

Issue: Compliance – Grievance Procedure (documents); Ruling Date: December 19, 2013; Ruling No. 2014-3718; Agency: Virginia Department of Transportation; Outcome: Agency 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 Transportation
Ruling Number 2014-3718
December 19, 2013

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) regarding alleged noncompliance with the grievance procedure by the Virginia Department of Transportation (the “agency”) in failing to produce requested documents.

FACTS

On August 27, 2013, the grievant submitted a request for documents pertaining to his July 10, 2013 grievance with the agency. On September 4, 2013, the agency provided a response to the grievant’s request, compiling the requested data into nine electronic files. The grievant alleges that the agency’s response was incomplete as to several requested items and accordingly advised the agency. The agency disputes that its response was incomplete. The grievant 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, in a timely fashion.”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

Moreover, EDR has 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

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

² *Id.* at § 9.

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

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.⁴

In this case, the document request at issue was submitted to the agency by the grievant on or about August 27, 2013, and consists of eleven numbered items. The requests are discussed below in the numbered order in which they were originally submitted to the agency as well as with certain general objections.

General Objections

First, the grievant argues that the agency did not provide all documentation to him in its original format, per his request. He states that he made this request to obtain the metadata for each document. While metadata is not entirely irrelevant in every instance, we can find no basis in the *Grievance Procedure Manual* to require the production of documents in their original format in this case. Thus, EDR cannot find noncompliance on this basis.

The grievant also argues that the employee responding to his document request on behalf of the agency (Ms. M) improperly limited her search to only those documents in her personal possession. Upon EDR’s investigation, the agency clarified that Ms. M’s response to the grievant’s document request was based upon a search through the entirety of the agency’s records. While Ms. M’s initial response to the grievant may not have clearly indicated that fact, the agency has verified that its search did encompass all agency records, as per the grievant’s request, and we see no information presented that would indicate otherwise.

Objections to Specific Requests

1. “All documentation, from January 2012 to present, related to the potential and/or possibility of a future role reclassification of Position [#], Human Resources Manager III.”
2. “All documentation, from October 2010 to present, related to the potential, possibility, and/or actual change in working title of Position [#], Human Resources Manager III.”

⁴ *Grievance Procedure Manual* § 8.2.

3. *All documentation, from October 2010 to present, related to the potential and/or possibility of the elimination of Position [#], Human Resources Manager III.*”

The grievant asserts that the agency provided only limited documentation responsive to these requests. Specifically, he argues that the agency possesses documentation, or the ability to retrieve such information, that would be responsive to these requests, yet did not provide it to him. He alleges that the following items should have been produced, but were not:

- A draft EWP submitted to the VDOT HR office on or about June 17, 2013

EDR has verified that this document has been produced in the agency’s original response, and thus, no non-compliance exists with respect to this request.

- Correspondence referenced in a 7/12/13 email regarding a request that [a member of the agency’s human resource staff] sent to [Ms. M]

The agency indicates that this email cannot be located in the files of either employee, and asserts that it has made a good faith effort to locate this email. EDR has no authority to order VITA to search agency employees’ email accounts for further responsive documents.

- Handwritten notes taken by [an agency employee] during any meeting where she was instructed by [Ms. M] to draft an EWP for [the grievant]

The agency indicates that no such responsive notes exist. In the absence of evidence demonstrating that such notes exist, there is no basis here for a finding that the agency has not complied with the grievance procedure.

- HR’s correspondence to [Ms. M] regarding drafting a new EWP for [the grievant]

The agency indicates that no correspondence other than that which has already been produced exists. The grievant has presented no further evidence as to what documents the agency may not have produced. In the absence of such information, we do not find that the agency has failed to comply with the grievance procedure with respect to this claim.

Via these requests, the grievant seeks information regarding a change made to his working title after November 2011. The agency indicates that the grievant’s working title did change in May 2013, as part of a Compensation Study, in order to better align his working title with his actual job functions. Information documenting this change was provided to the grievant, and accordingly, there exists no basis for a finding of noncompliance.⁵

⁵ As to the grievant’s requests numbered 4, 5, and 6, the grievant acknowledges that the agency has produced information related to these requests.

7. *“All documentation, from January 2013 to present, related to being returned to a Payband 7 position within the Administration Directorate.”*
8. *“All documentation, from January 2013 to present, related to the agency’s decision to continue my assignment on the [project] beyond February 2013.”*

The agency asserts that it has provided the grievant with all responsive information that exists regarding these requests. However, the grievant continues to be dissatisfied with the agency’s responses and believes that additional documentation exists that has not been produced by the agency. The grievant argues that “it is a known fact” that certain employees take handwritten notes when participating in meetings. This belief, however, does not present sufficient grounds to second-guess the agency’s direct statement that no such responsive documentation exists. In the absence of evidence indicating otherwise, we do not find that the agency has failed to comply with the grievance procedure with respect to this claim.

9. *“Identify all participants in a meeting of VDOT senior managers on or about late October 2010 or November 2010 to discuss and agree upon the agency’s first step response to my October 2010 grievance.”*

This request cannot properly be considered a request for documents. Under the *Grievance Procedure Manual*, the agency must produce responsive documents in its possession or control.⁶ It is not required to create any documents in response to the grievant’s requests if such documents do not exist.⁷

10. *“All documentation, including but not limited to meeting notes, briefing documents, summaries, emails, etc. developed by [Ms. R] as part of my October 2010 and May 2011 grievances that is related to the agency’s commitment to return me to a Payband 7 position in the Administration Directorate.”*

The agency asserts that the grievant has been provided with all responsive documentation regarding this request.⁸ Further, the agency indicates that Ms. R is no longer employed by the agency and any documents stored on her personal hard drive are no longer accessible. As mentioned above, EDR cannot order VITA to search agency accounts for responsive documents. No additional information has been provided as evidence that the agency has withheld documents responsive to this request. Thus, we do not find that the agency has failed to comply with the grievance procedure with respect to this claim.

11. *“Documentation that identifies all new or reassigned/reclassified positions created by the agency between October 2012 to present for the purposes*

⁶ See EDR Ruling No. 2009-2087.

⁷ Va. Code § 2.2-3003(E).

⁸ It appears that the grievant may have also sought these and perhaps other documents under the provisions of FOIA. EDR has no authority to enforce the provisions of FOIA. Rather, a person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA’s provisions in a court of law. Va. Code § 2.2-3713; see EDR Ruling No. 2009-2173 n.22; EDR Ruling No. 2006-1172.

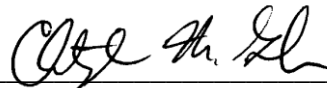
of hiring new employees, the placement of employees returning from temporary or other type of assignment, etc. Request is for a listing of positions to include, but not be limited to, the former position number, payband, role title, and working title and the new/current position number, payband, role title, and working title.”

The grievant indicates that such information is relevant to the relief he requests, as the agency made the commitment to return him to his old position, which may or may not still exist. The agency responds that this documentation does not exist, as at one time it routinely produced reports tracking such information, but no longer does. However, the grievant asserts that while a single consolidated report may not exist, agency records contain such information that could be easily extracted and produced.

Documents containing information responsive to this request may result in the disclosure of some amount of potentially relevant evidence. However, this request seeks all information of this type as it pertains to the entire agency. Responsive documents would undoubtedly include information created in the ordinary course of business that would be entirely irrelevant to the management actions at issue. As a result, EDR concludes that these requests are overly broad and production would be unduly burdensome, and, therefore, there is just cause for the agency to not produce documents responsive to this request.

CONCLUSION

For the preceding reasons, there is no basis to find that the agency has not complied with the grievance procedure. EDR's rulings on matters of compliance are final and nonappealable.⁹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

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