

Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 22, 2013;  
Ruling No. 2014-3650; Agency: Department of Motor Vehicles; 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 Motor Vehicles  
EDR Ruling No. 2014-3650  
July 22, 2013

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management regarding alleged noncompliance with the grievance procedure by the Department of Motor Vehicles (the “agency”) regarding issues with the production of documents.

FACTS

The procedural and substantive facts of this case are set forth in EDR’s first compliance ruling in this case (EDR Ruling Number 2013-3604) and are incorporated herein by reference. In EDR Ruling Number 2013-3604, the agency was ordered to respond to document requests submitted by the grievant.<sup>1</sup>

On June 13, 2013, the agency produced 2 CD’s containing electronic copies of documents and approximately 60 pages of printed documents. The agency stated that it was not producing documents that were nonresponsive, irrelevant or privileged. The agency also submitted a request for payment from the grievant for the actual costs incurred in producing the documents, in the amount of \$862.00. The grievant submitted a notice of noncompliance with the grievance procedure to the agency on June 18, 2013, claiming that the agency had not properly explained its claims regarding any documents that were withheld and objecting to the agency’s request for payment of its costs to produce the documents.<sup>2</sup> The grievant then requested a compliance ruling from EDR on July 3, 2013.

DISCUSSION

In EDR Ruling Number 2013-3604, EDR ordered the agency to respond to the grievant’s document requests “consistent with Section 8.2 of the *Grievance Procedure Manual*.”<sup>3</sup> It appears from the parties’ correspondence that there may have been some misunderstanding about the

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<sup>1</sup> EDR Ruling No. 2013-3604.

<sup>2</sup> It seems there was initially some confusion as to the extent of the agency’s production of documents. The grievant did not receive the CDs at first, but the CDs have since been delivered to the grievant. The grievant has stated that she is not claiming the agency has failed to produce requested documents under the grievance procedure.

<sup>3</sup> EDR Ruling No. 2013-3604; *see also Grievance Procedure Manual* § 8.2.

nature of this order. The agency was ordered to provide a response *either* by producing the documents as requested *or* explaining why production was not possible. EDR does not agree with the agency's conclusion that it was "ordered to produce documents by EDR."<sup>4</sup> The grievance procedure is intended to resolve workplace disputes fairly and promptly and allows for the discovery of documents relating to grieved management actions.<sup>5</sup> EDR Ruling Number 2013-3604 ordered the agency only to respond to the grievant's requests, which to that point had gone without response, in furtherance of those goals and as a means of continuing this grievance's progress through the management steps.

### *Charges for the Production of Documents*

The *Grievance Procedure Manual* provides that any party requesting documents "may be charged a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents."<sup>6</sup> In interpreting this section, EDR will look to other analogous laws and regulations for guidance if needed. Principles and approaches arising under the Virginia Freedom of Information Act ("FOIA") are an immediately relevant resource.<sup>7</sup> For instance, under FOIA, an agency may request payment of a deposit in advance before producing documents in certain cases.<sup>8</sup> Such a practice would appear to be reasonably applicable and useable under the grievance process. However, EDR must also review whether the agency's proposed charges were reasonable under the facts of this case.

### Actual Time Spent

The agency may only charge the grievant for the actual time spent on the document collection and production effort.<sup>9</sup> In this case, the agency selected a single employee to collect the documents requested by the grievant. Over the course of approximately five days, she performed at least twenty-one hours of work identifying, sorting, compiling, and reviewing documents to be provided to the grievant. The documents in question included interview transcripts, investigative files and notes, agency policies, and emails. The agency was unable to estimate the total number of documents the employee reviewed, but ultimately produced documents to the grievant totaling approximately 2,500 to 3,000 pages in both paper and electronic form. According to the agency, the majority of documents reviewed and produced were emails. The agency did not include any time seeking documents from other employees or copying and mailing responsive documents to the grievant in its calculation of actual time spent by the reviewing employee. Based on the tasks performed by the reviewing employee, the agency's information about the volume of documents produced, and its decision not to request payment for administrative duties, it appears that the agency's assessment of the amount of time

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<sup>4</sup> The ruling specifically stated that EDR was not addressing whether the requested documents were relevant to the grievance, a prerequisite for EDR to order actual production of documents versus a response to a request.

<sup>5</sup> See *Grievance Procedure Manual* §§ 1.1, 8.2.

<sup>6</sup> *Grievance Procedure Manual* § 8.2.

<sup>7</sup> See, e.g., EDR Ruling Nos. 2012-3149 through 2012-3163, 2012-3245 through 2012-3252, and 2012-3268 through 2012-3281; EDR Ruling Nos. 2010-2628, 2010-2629.

<sup>8</sup> Va. Code § 2.2-3704. Although in this case the agency did not estimate the total cost of production or require payment of a deposit in advance, this approach may be prudent in the future.

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

spent, as represented to the grievant and reflected in the agency's request for payment, was reasonable.

### Hourly Rates

The agency's current estimated costs are also based on the salary, broken down to an hourly rate of \$41.08, of the person who actually conducted the collection and review of the documents. While an agency is certainly free to have any employee that it chooses perform tasks related to the search for and production of documents, it would be unreasonable to allow the agency to pass on to a requesting party the salary cost of a high level manager when an employee with a lesser salary would be equally qualified to perform the task.<sup>10</sup>

In a less complex case, the agency's choice of a high level human resources manager to conduct a review of the documents sought in this case might be unreasonable. This grievance, however, along with other grievances related to the same issues and filed by other grievants, presents a multiplicity of issues, particularly with respect to the production of documents. This grievance has already been the subject of one compliance ruling relating to production of documents, and other pending grievances related to the issues raised in this grievance have been the subject of multiple compliance rulings also relating to production of documents. The issues raised in this grievance are also currently the subject of several other administrative and judicial proceedings. Taking these factors into account, it is understandable that the agency would choose to have its review of documents conducted by an employee with a greater-than-average level of authority and expertise.

Furthermore, the employee selected to conduct the review of documents participated in an investigation and other agency activities that were related to the grieved issues, and consequently is familiar with those issues and with the types of documents that were requested by the grievant. Her work consisted of such tasks as the following: (1) reviewing all relevant documents in the agency's possession and identifying those that were responsive to the grievant's particular requests; (2) reading agency policies in search of specific provisions named in the grievant's requests; (3) compiling all responsive documents and preparing them for production; and (4) reviewing responsive documents for private information and redacting such documents as appropriate. The agency did not pass on to the grievant the costs for the employee's time spent copying and mailing documents or seeking documents from other agency employees. Rather, it is seeking payment only for actual hours necessary for a qualified employee to actually conduct an intensive review of the documents to be produced. Finally, the grievant has presented no specific information as to why the costs quoted or hours spent by the agency are unreasonable, other than her objection to the agency's request for payment generally.

On the whole, it does not appear that the production of documents in this particular case could have been performed as effectively or efficiently by a less experienced or lower salaried employee, and as a result EDR concludes that the agency's choice of employee to conduct the search for documents, and consequently the hourly rate of \$41.08 charged to the grievant, is

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<sup>10</sup> See EDR Ruling No. 2011-2921.

reasonable. Consistent with the above discussion of the number of hours spent by the agency on document collection and production, the agency's rate of \$41.08 for 21 hours amounts to a total of \$862.68, which the agency has rounded to \$862.00. Consequently, EDR will not order a reduction of the agency's request for payment submitted to the grievant.

### *Privileged and Irrelevant Documents*

The grievant also argues that the agency's explanation for not producing documents that it determined were irrelevant or that were protected by a legal privilege is inadequate. She essentially claims that the agency was required to provide of written explanation of its determination that certain documents were irrelevant and to "identify each claim of privilege separately" in the form of a privilege log, and has not done so. 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."<sup>11</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>12</sup> If a party withholds documents due to a claim of irrelevance or just cause, including legal privilege, then the withholding party must provide "a written explanation of each claim" to the requesting party.<sup>13</sup> The grievance procedure does not require, nor has EDR ever ordered, the creation of a privilege log detailing documents withheld based on a claim of irrelevance or just cause. Thus, the agency will not be directed to create a privilege log.

In this case, the agency's statement that it "is not producing" any privileged documents does not address whether any documents responsive to any particular document request may have actually been withheld based on a claim of privilege. To the extent the agency has withheld documents, if any, based on a claim of privilege, it must provide the grievant with a written explanation of those claims as to each document request, where applicable, consistent with the grievance procedure **within ten workdays of its receipt of this ruling**.<sup>14</sup> Any further dispute between the parties as to documents that have been withheld based on a claim of just cause may be addressed by EDR in a compliance ruling.

The agency further stated it produced only responsive, relevant documents, but did not address how it assessed documents for relevance to the grieved management actions. While explaining that it considered many of the grievant's requests "confusing" due to the nature and scope of the documents sought, the agency provided no explanation as to how it interpreted such requests. Indeed, EDR must agree with the agency that many documents responsive to the grievant's requests could be far outside the scope of the issues in this case. For example, the grievant sought "any and all communication[s] and/or documents relating to [the grievant's]

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<sup>11</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

<sup>12</sup> *Id.* at § 9.

<sup>13</sup> *Id.* at § 8.2.

<sup>14</sup> For example, stating that additional responsive documents exist as to a particular document request, but have been withheld according to an identified privilege, would be sufficient.

performance while at DMV.” Responsive documents would clearly include information created throughout the entire length of the grievant’s employment and far beyond the scope of this grievance. In response to such requests, however, the agency has not explained how it identified relevant documents or construed the requests to capture only relevant information. Accordingly, the agency must provide the grievant with a written explanation of its claims regarding irrelevant documents as to each document request, where applicable, consistent with the grievance procedure **within ten workdays of its receipt of this ruling.**<sup>15</sup> Any further dispute between the parties as to documents that have been withheld based on a claim of irrelevance may be addressed by EDR in a compliance ruling.

#### CONCLUSION AND ADDITIONAL MATTERS

Based on the discussion above, the grievant is ordered to provide payment to the agency for identified costs incurred in the production of documents, unless the parties reach some agreement otherwise. The agency is ordered to provide the grievant with a written explanation of any claims of just cause as to responsive documents that have been withheld consistent with the directives in this ruling **within ten workdays of its receipt of this ruling.**

In closing, EDR cannot overstate the importance of moving all pending grievances through the management resolution steps as quickly and efficiently as possible upon receipt of this compliance ruling. The parties are encouraged to make a good faith effort to resolve any disputes that may arise before seeking further rulings from EDR.

EDR’s rulings on matters of compliance are final and nonappealable.<sup>16</sup>



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<sup>15</sup> The agency may state, for example, that responsive documents exist as to a particular document request but have been withheld and provide an explanation of the claims or parameters of irrelevance.

<sup>16</sup> *Id.* at §§ 2.2-1202.1(5), 2.2-3003(G).