, 2012 document request because the agency sent an incomplete record to the grievant. On January 24, 2013, the agency responded that it would produce the remaining October 31st requested documents, but due to the fact the agency required the assistance of IT Support for the electronic data mining and account analysis, it would cost the agency \$462.96 to produce the remaining documents. As such, the grievant would be required to pay \$462.96 to the agency for the incurred charges.

On January 31, 2013, the grievant e-mailed a notice of noncompliance to the agency head, alleging the agency was noncompliant with Section 8.2 of the *Grievance Procedure Manual* (the “*Manual*”) by producing a partial response to the grievant on November 7, 2012, at no cost, but then requiring the grievant to pay a \$462.96 production charge for the allegedly omitted documents. Specifically, the grievant asserts the production charge is “not reasonable and not in the spirit of the Grievance Procedure’s Code of Conduct and Civility.” On January 31, 2013, in response to the grievant’s notice of noncompliance, the agency stated that the production charge was compliant with the grievance procedure because the grievant’s volume and scope of the document request increased. Furthermore, pursuant to agency established practice, the agency stated that:

“Previously the agency provided records you requested at no cost. That was when the effort to produce the records was anticipated to take fewer than four hours of staff time and/or would yield fewer than 200 pages of records. It was the agency’s prerogative not to charge you for those records, even though there is no Grievance Procedure or Code of Virginia prohibition against doing so. When the volume and scope of your requests increased, the agency determined that you would be charged for production of records going forward. This was done as a responsible steward of state resources.”

Additionally, the agency denied the grievant’s request to halt the grievance process because it had not denied any of the grievant’s document requests.

In a February 7, 2013 letter to the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management, the agency elaborated that it received nineteen document requests from the grievant from October 1, 2012 through February 7, 2013. Although the agency initially provided the responsive documents at no charge to the grievant, the agency asserts that it started to charge the grievant for the actual cost to produce the documents after the volume and scope of the grievant’s requests multiplied. In a February 21, 2013 e-mail from the grievant to EDR, the grievant challenges the agency’s statements and alleges she has only made nine document requests to the agency, two of which she allegedly rescinded.

In a February 27, 2013 e-mail from the agency to EDR, the agency admitted that initially it thought the grievant’s document request was “a simple matter of having each party named search through their computers and personal files for the documents that were requested.” However, according to the agency, it turned out to be “much more labor intensive than imagined” and took more than four hours to search for the responsive documents. The agency’s e-mail states that “since the agency had not told [the grievant] in advance that she must pay a deposit for the production of the records, she was not [initially] charged for them.” Also, subsequent to the grievant’s October 31, 2012 document request, the agency alleges that the grievant sent the agency four additional document requests from November 28, 2012 through December 10, 2012. Consistent with its established agency procedure, and in order to be a good steward of the state’s resources, the agency asserts that it could no longer provide the requested records to the grievant at no charge. Also, having experienced the effort it took to produce the responsive records, which the agency noted were ultimately to the grievant’s dissatisfaction, the

agency determined that it was best for IT Support to search for the requested documents because they “can do it more efficiently” and their records are “unimpeachable.”

Now, pursuant to Section 6 of the *Manual*, the grievant seeks a compliance ruling from EDR on whether the agency “should provide [the grievant] the complete record originally requested on October 31, 2012, at no charge.”¹

DISCUSSION

The grievance statute provides 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.”² 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.”³ 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.⁴ 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.”⁵

Moreover, EDR has 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.⁶

¹ While it is unclear how the items requested on October 31, 2012 are relevant to the October 25, 2012 grievance, the agency has not raised this issue. As such, relevance of the documents will not be addressed in this ruling.

² Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

³ *Grievance Procedure Manual* § 9.

⁴ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁶ *Grievance Procedure Manual* § 8.2.

Charges

The *Manual* provides that “[t]he party requesting the documents may be charged a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents.”⁷ EDR has had few occasions in past rulings to address this provision.⁸ In interpreting this section, EDR will look to other analogous laws and regulations for guidance if needed. As such, principles and approaches arising under the Virginia Freedom of Information Act (FOIA) are an immediately relevant resource. For instance, under FOIA, an agency must notify a requester of documents if the agency will be charging for the search and production of materials sought and can further request payment of a deposit in advance before producing the documents in certain cases.⁹ Such a practice would appear to be reasonably applicable and useable under the grievance process, as the agency has done in this case. However, EDR must also review whether the agency’s proposed charges were reasonable under the facts of this case.

At no time can an agency charge the grievant more than the actual time costs incurred based on the hourly rates quoted.¹⁰ For example, the agency estimates approximately six hours per user for IT Support to search and capture the requested Weekly Reports and requested documents and e-mails from each of the three user’s hardware. If IT Support took less overall time than the eighteen hours proposed (6 hours times 3 users), then lower costs would be incurred resulting in reduced charges to the grievant.

The agency can also only charge the grievant for the actual time spent on the document collection and production effort.¹¹ Therefore, for instance, in conducting an electronic search, if IT Support is able to perform other work while the search runs without any further input needed during the search, that search time could not be charged to the grievant. As such, IT Support’s time must be accurately documented consistent with the provisions of this ruling so that the grievant is not charged for any time in addition to the actual work done on the document collection.

In this case, the agency asserts that IT Support must search three employee computer hard drives and network drives for “a variety of records types from a variety of employees’ records to identify the records responsive to [the grievant’s] expansive list of record types she seeks.” The agency admits this is because it does not have a standard protocol that defines how every document or message must be named or filed. The agency alleges the responsive records “could be anywhere on the e-mail account, CPU, or network drives that individual has access to” and the agency’s IT Support estimates this will take six hours per workstation to conduct this labor intensive undertaking. EDR finds the agency’s number of estimated hours seems reasonable given that IT Support will need to search 32 weeks of e-mails, reports, and documents on three users’ hardware and network drives. This estimated time is not unreasonable given the

⁷ *Id.*

⁸ *See, e.g.,* EDR Ruling Nos. 2012-3268 through 2012-3281, Ruling Nos. 2012-3245 through 2012-3252, Ruling Nos. 2012-3149 through 2012-3163, and Ruling Nos. 2010-2628, 2010-2629;

⁹ Va. Code § 2.2-3704.

¹⁰ *See Grievance Procedure Manual* § 8.2.

¹¹ *See id.*

scope of the grievant's request. Therefore, we conclude that under the grievance procedure, the agency's proposed charges are objectively reasonable.

When document productions are small, agencies may decide not to charge grievants at all. Indeed, the grievance process works better when parties are able to freely exchange information and documents without such charges.¹² However, even though the agency did not charge the grievant initially for the requested documents, that does not preclude an agency from subsequently charging for documents when a document collection and production reaches the level of effort that is involved in this case. Here, seeking to recoup the costs expended by the agency is reasonable. Therefore, having no other indication that the agency's proposal of charges to the grievant was based on an improper purpose, EDR can find no breach of the grievance procedure or EDR's Code of Conduct and Civility in this matter.

CONCLUSION

In summary, the grievant will be responsible for the agency's actual costs consistent with the limitations provided in this ruling. The grievant must pay one-half of the estimated amount before the document collection and production will progress. If the grievant chooses not to submit the deposit, the document requests will be considered waived and the grievance process must proceed to the next appropriate step.

EDR's rulings on matters of compliance are final and nonappealable.¹³



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¹² Cf. Va. FOIA Council Adv. Op., AO-06-09, June 9, 2009.

¹³ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).