

Issue: Compliance – Grievance Procedure (documents); Ruling Date: February 19, 2014; Ruling No. 2014-3810; Agency: Old Dominion University; Outcome: Agency in Compliance.



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

COMPLIANCE RULING

In the matter of Old Dominion University
Ruling Number 2014-3810
February 19, 2014

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to the alleged failure of Old Dominion University (the “University”) to produce requested documents.

FACTS

On or about December 9, 2013, the grievant initiated a grievance with the University alleging that the second step-respondent in a prior grievance had made false and/or misleading statements in his second step response. The grievant appears to claim that he requested documents related to the prior grievance in order to prove their existence, the University did not produce the documents, and the second step-respondent then falsely stated that the documents exist.

The grievant submitted a second request for documents on December 11, 2013 that is nearly identical to his original request from the prior grievance, and specifically seeks the following: (1) “[e]ach and every daily work report, regardless of form, submitted to [supervisor] by any of his subordinates, [grievant] excluded, from 12 June 2013 to 12 September 2013,” (2) all other communications relating to daily work reports from that time period, and (3) “[e]ach and every time-clock event” sent to the supervisor from that time period. The only identifiable difference between the grievant’s current document request and his previous document request is the time frame from which he seeks responsive documents. The grievant previously requested documents dating from October 8, 2011 to September 12, 2013. He currently seeks documents dating from June 12, 2013 to September 12, 2013.

After the University failed to provide the grievant with documents responsive to his December 11 request, he notified the University President that the University was not in compliance with the grievance procedure on January 16, 2014. When the University did not correct the alleged noncompliance within five workdays, the grievant requested a compliance ruling from EDR on January 30, 2014.

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

The issues presented in this grievance revolve around an ongoing dispute between the grievant and the University regarding the grievant’s supervisor’s requirement that the grievant submit daily emails detailing his arrival to and departure from work as well as the work he performed during the day.⁶ The grievant argues that he is entitled to review other employees’ daily work briefs and time reports because he believes that no other employees are required to submit such information. He further asserts that “[o]nly the production of the documents can definitively” prove whether the daily work reports “were collected from [his] coworkers.”

The University argues that it is not required to produce the requested documents because, in a previous compliance ruling related to the grievant’s first request for documents, EDR

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

² *Grievance Procedure Manual* § 9.

³ *See, e.g.,* EDR Ruling Nos. 2008-1935, 2008-1936.

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

⁵ *Grievance Procedure Manual* § 8.2.

⁶ That issue is the subject of a separate grievance that has been qualified for a hearing.

determined that there was just cause for the University to withhold the documents.⁷ The University claims that it employs the grievant and one other individual as Information Technology Specialists, that they are “[b]oth are required to clock in/out daily and file a daily work brief,” and that “this requirement has been applied consistently” to the grievant and the other employee. In response to the grievant’s first request for documents, the University maintained that it could not produce the documents sought by the grievant because it was unable to adequately protect the confidentiality of the other Information Technology Specialist.

Although the grievant has revised his request to seek only three months’ worth of daily work brief and time clock reports, the fact remains that the University cannot produce the full content of the documents in a manner that would protect the confidentiality of the other Information Technology Specialist. The information contained in the daily work briefs and time clock reports could include irrelevant and/or confidential materials and information. For example, the emails requested by the grievant would contain, at a minimum, information about the other employee’s comings and goings from work and the tasks he performed at work for a period of three months. Requiring the production of documents in this case would effectively permit the grievant to audit the University’s files related to this employee’s job performance during that time period. There is nothing that authorizes such an investigation under the limited discovery set out in the grievance procedure. Further, such matters are not the subject of this grievance and are, therefore, irrelevant.

The actual content of the documents is not what is relevant to this grievance, but rather whether the documents exist at all. It seems that the grievant does not believe that “the assertion by the [University] that the documents exist” is sufficient evidence that at least one other employee does, in fact, submit daily work briefs and time clock reports. The agency has informed the grievant repeatedly that the documents he seeks exist, and there does not appear to be any basis to conclude otherwise. Coextensive with the University’s concerns regarding confidentiality discussed above, requiring the University to produce the documents would, therefore, require the disclosure of potentially confidential information that is entirely irrelevant and immaterial to the grievance. The burden on the University to comply with the grievant’s request would be fairly described as moderate. Because the University has confirmed that the documents exist, however, the evidentiary value of the documents themselves is very slight. Accordingly, when balancing the respective interests of the parties, requiring the University to collect and produce the documents sought by the grievant would impose an undue burden in this case.

Finally, as part of its investigation of the issues presented in this case, EDR requested information about the daily works briefs and time clock reports from the University. The University provided a summary of the typical content of the emails sent by the other employee and confirmed that fifty-three such emails were received by the grievant’s supervisor from the other employee between June 12, 2013 and September 12, 2013, corresponding to the dates on

⁷ See EDR Ruling No. 2014-3728.

which this person worked during that time.⁸ EDR has reviewed no evidence to suggest that the University has made any false or misleading statements as to the content and/or existence of the daily work and time reports of the other employee who submits such information, and the grievant has not identified any specific information to show that this may be the case. In the absence of such evidence, and because requiring production of the documents in this case would impose an undue burden, we find that there is just cause for the University to withhold the documents requested by the grievant.

CONCLUSION

For the reasons set forth above, the University is not required to produce the documents requested by the grievant in this case. It is our understanding that, when the grievant requested this ruling, the grievance process was temporarily halted before the first step-respondent had issued his response. The University is, therefore, directed to provide the grievant with the first resolution step response **within ten workdays of the date of this ruling.**

EDR's rulings on matters of compliance are final and nonappealable.⁹



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Director
Office of Employment Dispute Resolution

⁸ While it does not appear that anything short of production of the actual email records will satisfy the grievant that they do exist, it is possible that by providing the grievant with information about the volume of the emails in a similar, generic way may help further resolution of this question in this case.

⁹ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).