

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: May 28, 2013;
Ruling No. 2013-3603, 2013-3604; Agency: Department of Motor Vehicles;
Outcome: Agency in Compliance, Grievant in Compliance.



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

COMPLIANCE RULING

In the matter of the Department of Motor Vehicles
EDR Ruling Nos. 2013-3603, 2013-3605
May 28, 2013

Both the grievant and the Department of Motor Vehicles (the “agency”) have requested compliance rulings regarding alleged noncompliance with the grievance procedure by the other party in not providing requested documents. Because both parties have alleged noncompliance with respect to the disclosure of documents, the Office of Employment Dispute Resolution (“EDR”) will address the parties’ requests in a single compliance ruling.

FACTS

On February 28, 2013, the agency placed the grievant on pre-disciplinary suspension with pay based on the results of an administrative investigation. The agency subsequently issued an Allegation Letter (the agency’s equivalent of a pre-disciplinary due process notice) on March 6, 2013. On March 29, 2013 the grievant filed a grievance challenging the suspension, the issuance of the Allegation Letter, and other agency actions.

The grievance included an attachment requesting documents that the grievant alleges are related to the grieved management actions. The agency provided some of the requested documents, and, on April 16, 2013, provided a written response stating that the remainder of the grievant’s requests were overly broad and sought confidential personnel information and asking the grievant to narrow the timeframe and subject matter of those requests. The grievant apparently refused to modify his document requests, notified the agency that it was not in compliance with the grievance procedure on April 23, 2013, and now seeks a compliance ruling from EDR.

On April 5, 2013, the agency requested that the grievant provide “copies of all documents . . . in [his] possession that relate to the actions grieved in each of [his] current active grievances.” After the grievant did not produce any documents, the agency notified the grievant that he was not in compliance with the grievance procedure on April 19, 2013, and now seeks a compliance ruling from EDR.

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.”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

Grievant’s Request

In this case, the agency has withheld some of the documents requested by the grievant, claiming that his requests are overly broad and would include confidential personnel information not relevant to the grievance. The disputed requests include the following:

1. “All transcripts, recordings, and notes of all interviews of [an employee]”;
2. “All memoranda, notes, transcripts, records and reports generated by [a supervisor] relating to [an employee]”;
3. “All memoranda, notes, transcripts, records and reports generated by [a supervisor] relating to [an employee]”;

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

² *Id.* at § 9.

³ See, e.g., EDR Ruling No. 2008-1935, 2008-1936.

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

⁵ *Grievance Procedure Manual* § 8.2.

4. "All recordings, transcripts, notes, and reports made by [an employee]";
5. "All orders, memorandum [sic], emails, and communications from [a supervisor] to [an investigator] from September 13, 2012 to present"; and
6. "All orders, memorandum [sic], emails, and communications from [a supervisor] to [another supervisor] from September 13, 2012 to present."⁶

EDR concludes that these requests, as currently stated, are overly broad. Some documents responsive to the disputed requests, however, may be relevant to the issues raised in the grievance. For example, all communications between several employees of the agency for a period of over nine months may contain some information relevant to the grievant's claims, but would also require the disclosure of a large amount of irrelevant information, undoubtedly at great time and expense to the agency. The grievant's request that the agency produce "all recordings, transcripts, notes, and reports" from a particular employee, apparently throughout the entire length of that individual's employment, may also contain relevant information, but is similarly overbroad. Therefore, if he wishes to proceed with these requests, EDR directs the grievant to provide the agency with a written statement refining the disputed requests. The grievant may, for example, identify specific incidents or dates relevant to the management actions grieved. Documents pertaining to non-parties may be redacted as appropriate to preserve the privacy of individuals not personally involved in the grievance.⁷

Agency's Request

The agency has requested that the grievant produce "copies of all documents . . . in [his] possession that relate to the actions grieved in each of [his] current active grievances." Such a request is too indefinite and broad in this instance.⁸ We do note, however, that if the grievant has not responded to the document request at all, even to explain why records would not be produced, that would not be consistent with the grievance procedure. Nevertheless, if the agency chooses to proceed with requesting documents from the grievant, the agency must provide the grievant with a written statement refining its request.

CONCLUSION AND ADDITIONAL MATTERS

While EDR does not find noncompliance as to either party at this time, the parties are cautioned to exercise good faith in dealing with one another. As stated above, to proceed with their document requests, the grievant and the agency are both directed to further refine and/or justify their respective requests for documentation. Upon receipt of such requests, the parties

⁶ In addition, it appears that at some point the grievant requested that the agency produce all communications between the agency's human resources director and the grievant's legal counsel; the agency refused this request, stating that production would be an undue burden. The grievant's request for a compliance ruling does not state that the agency has failed to produce such documents, however, and EDR will not address that request in this ruling.

⁷ See *Grievance Procedure Manual* § 8.2.

⁸ Indeed, as the grievant has noted, this request could be interpreted as requiring the grievant to produce all documents previously provided to the grievant by the agency in relation to this grievance as well as his other current grievances.

have a duty to search their records to ensure that, absent just cause, all such relevant documents are produced.⁹ EDR's rulings on matters of compliance are final and nonappealable.¹⁰

In addition, EDR notes that the subject grievances and surrounding issues have been the subject of request(s) for a stay due to a pending court filing. Since EDR's last correspondence on that question, we have received nothing from either party indicating any prejudice that would result from allowing these grievances to proceed. Therefore, EDR will not order a stay at this time. Should either party wish to identify any prejudice that could result from moving forward, please provide that information in writing as soon as possible. Perhaps the lack of follow-up information indicates that the parties are working together to address such issues.

To the point of working together, EDR encourages the parties to consider seeking additional alternative dispute resolution means possibly to resolve all their claims. For example, procuring the services of an experienced and skilled mediator or facilitator¹¹ to assist the parties in resolving these cases could result in better outcomes for either party than at a grievance hearing. EDR will allow the necessary time to work out these matters should the parties avail themselves of such alternative resolution methods. It should be noted, however, that, if it is considered an option, now is probably the time to do so. For example, if these or other grievances later proceed to a hearing stage, some hearing officers will not approve a request for a continuance for the purpose of mediation.



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⁹ *Grievance Procedure Manual* § 8.2.

¹⁰ Va. Code § 2.2-1202.1(5), 2.2-3003(G).

¹¹ While EDR administers a statewide mediation program, the instant case is not appropriate for the EDR mediation program. If sought, it would appear that the primary purpose for ADR would be for a negotiated settlement, which is not what EDR's program is intended to address.