

Issue: Compliance – Grievance Procedure (documents); Ruling Date: March 21, 2013; Ruling No. 2013-3550; Agency: Virginia Department of Health; Outcome: Agency Not 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 Health  
Ruling Number 2013-3550  
March 21, 2013

The grievant has requested a ruling regarding the Virginia Department of Health's (the agency's) alleged noncompliance with the grievance procedure in allegedly failing to produce requested documents.

FACTS

On or about January 3, 2013, the grievant initiated a grievance challenging a work transfer<sup>1</sup> and a Group II Written Notice. The Group II Written Notice, which also carried a five day suspension, was issued on December 6, 2012 for the grievant's alleged failure to follow supervisor's instructions and unsatisfactory work performance in the management of a grant (the "XYZ grant"). The grievant asserts that the transfer relates to the same events as the Written Notice and "was for disciplinary reasons even if that has been denied by [the Agency Head]."

The grievant states that on December 17, 2012, she made a FOIA request that the agency provide her with "all documents maintained by the Office of the Commissioner or the Office of Human Resources that address the decision to transfer [the grievant] from one position to another within VDH."<sup>2</sup> Subsequently, on or about January 28, 2013, the agency provided her with "a set of documents related to the transfer." These documents included a list of recommended questions for agency management to ask her supervisor about the administration of the XYZ grant.<sup>3</sup>

After reviewing the documents produced by the agency, the grievant asked for a copy of any responses provided by her supervisor to the list of questions. On February 11, 2013, the agency denied the grievant's request on the ground that release of the document was prohibited

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<sup>1</sup> The grievant alleges that she was transferred "from a supervisory position that is funded by and required by a Federal grant to a non-supervisory position that has not yet been fully defined."

<sup>2</sup> The parties appear to have subsequently treated this request as having also been made under the grievance procedure. See *Grievance Procedure Manual* § 8.2 ("Once a grievance has been initiated, an employee's request for documents relating to his/her grievance, pursuant to the Freedom of Information Act ('FOIA'), shall also be treated by the agency as a request for documents under the grievance procedure.")

<sup>3</sup> The agency apparently does not dispute that the agency head in fact asked the grievant's supervisor the questions on the list.

under the Virginia Freedom of Information Act, because it related to the personnel record of another employee. The grievant gave the agency written notice of non-compliance on February 21, 2013, and on February 28, 2013, the agency again denied the grievant's request. The grievant now seeks a 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.”<sup>4</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>5</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>6</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>7</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.

In this case, the grievant has requested a copy of the responses given by her supervisor to a list of questions regarding the XYZ grant. The agency asserts that the requested document relates only to the grievant’s supervisor, is not in the grievant’s personnel records, and therefore is not related to her transfer. Moreover, the agency argues that it is prohibited from disclosing the supervisor’s responses under the Virginia Freedom of Information Act.

The agency’s focus on the transfer is understandable given that the initial document request made by the grievant sought transfer-related documents. However, because the grievant subsequently made a specific request for the supervisor’s responses,<sup>8</sup> the determination of relevance must be based on whether the requested document pertains to the grievance *in its entirety*, including the Written Notice. The list of questions given to the grievant indicates that the agency asked her supervisor about the supervisor’s involvement in and knowledge of the management of the XYZ grant. The grievant asserts as a challenge to the disciplinary action

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

<sup>5</sup> *Grievance Procedure Manual* § 9.

<sup>6</sup> *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

<sup>7</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>8</sup> On January 28, 2013, the grievant requested, via e-mail, a copy of her supervisor’s answers, if those answers were in writing, or a summary of her responses, if a summary was prepared.

taken against her that her supervisor was aware of the nature of the activities being performed under the grant. Thus, the supervisor's responses to the questions could clearly be relevant to her grievance.

With respect to the agency's assertion that it cannot produce the supervisor's answers under Code of Virginia § 2-2-3705.1, such reliance on the Freedom of Information Act is misplaced. As we have long stated in prior rulings and have noted in the *Frequently Asked Questions* section of our website, document requests under the grievance statutes are not associated with FOIA.<sup>9</sup> While EDR will look to FOIA for guidance as to what documents shall be produced under the grievance procedure, FOIA exemptions, especially discretionary ones like that at issue here, do not generally provide automatic protection from disclosure. Further, EDR has frequently ruled that the personnel records exemption is inapplicable in grievances.<sup>10</sup> Indeed, the grievance statutes specifically contemplate the production of documents related to nonparties.<sup>11</sup> Accordingly, the agency has failed to show that just cause exists for denying the grievant the requested documentation.<sup>12</sup>

#### CONCLUSION

Based on the foregoing, the agency is ordered to produce requested document in response to the grievant's requests as identified above **within five workdays of receipt of this ruling**. Appropriate redactions may be necessary if the requested record contains personal information of a nonparty.<sup>13</sup> EDR's rulings on matters of compliance are final and nonappealable.<sup>14</sup>



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Christopher Grab  
Director  
Office of Employment Dispute Resolution

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<sup>9</sup> See, e.g., EDR Ruling Nos. 2010-2381 and 2009-2136; see also <http://www.dhrm.virginia.gov/EDR/faqs.htm>.

<sup>10</sup> E.g., EDR Ruling Nos. 2009-2348, 2009-2357; EDR Ruling Nos. 2009-2272, 2009-2289; EDR Ruling No. 2006-1312.

<sup>11</sup> Va. Code § 2.2-3003(E).

<sup>12</sup> The grievant has asked EDR to grant the relief sought in her grievance on the basis of substantial noncompliance with the grievance procedure. As there is no evidence that the agency's actions were motivated by bad faith or a gross disregard of the grievance procedure, there is no basis to award the substantive relief sought by the grievant. See EDR Ruling No. 2013-3511.

<sup>13</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>14</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).