

Issues: Compliance – Grievance Procedure (Documents and Resolution Steps);  
Ruling Date: April 16, 2014; Ruling No. 2014-3854; Agency: Department of Juvenile  
Justice; Outcome: Agency in Compliance.



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

**COMPLIANCE RULING**

In the matter of the Department of Juvenile Justice  
Ruling Number 2014-3854  
April 16, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management related to alleged noncompliance with the grievance procedure by the Department of Juvenile Justice (the “agency”).

FACTS

The grievant is employed by the agency as a Payroll Technician. On or about January 21, 2014, an altercation occurred between the grievant and a co-worker while their supervisor was absent from work. When the supervisor returned, she attempted to meet with the grievant and the co-worker to “discuss and address” the issue. The grievant refused to attend the meeting. On or about January 27, 2014, the grievant “walked out” of a staff meeting that was in progress without her supervisor’s approval. On or about February 6, 2014, she was issued a Group II Written Notice for failure to follow a supervisor’s instructions and insubordination in relation to these incidents.

On or about February 12, 2014, the grievant received a second Group II Written Notice for insubordination based on her conduct during a due process meeting conducted prior to the issuance of the first Group II Written Notice. The grievant and her supervisor later exchanged several emails about an unrelated issue with the grievant’s work performance that caused improper deductions from a newly-hired employee’s salary. As a part of this exchange, the grievant’s supervisor stated that the grievant was responsible for performing work tasks correctly and that any changes in the agency’s payroll system did “not negate [the grievant’s] inability to properly set up a new hire.”

The grievant filed a grievance on or about March 5, 2014, challenging both Group II Written Notices and her supervisor’s “false and slanderous accusation” that her work performance was unsatisfactory. When she initiated the grievance, the grievant also submitted a lengthy request for documents related to the challenged management actions. The agency produced all documents pertaining to both Written Notices as well as some information requested in relation to the supervisor’s email. The agency determined that the remainder of the documents requested in relation to the supervisor’s emails either did not exist, were not relevant, or were created as part of an active agency investigation and cannot be produced at this time.

On or about March 21, 2014, after the first step-respondent issued her response, the grievant notified the agency that it was not in compliance with the grievance procedure because the first step response did not adequately address the issues in the grievance. Her notice of

noncompliance further stated that the agency's production of documents was incomplete and/or inadequate.<sup>1</sup> When the agency did not correct the alleged noncompliance within five workdays, the grievant requested a compliance ruling from EDR on March 31, 2014.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</sup> That process assures that the parties first communicate with each other about the noncompliance and resolve any compliance problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>3</sup> If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.<sup>4</sup>

#### *First Step Response*

The grievant asserts that the first step response did not address the issues presented in the grievance. She claims that the first step response was merely a "reiteration of the first step respondent's position, along with new allegations against [her], without response to or addressing the issues and facts" raised in the grievance. The grievant further argues that the first step response contains "new and false allegations." The first step response states that the grievant "demonstrated poor work performance" that caused an employee to "pay additional monies," and seems to imply that the grievant failed to "take ownership and work cooperatively and constructively in resolving errors." It appears that the grievant takes issue with the first step-respondent's description of the offense and characterization of her behavior.

Section 3.1 of the *Grievance Procedure Manual* provides that the first step response "must address the issues and the relief requested and should notify the employee of his/her

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<sup>1</sup> The grievant further notes that a member of the agency's Human Resources staff responded to her request for documents. She argues that his participation in the grievance process is inappropriate because he was involved in the investigation of some of the issues that are the subject of the grievance. There is nothing inherently inappropriate about Human Resources staff assisting agency management with employee grievances; indeed, that is one of the primary purposes of this particular individual's position. While the grievant's concern is understandable, we are unable to identify any way in which this person's coordination of the agency's response to the grievance, in and of itself, was not in compliance with the grievance procedure.

<sup>2</sup> *Grievance Procedure Manual* § 6.3.

<sup>3</sup> *See id.*

<sup>4</sup> While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors 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. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

procedural options.” While the first step-respondent is not required to respond to each and every point or factual assertion raised by the employee, she must address each issue raised and the requested relief. Having reviewed the first step response, it is apparent that the first step-respondent considered the issues raised by the grievant and determined that she could not grant the relief requested. While the grievant may disagree with some of the content and/or character of this information, there is no indication that the first step response does not fulfill the requirements of the grievance procedure.

Accordingly, we do not find that the first step-respondent failed to satisfy the requirements of the grievance procedure in this case. To the extent that such information is relevant, the grievant may continue to discuss the issues relating to whether her allegedly unsatisfactory work performance resulted in financial loss to another employee and whether her response to the incident was appropriate with her agency throughout the remainder of the management resolution steps and qualification phase of the grievance.

#### *Agency’s Production of Documents*

The grievance statutes further 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>5</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>6</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>7</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>8</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 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>9</sup>

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

<sup>6</sup> *Grievance Procedure Manual* § 9.

<sup>7</sup> See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

<sup>8</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

<sup>9</sup> *Grievance Procedure Manual* § 8.2.

In this case, the grievant has requested numerous documents from the agency that she alleges are related to the challenged management actions. She requested, and does not seem to dispute that she has received, all information related to both Group II Written Notices.<sup>10</sup> The grievant also seeks many additional categories of documents that she claims are relevant to her claims regarding her supervisor's inappropriate email. The agency has asserted a claim of just cause as to some of the requests, explained that it has already produced responsive documents for others, and notified the grievant that no documents exist or that it does not believe responsive documents would be relevant for the remainder. In her compliance ruling request, the grievant asserts that the agency has improperly withheld or otherwise failed to produce the requested documents.<sup>11</sup>

#### Documents Related to Agency Investigations

The grievant seeks information related to an agency investigation that was initiated as a result of allegations she made in responses to the agency's due process notices that preceded the issuance of each of the Group II Written Notices. The agency explained that "documents and recordings related to the [agency] investigation" that was prompted by the grievant's allegations could not be produced because the investigation is still in progress. The investigation is primarily related to alleged harassment and/or other improper treatment of the grievant by other employees. We do not find that it is improper in this case for the agency to withhold documents related to its investigation of alleged misconduct by agency employees while that investigation is not yet complete.<sup>12</sup> Requiring the disclosure of such documents prior to the conclusion of the investigation could, for example, jeopardize the agency's ability to effectively gather information necessary to ensure that appropriate action is taken to address possible misconduct. Such temporary justification for nondisclosure would not extend to information that was previously in existence and has merely been gathered or collected as a part of the investigation; rather, only those documents that are created specifically in relation to the investigation would not be subject to disclosure prior to its completion.<sup>13</sup>

The grievant has further requested documents related to the agency's investigation of the workplace dispute that occurred on January 21, 2014, specifically including "a copy of [each] document's origination properties page" and "screen print[s] of file origination." The agency notified the grievant that she has already been provided with all responsive documents and that "[n]o origination properties pages, screen prints of file origination, or other such documents exist." Based on the information presented by the parties, it appears that there was no official

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<sup>10</sup> The grievant does, however, argue that the documents she has received were improperly redacted. That issue will be discussed further below.

<sup>11</sup> One such request seeks a copy of recently implemented "forms, procedures, processes and protocol(s)" for her work unit that date from May 1, 2013 to the present. The agency has produced documents in response to this request. The grievant has not alleged that the agency's production of documents was incomplete or deficient. It appears, therefore, that the agency has satisfied this particular request, and it will not be discussed further in this ruling.

<sup>12</sup> Even assuming that information relating to the investigation is relevant to the issues in the grievance, the agency has explained to EDR that no documents related to the investigation that were previously in existence have been withheld from the grievant.

<sup>13</sup> At this time, EDR takes no position as to whether materials related to and/or created as a part of the investigation are relevant to the grievance. That question may be more fully addressed later if there is a dispute as to the relevance of the documents, to the extent they exist and are not subject to a claim of just cause. See *Grievance Procedure Manual* § 8.2.

investigation of this incident. Rather, the grievant's supervisor gathered information from employees informally as part of an attempt to resolve the issue. The documents created include statements from witnesses about the incident, but there are no official investigatory findings. The grievant has presented no information to show any documents responsive to this request exist and have been improperly withheld; indeed, several statements from witnesses were forwarded to EDR with the grievance record.

Furthermore, it is not clear what documents the grievant is seeking in asking the agency to produce "origination properties page[s]" and "screen print[s] of file origination." It would appear that she is seeking metadata related to any responsive documents that have already been produced. While metadata associated with such documents may, despite the agency's assertion to the contrary, exist, we are unable to identify how requiring the agency to produce metadata in this case would result in the disclosure of any information that is relevant or material to the issues in the grievance. For example, there is no evidence to show that the grievant disputes when the documents were created or who created them. In addition, it does not appear that this information would establish the reliability or existence of the documents any more conclusively than the documents themselves. In the absence of any information to show that "origination properties page[s]" and "screen print[s] of file origination" would have any evidentiary value, we conclude that requiring the agency to collect and produce this information, assuming it amounts to metadata about these documents, would impose an undue burden in this case.

#### Documents the Agency Claims Do Not Exist

The grievant has also requested records of disciplinary actions for all employees in her work unit issued between April 1, 2013 and the present, as well as documents showing "training schedules and/or remedial training sessions" for supervisors in her work unit dating from October 25, 2012 to the present. The agency asserts that no such documents related to disciplinary actions issued to other employees exist from the time period specified by the grievant and that there are no records of the requested "training schedules and/or remedial training sessions." The grievant has presented no information to show that any documents responsive to these requests exist and have been improperly withheld by the agency. Accordingly, we find that the agency has complied with the grievance procedure with respect to these requests by notifying the grievant that no responsive documents exist.

#### Documents the Agency Claims are Irrelevant

Finally, the grievant has requested (1) records of "professional accommodations, accolades, bonuses, [and] rewards" for all employees in her work unit from October 25, 2012 to the present; (2) information related to "overtime and related justification granted to employees" in the grievant's work unit from October 25, 2012 to the present; (3) copies of the current Employee Work Profiles for certain positions in the grievant's work unit; (4) documents showing "resignations/terminations/transfers" of former employees and the hiring of new employees and supervisors in the grievant's work unit between January 1, 2007 and March 1, 2014; and (5) information about "supervisory skills, leadership and/or cultural diversity training" for supervisors in the grievant's work unit from January 1, 2010 to the present. The agency notified the grievant that all documents responsive to these requests were "being withheld as they are not deemed to be relevant to [the] grievance."

The management actions challenged in the grievance consist of two Group II Written Notices and allegedly improper statements made by the grievant's supervisor about the grievant's work performance. Having reviewed the information submitted by the parties, we are unable to determine how documents related to "professional accommodations, accolades, bonuses, [and] rewards" for other employees, overtime work performed by other employees, current Employee Work Profiles for other employees, "resignations/terminations/transfers" of former employees and the hiring of new employees, or "supervisory skills, leadership and/or cultural diversity training" for supervisors in the grievant's work unit have any relevance to the challenged management actions, and the grievant has presented no information to show that this is the case.<sup>14</sup> EDR is unable to identify any facts, for example, to demonstrate that the grievant's claims about the Written Notices and allegedly improper statements have any connection with or relation to the agency's recognition of other employees, overtime work performed by other employees, the assignment of duties to other employees, the retention and hiring of other employees, or training for supervisors in the grievant's work unit. Because it does not appear that documents responsive to these requests would be relevant to the grievance, the agency is not required to produce such information at this time. As a result, there is no basis for EDR to conclude that the agency's response to the grievant's requests was not in compliance with the grievance procedure.

#### *Redaction*

Many of the grievant's requests for documents specifically sought information in an unredacted format, which she argues is "in accordance to the grievance procedure." In her compliance ruling request to EDR, the grievant asserts that the documents she has received from the agency were improperly redacted contrary to her understanding of the document disclosure provisions of the grievance procedure. The grievance procedure, however, clearly provides that "[d]ocuments pertaining to non-parties 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>15</sup> Consequently, redactions of certain information of non-parties can be appropriate under the grievance procedure.

Although the grievant has not specifically identified what documents were allegedly improperly redacted, a sample of such documents was included with the grievance record that was forwarded to EDR. These documents consist of witness statements related to the altercation that occurred on January 21, 2014, with the witnesses' names redacted. While removing the names of witnesses to such an incident would not be appropriate in every case, we do not find that it was not in compliance with the grievance procedure here. If, for example, the grievant had been disciplined for her conduct during this workplace dispute, or if her grievance were directly challenging the agency's response to the incident, then she would, perhaps, have legitimate reasons to discover the identity of particular witnesses who had provided the agency with statements detailing their observations. In this case, however, the incident itself is not a central issue. While the agency's response to the conflict appears to have prompted the behavior for which the grievant was disciplined, the grievance does not directly challenge either the dispute or

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<sup>14</sup> In addition, the various time periods from which the grievant seeks documents appear to have no connection to the issues raised in the grievance. There is nothing, for example, to show that documents dating from approximately two to four years ago would have any relevance to the challenged management actions here, which primarily consist of two Group II Written Notices from February 2014.

<sup>15</sup> *Grievance Procedure Manual* § 8.2.

the agency's informal investigation of what occurred, but its actions in response to her conduct after the incident. Consequently, it does not appear that the redactions in this case were inappropriate and, thus, there is no basis to conclude that the agency failed to comply with the grievance procedure by redacting the documents that were produced.

*Alleged Substantial Noncompliance by the Agency*

The grievant further argues that, based on the alleged noncompliance by the first step-respondent and the additional alleged failure of the agency to produce requested documents, "the relief in [her] grievance" should be granted "and the matter resolved" in her favor. It appears that the grievant seeks to have EDR render a decision against the agency due to substantial noncompliance the grievance procedure. We do not find that such action is warranted here. While 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>16</sup> EDR favors having grievances decided on the merits rather than procedural violations. The agency's noncompliance in this case, if any, does not rise to the level that would justify such extreme action. Accordingly, the relief requested by the grievant is denied.

CONCLUSION

For the reasons set forth above, the agency has not failed to comply with the grievance procedure in this case. The first step response complies with the requirements of the grievance procedure, the agency is not required to produce the documents requested by the grievant that are discussed in this ruling, and there is no indication that any redaction of documents provided to the grievance was improper. As a result, there is no basis to render a decision against the agency for failure to comply with the grievance procedure at this time. To proceed with this grievance, the grievant must either advance her grievance to the second step or conclude her grievance **within ten workdays of the date of this ruling.**

EDR's rulings on matters of compliance are final and nonappealable.<sup>17</sup>



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Director  
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<sup>16</sup> Va. Code § 2.2-3003(G).

<sup>17</sup> *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).