

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 27, 2013; Ruling No. 2014-3697; Agency: Department of Motor Vehicles; Outcome: Grievant 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 Number 2014-3697  
September 27, 2013

The Department of Motor Vehicles (the “agency”) 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 grievant in not providing requested documents.

FACTS

The procedural and substantive facts of this case are set forth in EDR’s previous compliance ruling on this matter, EDR Ruling Numbers 2013-3603, 2013-3605, issued May 28, 2013, and are incorporated herein by reference. The grievant and the agency are engaged in an ongoing dispute regarding disclosure of documents. In EDR Ruling Numbers 2013-3603, 2013-3605, EDR ruled that the agency’s request for “copies of all documents . . . in [the grievant’s] possession that relate to the actions grieved in each of [his] current active grievances” was overly broad and directed the agency to further refine and/or justify that request.

On July 1, 2013, the agency submitted a revised document request to the grievant. The grievant responded on July 5, 2013, stating that the agency’s requests were overly broad and unduly burdensome and sought to obtain privileged materials. The agency submitted an additional request for documents on July 26, 2013. The grievant responded on July 26, 2013, stating again that the agency’s requests were overly broad and unduly burdensome and sought irrelevant documents, documents not in the grievant’s possession, documents already in the agency’s possession, and/or privileged documents.

After he did not produce any documents, the agency notified the grievant that he was not in compliance with the grievance procedure on August 8, 2013, and requested a compliance ruling from EDR on August 16, 2013.

DISCUSSION

*Agency’s Document Requests*

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>

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>

#### The July 1, 2013 Requests

The agency’s July 1, 2013 document request seeks: (1) all documents relating to the grievant’s and other nonparties’ communications (within a period of August 1, 2011 and March 29, 2013<sup>6</sup>) with specific individuals “that in any manner supports and/or relates to the grievance dated 3/29/2013, or which might tend to support or refute the Agency’s reason for placing [the grievant] on suspension and/or issuing an allegation letter to him”; and (2) all documents created during the same time period “that in any way support and/or relate to the grievance of 3/29/2013, or which might tend to support or refute the Agency’s reason for placing [the grievant] on suspension and/or issuing an allegation letter to him.” The grievant argues these requests are “overly broad [and] unduly burdensome.” We disagree with the grievant’s contention that these requests are overly broad and find that they are sufficiently tailored to capture information that is relevant to the management actions or omissions at issue. Unlike the agency’s request for “all documents . . . in [the grievant’s] possession that relate to the actions grieved in each of [his]

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

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

<sup>3</sup> See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

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

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

<sup>6</sup> In a subsequent communication on July 26, 2013, the agency specified this time period for its July 1 request.

current active grievances” addressed in EDR’s previous ruling on this matter,<sup>7</sup> these requests are appropriate in that they specifically target documents that are related to the agency’s decision to issue an allegation letter and suspend the grievant and documents relating to the grievant’s communications with certain individuals in relation to those same actions. In addition, these two requests seek documents that were created within a specific time period during which events related to the grieved management actions occurred.<sup>8</sup>

In addition, the grievant also argues that (1) these requests seek documents that are protected by the attorney-client privilege and/or the attorney work product privilege, (2) some responsive documents are not in his possession, and (3) these requests would require him to produce documents that he previously received from the agency in response to his own requests for documents. The grievance procedure does not require a party to produce documents that are protected by a legal privilege.<sup>9</sup> Further, the grievant is required only to “search [his] records to ensure that all [] relevant documents are provided,” and need not search for or produce documents that are not in his (or his attorney’s) possession.<sup>10</sup> In addition, any documents that the agency has already provided to the grievant need not be produced again in response to the agency’s requests. That the agency’s document request could be construed to seek documents that fall into any or all of the objected categories does not justify the grievant’s universal objection. Rather, the grievant is under a duty to provide responsive documents not falling into one of the objected-to categories (documents protected by privilege; documents not in the grievant’s (or his attorney’s) possession; documents previously produced to the grievant by the agency). Accordingly, the grievant is ordered to respond to the preceding requests in a manner consistent with the grievance procedure and the provisions of this ruling **within ten workdays of receipt of this ruling.**

#### The July 26, 2013 Requests

The agency’s July 26, 2013 request for documents seeks the following: (1)(a) all text messages sent or received between September 12, 2012 and September 16, 2012 by the grievant and certain other individuals that are related to the agency, their employment with the agency, or certain workplace issues; (1)(b) all text messages between the grievant and certain other individuals sent and received during their working time from September 12, 2012 to September 16, 2012, regardless of their content; (2) all documents used by the grievant to engage in “psych ops” through his state email account; (3) all “notes, journals, calendars or personal data” relating to the agency, employees of the agency, or agency management either created between, or referring to workplace incidents that occurred between August 1, 2011 and March 29, 2013; and (4) “all documents related to the grievant’s pending grievance and the actions grieved.” The grievant argues that these requests are “overly broad and unduly burdensome.”

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<sup>7</sup> See EDR Ruling Nos. 2013-3603, 2013-3605.

<sup>8</sup> See also EDR Ruling No. 2013-3642 (discussing the span of time from which documents were sought in a related case).

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

<sup>10</sup> Va. Code § 2.2-3003(E).

Requests 1(a) and 2 are sufficiently tailored to capture documents that are relevant to the management actions or omissions at issue. Documents responsive to Request 1(a), for example, would include information about the grievant's communications with certain individuals regarding workplace disputes that are closely connected to this grievance. Request 2 seeks information related to the grievant's use of his state email account for "psych ops," which was referenced in the agency's March 6, 2013 allegation letter as part of the alleged misconduct for which the grievant could be disciplined. We disagree with the grievant's contention that these requests are overly broad and find that they are sufficiently tailored to capture information that is relevant to the management actions or omissions at issue. In addition, Requests 1(a) and 2 specifically target documents related the grievant's communications with certain individuals about the subject matter of this grievance, as well as conduct that was directly referenced in the challenged allegation letter.

Request 1(b), as currently stated, is overly broad. While some documents responsive to this request may be relevant to the management actions at issue, production of all responsive documents could also require the disclosure of irrelevant and personal information. For example, the production of "all text messages sent or received" by the individuals in question "regardless of the content" could include personal, non-grievance related information about some or all of the individuals involved, and therefore does not appear to be stated so as to only result in the disclosure of information that is related to the grievance. Request 1(b) could also be seen as particularly intrusive in that it seeks information from the grievant's personal phone, when combined with the broad scope of the request itself.

Request 3 seeks other documents in the grievant's possession that relate to "DMV, DMV employees or management, prepared or referencing incidents or conduct that occurred on August 1, 2011 through March 29, 2013." The grievant argues that complying with this request would require him to produce documents that are not in his possession and/or produce documents that are already in the agency's possession. As stated above, the grievant is not required to produce documents that are not in his possession. Further, to the extent that any documents responsive to these requests were previously given to the grievant by the agency in response to the grievant's document requests, such documents need not be produced again.

However, Request 3, as it is currently phrased, seeks information far outside the challenged management actions. Responsive documents could include, for example, information about agency employees or "incidents or conduct" that occurred during the appropriate time period that are entirely unrelated to the issues that are the subject of this grievance. Accordingly, the grievant is not required to produce all documents that might be viewed as responsive to this request. We do, however, find that it is reasonable for the grievant to produce documents that are related to events, individuals, or conduct referenced in the agency's allegation letter of March 6, 2013 and/or other management actions or inactions grieved in the active grievance. Any such documents in the grievant's (or his attorney's) possession must be produced.

Request 4, which seeks "all documents relating to the pending grievance and the actions grieved," is too indefinite a request under the grievance procedure for EDR to determine whether any production of documents would be compliant in this case. However, EDR's ruling in this

regard is not meant to limit any party's ability to request and receive relevant and appropriate documentation from the opposing party. Indeed, compliant responses to the agency's other document requests as addressed above would appear to encompass a sufficiently comprehensive scope of relevant documentation. Thus, EDR will not require a further additional or separate response to Request 4 in this case.

#### CONCLUSION

For the reasons set forth above, the grievant is ordered to respond to the agency's requests in a manner consistent with the grievance procedure and the provisions of this ruling **within ten workdays of receipt of this ruling**. In addition, the grievant has also submitted a request for payment of the estimated costs associated with production of the documents requested by the agency. It is unclear from the grievant's estimate how this ruling will alter the extent of the search and/or production of documents as reflected in his request for payment. If the grievant still wishes to seek payment from the agency, he should submit a new statement, assessing the estimated cost of production consistent with the terms of this ruling. Upon receiving the grievant's request for payment, the agency must provide payment of a deposit to the grievant before he is required to produce documents, unless the parties reach some agreement otherwise. Absent such an agreement, the agency must provide the grievant with the requested deposit within five workdays of receipt of the grievant's revised cost estimate to proceed with these document requests. If additional time is needed to obtain appropriate funds, EDR will entertain a request from the agency within five workdays of its receipt of the cost estimate. If no such extension is entered and the deposit is not provided within the given deadline, the document requests will be considered waived.

EDR's rulings on matters of compliance are final and nonappealable.<sup>11</sup>



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<sup>11</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).