

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 27, 2013; Ruling No. 2014-3698; 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. 2014-3698
September 27, 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”) in failing to produce requested documents.

FACTS

The procedural and substantive facts of this case are set forth in EDR’s first compliance ruling in this matter, EDR Ruling Numbers 2013-3603, 2013-3605, issued May 28, 2013, and are incorporated herein by reference. On July 5, 2013, the grievant submitted a revised request for documents consisting of twenty-two separate requests. The agency provided a comprehensive response on July 26, 2013, in which it produced some documents and objected to some of the grievant’s requests. The grievant notified the agency that it was not in compliance with the grievance procedure on August 2, 2013 and, on August 20, 2013, he sought a compliance ruling from EDR.¹

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.”² 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.”³ 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.⁴ The statute further states that “[d]ocuments

¹ This ruling will use placeholder names for individuals named in the grievant’s requests for documents. The parties may remedy any confusion as to the specific individuals indicated by referring to unredacted copies of their correspondence.

² Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

³ *Grievance Procedure Manual* § 9.

⁴ *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936.

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.”⁵

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.⁶

Document Requests in Dispute

The grievant submitted a list of twenty-two separate categories of requested documents to the agency on July 5, 2013. In its response on July 26, 2013 the agency responded to each of the twenty-two requests. The agency has already produced relevant documents in response to several of these requests, and has objected to others. This ruling will address only those document requests over which disputes continue to exist or that otherwise require further discussion from EDR. Such requests are discussed below in the numbered order in which they were originally submitted to the agency.

Requests 1 through 10⁷

The grievant has requested all emails sent to and from ten specific employees of the agency between September 13, 2012 and September 21, 2012. The agency argues that these requests are overly broad and seek information not relevant to the grievance, and that production of responsive documents would be unduly burdensome.

As currently stated, the grievant’s requests do not distinguish between ordinary, work-related correspondence and communications specifically related to the management actions he is challenging, namely, the agency’s decision to place him on pre-disciplinary suspension and a

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

⁶ *Grievance Procedure Manual* § 8.2.

⁷ The grievant has advised EDR that Requests 1 through 9 were also submitted to the agency as requests for documents pursuant to the Freedom of Information Act (“FOIA”) and are currently the subject of litigation. 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. This ruling determines only matters of compliance with the grievance procedure and has no bearing on, nor is it controlled by, the outcome of the action related to the FOIA requests.

notice of intent to issue disciplinary action that was issued to the grievant on March 6, 2013 (the "Allegation Letter"). Responsive emails would undoubtedly include a large volume of information that would be, in large part, irrelevant to the management actions at issue. As a result, these requests are overly broad and production of all responsive documents would be unduly burdensome. However, we do find that it is reasonable in this case for the agency to produce emails that are responsive to these requests and that also relate to the placement of the grievant on pre-disciplinary leave, the issuance of the Allegation Letter, and/or statements or information presented in the Allegation Letter.

Request 11

The grievant also seeks "[a]ll transcripts and interview notes of interviews of [Employee D] not previously produced." He argues that Employee D's "behavior [] and her interaction with other employees of the agency" is a "central issue" to his grievance, and that any interview or investigation into her conduct is relevant. The agency asserts that this request is overly broad and that production may result in the disclosure of information unrelated to the grievance. The agency has further informed EDR that the grievant has already received some documents responsive to Request 11, and believes it is in possession of only one additional relevant set of notes made by an investigator that were not previously given to the grievant. EDR has received no information to indicate that these notes are not relevant to the management actions at issue. Accordingly, the notes in question must be produced, provided there is no claim of just cause.

Request 14

The grievant requests "all emails serving as the basis for the written notice of emails sent as 'PSYCH OPS' [psychological operations] intentionally designed to 'get a rise' out of management." The agency claims that it does not know what emails the grievant created when he used his state email account in this way.

This request is confusing, in part because the grievant is not currently challenging a Written Notice, but rather a pre-disciplinary suspension and the issuance of the Allegation Letter. The Allegation Letter, however, does refer to emails of the type contemplated by this request. We will, therefore, treat the grievant's request as seeking all emails used to support the statements in the Allegation Letter about the grievant's alleged use of his email account in a way that was seemingly intended to confuse or harass agency management. The agency must produce documents that it used to support its statements in the Allegation Letter regarding the grievant's alleged use of his email account to engage in this type of conduct, to the extent they have not already been provided. Beyond these types of records, EDR is unable to determine how any other documents, if they exist, are responsive and/or relevant to the active grievance.

Requests 17 and 18

The grievant has requested that the agency produce "all notes (handwritten or otherwise), reports, and memoranda" drafted by two employees in connection with their "investigation or review of the activities and complaints relating to [Employee D]." He claims that the agency is

in possession of responsive documents that relate to “interviews and findings of an investigation into the conduct of [Employee D]” that demonstrate the agency’s motive to retaliate against the grievant. The agency asserts that these requests are overly broad and that production may result in the disclosure of information unrelated to the grievance.

The grievant seems largely to argue that the agency, in response to previous document requests similar to Requests 17 and 18, did not produce certain “typewritten notes” relating to an investigation of Employee D’s conduct, and that these notes were subsequently provided to another agency as part of a separate administrative proceeding. The agency has informed EDR that it cannot identify the “typewritten notes” to which the grievant is referring; the grievant has clarified that he believes the agency is in possession of handwritten and/or typewritten notes that relate to an investigation of Employee D, made by one of the employees referred to in Requests 17 and 18. EDR has reviewed nothing to suggest that these notes are not relevant to the grieved management actions and, provided there is no claim of just cause, they must be produced by the agency.

It is unclear if the grievant seeks any additional documents in addition to the typewritten notes discussed above, or if there are additional responsive documents in the agency’s possession besides those that were already disclosed to the grievant in response to his previous requests. If the grievant is requesting documents in addition to the notes discussed above, we find that it is reasonable for the agency to produce only those documents that relate to the placement of the grievant on pre-disciplinary leave, the issuance of the Allegation Letter, and/or statements or information presented in the Allegation Letter.

Request 21

The grievant further seeks “all recordings made by [Employee D].” He claims that these recordings are relevant because they show that the agency retaliated against him and that Employee D engaged in certain types of conduct. The agency argues that it is only in possession of a single recording made by Employee D, and that this recording involves a confidential personnel matter unrelated to the grievant.

While the grievant argues that this recording served as the basis of a 2012 allegation letter and is relevant to his claims regarding Employee D, we are not persuaded that a recording of Employee D discussing personnel matters with another agency employee is relevant to the challenged management actions. Additionally, the confidential nature of the recording weighs against disclosure, especially because the grievant was not a party to the recorded conversation and, therefore, is not directly connected to whatever is discussed in the recording. Accordingly, we find that the recording identified by the agency is not relevant to the grievance and need not be produced.

Request 22

This grievant has requested documents relating to “any and all complaints made by [Employee D] relating to [the grievant].” The grievant seems to argue that this information is relevant because it will show that the agency engaged in a campaign of retaliatory action against him. The agency claims that this request is overly broad.

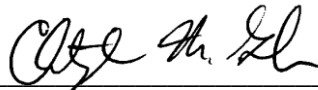
This request, as currently stated, seeks any documents relating to complaints made by Employee D regarding the grievant, regardless of the relationship of any such complaints to the management actions at issue. As such, we find that in responding to this request the agency is required to produce only those documents that relate to the placement of the grievant on pre-disciplinary leave, the issuance of the Allegation Letter, and/or statements or information presented in the Allegation Letter. Other responsive documents that have no connection to the grievant and/or are not relevant to the management actions at issue need not be produced.

CONCLUSION

The agency is ordered to produce documents that are responsive to the requests as discussed above **within ten workdays of its receipt of this ruling**. The agency has also submitted a request for payment of a deposit for the cost of collection and production to the grievant. This ruling may have either broadened or narrowed the scope of production as reflected in the estimate. If the agency still wishes to seek payment from the grievant pursuant to the grievance procedure, it must submit a revised estimate of the cost of collection and production of the documents to be disclosed **within five workdays of its receipt of this ruling**.

The grievant must provide payment of a deposit to the agency before it is required to produce documents, unless the parties reach some agreement otherwise. Absent such an agreement, the grievant must provide the agency with the requested deposit within five workdays of his receipt of the agency’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 grievant within five workdays of his 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.⁸



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⁸ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).