

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 30, 2013; Ruling No. 2014-3716; Agency: Department of Motor Vehicles; Outcome: Agency in Compliance, Grievant in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

RECONSIDERED COMPLIANCE RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2014-3716
September 30, 2013

The grievant and the Department of Motor Vehicles (the “agency”) have each asked the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management to reconsider certain compliance determinations in EDR Ruling Number 2014-3663. The parties’ respective arguments are addressed below.

DISCUSSION¹

The majority of EDR Ruling No. 2014-3663 addressed the agency’s estimated costs for collection and production of an extensive amount of emails requested by the grievant. As stated in that ruling, based on the information provided to EDR, individual email account holders searched their own emails for potentially relevant documents, which were then provided to another agency employee (“the Reviewer”) for further consideration of relevance, privilege, and redactions before being produced. In addressing these two levels of review, EDR stated, in part:

Based on EDR’s investigation into these matters, we have been unable to clearly understand the method by which the individual agency employees collected the potentially relevant scope of emails. We have also been unable to clearly understand the extent to which the time spent by the Reviewer on the back-end was split between review and redaction. However, we are left with an inescapable question of whether there was duplication of effort used to collect and determine the relevant scope of emails both on the front-end (by the individual employees’ searches of their emails) and on the back-end by the Reviewer. As stated above, the agency’s estimate for the collection of emails by the individual employees appears, at this time, reasonable. However, the agency should not be able to charge the grievant for an additional level of review of the emails by the Reviewer in an effort to collect the relevant scope of documents. Costs for the Reviewer to redact the emails are appropriate, as stated, but not the secondary relevancy review. Such an effort appears, based on the information provided to

¹ See EDR Ruling Number 2014-3663 for the factual background of this case. The underlying facts are set forth in that ruling and will not be repeated here.

EDR, to be potentially duplicative and, therefore, unreasonable as a cost to pass on to the grievant.²

It was additionally noted that “[e]ven if there is not truly a duplication of effort, we have not been persuaded by the information presented to EDR that the total time estimated for the agency’s collection, review, and presumed eventual production of these emails is reasonable.”³ As a result, EDR stated that the agency could charge either the full amount of the individual email account holders’ searches or the full amount of the Reviewer’s time, but not both as charges for the collection of relevant emails. The Reviewer’s estimated time for redaction of these emails was also capped at 16 hours.

Agency’s Arguments

In its request for reconsideration, the agency asserts that EDR’s determination as to the reasonableness of the cost estimate described above is flawed, maintaining that its two levels of review is the most efficient and cost-effective method of searching for and producing the documents requested by the grievant. As an initial matter, we note that the agency’s request for reconsideration seems to advance the position that EDR has ordered the agency to change the manner in which it conducts its document production efforts by modifying the agency’s cost estimate. This is not the case. The agency is free to search for, review, and produce documents in any way that it chooses. EDR’s role is to review any request for payment that is the subject of a compliance ruling to ensure that it is consistent with the grievance procedure.⁴

Furthermore, we do not disagree with the agency’s contention that its choice of how to search for and produce documents may be more efficient and/or cost-effective than other methods. The grievance procedure, however, provides that the requesting party may be charged “a *reasonable amount* not to exceed the actual cost to retrieve and duplicate the documents.”⁵ EDR found that it was not reasonable for the agency to charge the full estimated cost of production, a total of \$6,600.00, in this case. In addition, the agency is free to calculate the actual cost of production after the task is completed and seek payment for that amount. If the agency’s final request for payment is the subject of a compliance ruling, EDR will evaluate the reasonableness of the total cost at that time. The agency has presented no new information that would call into question the basis on which EDR Ruling Number 2014-3663 was decided, and for that reason the decision regarding the reasonableness of the agency’s request for payment of the estimated cost of production will not be modified.

Grievant’s Arguments

In his request for reconsideration, the grievant first argues that he was not given an opportunity to respond to the information provided by the agency about the details of how it is carrying out the production of documents prior to the issuance of the EDR Ruling Number 2014-

² EDR Ruling No. 2014-3663.

³ *Id.* at n.16.

⁴ *See Grievance Procedure Manual* § 8.2.

⁵ *Id.* (emphasis added).

3663. To the extent the grievant alleges he was harmed by not being given an opportunity to respond to the information the agency provided to EDR, any such harm has been cured by his subsequent opportunity to review that information relied upon by EDR and contained in the ruling and provide a response for consideration by EDR. The grievant has provided no such response, and as a result we assume that he has no information, other than that which he submitted prior to the issuance of the ruling, to submit regarding the agency's estimate of the cost of production.

In addition, the grievant asserts again that the grievance procedure does not allow the producing party to charge for the cost of redaction. The question of whether the agency could charge for the cost of redaction was discussed at length in EDR Ruling Number 2014-3663 based on the grievant's arguments. The grievant has re-raised this argument in his request for reconsideration. Specifically, he claims that a Virginia circuit court opinion, which states that a public body may not charge for redaction in the context of a request for documents pursuant to the Virginia Freedom of Information Act ("FOIA"), is binding authority on EDR.⁶ The grievant further argues that EDR itself ruled that agencies may not charge for redactions in EDR Ruling Number 2012-3337.

While EDR may look to principles and approaches arising under FOIA as a relevant resource for evaluating the assessment of costs arising in the context of the grievance procedure, the grievant is incorrect in claiming that they represent binding precedential authority on this Office.⁷ EDR's determinations of issues regarding document requests in grievances are questions of the grievance procedure and the grievance statutes, not FOIA. Further, as to the courts' consideration of FOIA issues, we are unaware of any appellate decision addressing the redaction issue, and the grievant has identified none. Thus, even the circuit court decisions cited by the grievant in the context of FOIA law do not have the force of binding precedent, but may be considered as persuasive authority.⁸

⁶ The grievant argues that the court in *Virginian-Pilot Media Companies v. City of Norfolk School Board*, 81 Va. Cir. 450 (Norfolk 2010), held that "in Virginia the cost for redaction is not appropriate in FOIA cases." The grievant previously cited this case to EDR for this proposition, but it was not specifically addressed in EDR Ruling No. 2014-3663. That case states the following: "[t]he parties agree that FOIA provisions regarding costs do not provide for public bodies to recover costs for the time or expenses required to make redactions." *Id.* at 465 (citing *Albright v. Woodfin*, 68 Va. Cir. 115, 118 (Nelson 2005)). The court did not discuss or examine the arguments either for or against the issue of whether FOIA allows a public body to charge for redaction. While the court may well have agreed with the parties that FOIA does not allow a public body to charge for redaction, it did not expressly rule on that matter. Even if that court had addressed the issue in that way, its consideration would not have been materially different from the *Albright* decision addressed in EDR Ruling No. 2014-3663. Thus, EDR's omission of any discussion of the *Virginian-Pilot* case from the ruling has little consequence.

⁷ *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.

⁸ *See* *Burkholder v. McGraw*, 63 Va. Cir. 537, 539 n.3 (Roanoke 2003); *see also* *Cassen v. Slater*, 75 Va. Cir. 327, 331 (Chesapeake 2008) ("[W]hile not binding precedent on this Court, the logic and reasoning found in another jurisdiction's circuit court opinion may be informative."); *Wash. Newspaper Publ. Co.*, 72 Va. Cir. 186, 192 (Fairfax County 2006) ("Other Circuit Court opinions always are persuasive . . . ; however, they are not binding precedent."); *Neurology Servs., Inc. v. Fairfax Med. PWH, LLC*, 67 Va. Cir. 1, 26 (Fairfax County 2005) (noting that "[w]hile there [was] no binding precedent on point, several other circuit courts in the Commonwealth" had considered an issue).

In addition, the grievant's reliance on EDR Ruling Number 2012-3337 is misplaced. That ruling did not address the question of whether the agency could charge for redaction because it had not requested payment for production of any of the requested documents. EDR Ruling Number 2012-3337 clearly referred to redaction in the context of ensuring that the requested documents were produced "in such a manner as to preserve the privacy of individuals not personally involved in the grievance."⁹ That ruling did not address the agency's ability to seek payment for such redactions.

In EDR Ruling Number 2014-3663, we determined that it was reasonable for the agency to seek payment for the cost of redacting the documents requested in this case, relying in part on persuasive guidance from the FOIA Advisory Council, which is tasked with interpreting the FOIA statutes.¹⁰ The grievant has presented no additional information that would call into question the basis of that decision. The grievant has also raised no new facts that warrant further reconsideration of EDR Ruling Number 2014-3663. Thus, we will not alter that ruling.

While EDR is not persuaded by the grievant's arguments regarding whether charges for redactions are allowable, we understand a premise that perhaps underlies the grievant's position: that redaction costs ought not be so great as to be an impediment to the production of critical documentation.¹¹ We agree with the basic premise that, to be considered reasonable, charges for redaction should be a relatively minimal part of the document collection and production effort in relation to the overall document request. As to the emails addressed in these rulings, the redaction estimates have been capped at 16 hours of the Reviewer's work time. While this still may represent a substantial time and cost, there is also a substantial number of documents being requested and potentially reviewed. Thus, EDR has attempted in these rulings to balance the interests between parties being able to obtain relevant documentation and the ability of parties to seek *reasonable* payment for collection and production costs.

CONCLUSION

Based on the foregoing, EDR will not alter its decision on the grounds presented by the grievant or the agency. To the extent any of the parties' remaining arguments have not been specifically addressed in this reconsidered ruling, EDR also finds no basis to change its previous ruling. EDR's compliance rulings are final and nonappealable.¹²

In accordance with the terms of EDR Ruling Number 2014-3663, the parties are ordered to proceed as follows. The agency must provide a revised total estimated cost to the grievant within **five workdays of the date 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

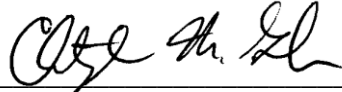
⁹ *Grievance Procedure Manual* § 8.2; see EDR Ruling No. 2012-3337.

¹⁰ See Va. FOIA Council Adv. Op., AO-02-07 (March 14, 2007) ("[A] public body may charge for staff time spent redacting portions of records as part of the actual cost of supplying the records.").

¹¹ While the documents sought are potentially relevant, we leave to another day any question of whether the documentation requested here is truly critical and material to the grievant's case.

¹² Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

requested deposit **within ten workdays of his receipt of the agency's revised cost estimate** in order to proceed with these document requests.¹³ If the deposit is not made before the given deadline, the document requests will be considered waived.



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¹³ Consistent with the terms of EDR Ruling Number 2014-3663, the grievant has notified EDR that he requires additional time to collect funds to pay the requested deposit. *See* EDR Ruling No. 2014-3663. Accordingly, we will allow the grievant to provide payment to the agency within ten workdays from the date he receives the agency's estimate, rather than the five workdays initially ordered in EDR Ruling Number 2014-3663. An additional five workdays seems a reasonable amount of time to extend the response period when also considering that the grievant has had far more time to seek these funds during the pendency of this reconsideration request.