

Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 25, 2013;  
Ruling No. 2013-3639; Agency: University of Mary Washington; 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 University of Mary Washington  
Ruling Number 2013-3639  
July 25, 2013

The grievant has requested a ruling regarding the University of Mary Washington's ("University's") alleged noncompliance with the grievance procedure in failing to produce requested documents.

FACTS

On November 27, 2012, the grievant was issued a Group II Written Notice for allegedly engaging in "conduct of a sexual nature" in the workplace. Subsequently, on December 27, 2012, the grievant initiated a grievance challenging the disciplinary action. During the course of his grievance, the grievant made a number of document requests to the University, which the grievant contends have been satisfied only in part. On April 17, 2013, the grievant gave written notice of noncompliance to the President of the University. After the University failed to comply with the grievant's requests, the grievant requested a compliance ruling from the Office of Employment Dispute Resolution ("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."<sup>1</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>2</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>3</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>4</sup>

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<sup>1</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>2</sup> *Grievance Procedure Manual* § 9.

<sup>3</sup> See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

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>5</sup>

In this case, the grievant asserts that the University has failed to provide all documentation responsive to his request for “all other related [sic] information to the disciplinary action against [him.]” In addition, he seeks copies of Written Notices issued to other employees and information regarding cases of sexual harassment by University employees. Each of these issues is addressed below.

#### *Information Related to the Disciplinary Action*

The grievant alleges that despite his repeated requests, the University has only provided information in a “piecemeal” manner and has failed to produce all relevant documentation within its possession. The University responds that each of the University’s responses to the grievant’s document requests has met with additional more expanded document requests, and that it has “indulged his request for every management email considering and iteration of the final documents presented.” The University further states that with respect to particular documents identified by the grievant as missing, each of the individuals involved with these documents have responded to Human Resources in writing that they have no further responsive documentation.

While the grievant opines that documentation exists that has not been produced, he has not provided EDR with evidence sufficient to make such a determination. Further, the University has affirmatively stated that all responsive documentation has been produced, and the grievant has not shown that the University’s determination should not be relied upon. Accordingly, EDR cannot agree with the grievant’s request that the University be found in noncompliance with the grievance procedure with respect to these documents.

#### *Written Notices*

The grievant further alleges that the University has failed to comply with the grievance procedure by refusing to produce a redacted copy of “all written notices issued in the past two years.” The grievant states that he needs this documentation to prove that the University has not

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<sup>5</sup> *Grievance Procedure Manual* § 8.2.

consistently applied disciplinary actions. In response, the University argues that the grievant is not entitled to this information because he has not alleged “inconsistent or misapplication of disciplinary action policy or differential treatment under the policy.”

We must disagree with the University that the grievant’s request for Written Notices does not pertain directly to his grievance. Although the grievant does not specifically allege an inconsistent application or misapplication of policy in his grievance, his challenge to his disciplinary action inherently raises such claims, and indeed, a hearing officer would necessarily consider such mitigating factors raised by the grievant at hearing.<sup>6</sup> The grievant’s request for all Written Notices for a two-year period is overly broad, however.

The grievant is entitled only to the requested information for those employees similarly situated to this grievant in terms of work responsibilities, job role and/or title, and conduct. Accordingly, the University is ordered to produce the requested redacted Written Notices for those individuals who perform work responsibilities similar or comparable to the grievant, in similar or comparable job roles and/or titles, and who have engaged in conduct similar to that which the grievant was charged **within five workdays of receipt of this ruling**. Appropriate redactions may be necessary if the requested record contains personal information of a nonparty.<sup>7</sup>

#### *Sexual Harassment Cases*

The grievant further asserts that the University is in noncompliance with the grievance procedure because it has failed to produce “copies of sexual harassment cases by the agency to demonstrate that the agency has in essence charged me with sexual harassment and has used the offense codes to redirect the process which ultimately arbitrates such accusations.” The University argues that documents related to sexual harassment are not relevant to the action.

At issue in this grievance is the conduct for which the grievant was charged and the manner in which it was disciplined: the label attached to the conduct by the University is therefore not dispositive in determining what documents are pertinent. While the grievant is not necessarily entitled to all documents relating to any sexual harassment cases, he is entitled to information regarding conduct similar to that for which he was disciplined, regardless of how such conduct was labeled by the University, by those employees similarly situated to the grievant in terms of work responsibilities and job role and/or title. However, given the confidential and sensitive nature of information regarding investigations of sexual conduct, the University will not be required to produce all documentation within its possession regarding any similar previous circumstances. Instead, the University is directed that to the extent documentation of similar conduct by similarly situated employees exists, it need only produce sufficient documentation to provide the grievant with a description of the conduct at issue and the

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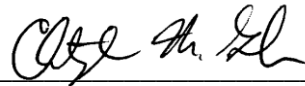
<sup>6</sup> See *Rules for Conducting Grievance Hearings* § VI(B).

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

disciplinary outcome, if any. This documentation should be redacted to the extent it contains personal information of a nonparty.<sup>8</sup>

Further, the grievant's right to receive such documents under the grievance process is not without limitation with respect to the time period at issue. Although the grievant did not apparently limit his request to any particular time period, EDR considers the same two-year period used for the Written Notices discussed above to be an appropriate time restriction with respect to this request for documentation as well. EDR therefore directs the University to produce, **within five workdays of receipt of this ruling**, documentation regarding similar conduct by similarly-situated employees during the previous two years consistent with this Ruling.

This Department's rulings on matters of compliance are final and nonappealable.<sup>9</sup>



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<sup>8</sup> See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2. As an alternative to providing the grievant with redacted copies of investigation findings or other materials relating to investigations of like conduct, the University may provide descriptions of the conduct and outcome in a summary format.

<sup>9</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).