

Issue: Compliance – Grievance Procedure (documents); Ruling Date: December 16, 2013; Ruling No. 2014-3755; 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
Ruling Number 2014-3755
December 16, 2013

The grievant has requested a 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”) relating to the production of requested documents.

FACTS

The procedural and substantive facts of this case are set forth in EDR’s prior compliance rulings on these issues and are incorporated herein by reference.¹ In essence, the grievant and the agency are engaged in an ongoing dispute regarding the disclosure of documents related to a pending grievance. On or about October 2, 2013, the grievant provided the agency with payment of a deposit for the cost of production of documents. The agency produced documents on October 14 and 18. On October 30,² the grievant requested a compliance ruling from EDR, citing numerous issues with the documents he received from the agency and claiming that the agency has not produced all responsive documents.³

DISCUSSION

Grievant’s General Objections

The grievant has raised several general concerns related to the documents he has received from the agency. When the agency produced documents, it notified the grievant that the following categories of documents were not included: (1) “E-mails fully included in subsequent e-mail strings,” (2) “E-mails/documents regarding grievances of and/or personnel matters concerning other employees unrelated to the grievance, with the exception of those records including and/or involving [grievant],” and (3) “E-mails protected by attorney-client privilege.”

¹ See EDR Ruling Number 2014-3663, EDR Ruling Number 2013-3642, and EDR Ruling Number 2013-3626 for further discussion of the factual background of this case.

² The grievant has also submitted multiple follow-up requests with additional information and issues subsequent to this initial submission.

³ The grievant does not seem to have notified the agency of its failure to produce all responsive documents and allowed the agency five workdays to correct the noncompliance, as required by Section 6.3 of the *Grievance Procedure Manual*. However, in the interest of expediently resolving the issues in this case, EDR will address the grievant’s compliance request as if he had properly followed this procedure.

The grievant argues these exclusions are inappropriate. He has further requested that EDR conduct an *in camera* review of and/or order the creation of a privilege log for all documents withheld based on a claim of legal privilege.

The agency's explanation that it did not produce those emails that were "fully included in subsequent e-mail strings" does not appear to indicate that the content of emails was actually withheld. Rather, for any series of emails consisting of responses from multiple recipients, the agency provided only the complete series that contained all threads of a particular email exchange, not the individual responses from each sender. The agency produced emails in this way to prevent duplicate production of the same material. This approach substantially complies with the grievance procedure.

Under the grievance procedure, "all documents *relating to the management actions or omissions grieved* shall be made available."⁴ The agency is not obligated to produce documents relating solely to the personal and/or personnel matters of nonparties to the grievance, and may redact documents that are produced to protect the legitimate privacy interests of third parties.⁵ Accordingly, we do not find that the agency has failed to comply with the grievance procedure by withholding documents related to the "grievances and/or personnel matters" of other employees that are not material to the grievant or the management actions that are at issue here.⁶

The grievance statutes further provide that "[a]bsent *just cause*, all documents . . . relating to the actions grieved shall be made available."⁷ Just cause may include a claim that a document is subject to a legal privilege.⁸ The agency may, therefore, withhold documents that are protected by the attorney-client privilege consistent with the grievance procedure. The grievant's objections to the agency's assertion of the attorney-client privilege do not rise to a level that would require EDR to conduct an *in camera* review of any documents that may have been withheld.⁹ Likewise, the grievance procedure does not require, nor has EDR ever ordered, the production of a privilege log detailing documents withheld based on a claim of irrelevance or just cause, and we decline to do so now.

Alleged Improper Withholding of Documents

The grievant claims that the agency has intentionally withheld responsive documents that could be considered "inflammatory" or that might "negatively impact the agency" in some way.

⁴ *Grievance Procedure Manual* § 8.2 (emphasis added); Va. Code § 2.2-3003(E).

⁵ *See Grievance Procedure Manual* § 8.2.

⁶ We also note that the agency attempted to obtain a mutual waiver of confidentiality from the grievant and several other employees with related grievances multiple times to maximize the production of documents, but no agreement was reached.

⁷ Va. Code § 2.2-3003(E) (emphasis added); *see Grievance Procedure Manual* § 8.2.

⁸ *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936.

⁹ The grievant seems to believe that the agency would only have had reason to consult with its current legal representative, and appears to argue that because many of the requested documents were created before she was retained the agency could have had no communications with any other legal representative. We are not persuaded by this argument and will not review documents that were withheld based on a claim of attorney-client privilege on this basis.

In support of this claim, the grievant refers to an email that he received on October 5, 2012 as part of an earlier document request. This email thread was not produced in its entirety again with the documents he received in October 2013. In a previous ruling related to this case, EDR explained that “[a]ny documents that the agency has already provided to the grievant need not be produced again” in order to minimize duplication of cost and effort.¹⁰ The agency was not required to produce duplicate copies of any documents already in the grievant’s possession as a result of previous requests he submitted to the agency. The grievant has not specifically identified any emails that were not produced in response to his current requests and that have not also been previously provided in response to one of his other document requests. It does not appear that the agency has failed to comply with the grievance procedure or the terms of any prior EDR ruling.¹¹

The grievant also asserts that the agency improperly withheld an email (“Email A”) related to matters that were previously before the Virginia Employment Commission (“VEC”) until after that proceeding was concluded. It is not within EDR’s authority to investigate or order action in any matters related to VEC proceedings. The grievant further argues that the agency’s “honesty . . . can no longer be relied upon” to produce documents completely and accurately, and requests that the Virginia Information Technologies Agency (“VITA”) be ordered to search through certain employees’ email accounts for relevant emails. EDR cannot order VITA to search agency employees’ email accounts for documents. Further, we do not find a basis to question the “honesty” of the agency based on the grievant’s assertions here.

Alleged Inconsistencies in the Production of Documents

The grievant also claims that the agency’s production of documents is inconsistent with previous cost estimates he received from the agency related to requests for documents under the Virginia Freedom of Information Act (“FOIA”). He points out that the agency currently claims no documents exist as to some of his requests, while it sought payment for production of similar documents under FOIA. The grievant asserts that this demonstrates the agency is engaged in “abuse” of the grievance procedure’s document production provisions.

As an example, the grievant explains that the agency currently states no emails exist between Employee B and Employee D, but previously requested payment of \$910 for twenty-four hours of review of these documents under FOIA. Emails between Employee B and Employee D could have been responsive to several of the grievant’s current requests; all of these requests, however, were narrow in scope so as to capture only those documents that were relevant to the management actions he is challenging. The grievant’s FOIA request, in contrast, sought “all emails between [Employee B] and [Employee D].” Reviewing and redacting all emails between these two employees could have required twenty-four hours of effort. Many of the emails, however, could have had no relation to the management actions at issue in this

¹⁰ EDR Ruling No. 2013-3642 n.11.

¹¹ To the extent that the grievant may have any other similar claims regarding the agency’s decision not to produce documents on October 14 and 18, 2013 that were given to him in response to previous requests, these arguments are likewise without merit.

grievance, and thus were not produced in response to the grievant's current requests. The FOIA and grievance procedure requests seek documents of two different kinds, and we are not persuaded that both would have resulted in production of the same documents. Our analysis of the grievant's claim regarding his FOIA request for "[a]ll emails between [Employee W] and [Employee D]" is the same. Consequently, the agency's response to these FOIA requests is not indicative of any misconduct.

The grievant further asserts that the agency requested payment under FOIA for sixteen hours of review of certain documents created by two employees in the course of an investigation, but now states that it possesses no additional documents of this kind. The grievant's FOIA request again, however, differs significantly from his grievance procedure request. The grievant's current request seeks "[a]ll interview notes, file material prepared by [Employee H] and [Employee G]" in relation to certain issues, compared with his FOIA request for "[a]ll notes and complaints, investigative reports and summaries" created, maintained, or received by Employee G and Employee H. Both requests would not have necessarily resulted in production of the same set of documents. Furthermore, the agency has provided the grievant with documents related to Employee G's and Employee H's investigatory activities. It is entirely possible that the agency produced all such documents in its possession and simply has nothing further to disclose. The alleged inconsistencies, if any, between the agency's response to the FOIA request and the grievance procedure request do not show that it has improperly withheld any documents.

Alleged Destruction of Documents

The grievant claims that the agency has "purged and misplaced" relevant records and otherwise intentionally allowed documents to be "lost and destroyed." He seeks an "affirmative statement by the agency as to who had last possession of the documents and what specifically was done to locate these documents" and requests "sanctions against the agency" because of this alleged improper conduct.

It is not within EDR's authority to order the agency to produce a statement of the kind requested by the grievant. Further, the grievance statutes do not grant EDR the authority to order sanctions against a party for failing to comply with the grievance procedure, except that the "failure [of a party] to comply with a substantial procedural requirement of the grievance procedure without just cause may result in a decision against the noncomplying party on any qualified issue."¹² The grievant's allegations in this case do not rise to the level that would justify such extreme action from EDR. There is no evidence to indicate that the agency has intentionally destroyed documents to avoid providing the grievant with evidence to support his case. No further action will be taken on this issue at this time.¹³

¹² Va. Code § 2.2-3003(G).

¹³ The grievant also appears to be under the impression that EDR has previously determined that the documents sought by the grievant actually exist, and that such documents must be produced. This is not the case. EDR ordered the agency to produce documents in its possession or control that were responsive to his requests. EDR has never considered or addressed whether any of the requested documents exist. *See* EDR Ruling No. 2013-3642.

Grievant's Specific Objections

The grievant has also raised a number of objections to specific types of documents that he believes have been improperly withheld by the agency. Each of the grievant's claims will be addressed below in the order in which they were originally presented to EDR.

Production of Employee B's email

The grievant claims that the agency has produced no emails from Employee B in response to his requests. The agency states that it has no responsive emails created by Employee B. The grievant further explains that the agency's position "further substantiates" his claim that "the agency has permitted records to be destroyed," but has presented no further evidence as to what documents the agency may not have produced. In the absence of such information, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of Employee W's email

The grievant argues that the agency did not produce all emails from Employee W in response to his requests. The agency claims that it had only a single email from Employee W, which was produced. The grievant asserts that "evidence exists" to show that agency should be in possession of more documents, but has presented no further explanation as to whether the documents actually exist or how they are relevant to the grievance. Accordingly, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of investigation materials related to certain agency employees

The grievant asserts that the agency has failed to produce "interview transcripts, notes, [and] recordings" pertaining to interviews of certain agency employees describing how the grievant "was being terminated and [including] details as to why the agency was taking action against him." The agency states that it has provided the grievant with all documents in its possession that are responsive to this request. The grievant has presented no further evidence to show that any responsive documents exist and have been withheld. In the absence of such information, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of documents created by Employees G and H

The grievant claims that the agency has not produced "all records, emails, notes, reports[,] summaries and documents" created by Employee G or Employee H related to their investigation of certain issues. The agency states that it has already produced all documents responsive to this request, and that there is nothing more to disclose. The grievant asserts that the agency should have additional documents to disclose, many of which were allegedly given to Employee G and/or Employee H by the grievant and Employee D.

The grievant's claims on this issue are somewhat confusing; his actual request for documents sought "[a]ll interview notes" and "file material" of Employee G and Employee H, although other requests may have also resulted in the production of other documents created by these individuals. The agency previously provided the grievant with many of the documents created by Employee G and Employee H in the course of their investigation, and it is possible that the documents the grievant now insists have been withheld were merely not responsive to his requests, if they exist. The grievant has not presented any evidence to show that specific responsive documents have not been produced. In the absence of such information, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of emails sent and/or received by high-level agency employees

The grievant argues that he has not received all emails sent or received by certain agency employees between August 1, 2011 and March 23, 2013 relating to the management actions he is challenging. In support of this claim, the grievant states that he "is aware of communications" between agency management, elected representatives, and other individuals that are relevant. The grievant further states that he either directly received certain emails that have not been produced by the agency or was given copies of such emails from one or more of the original recipients. The grievant claims that this indicates the agency has improperly withheld documents. The agency responds that it has produced all responsive emails in its possession. While the grievant asserts that the allegedly withheld emails are "directly related to" the management actions at issue, he has not identified any specific emails that may be missing or demonstrated how that additional documentation is relevant to the grievance.¹⁴ In the absence of such information, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of the agency's current investigative summary

The grievant asserts that the agency has failed to produce the most current version of its investigative summary. The agency states that it has provided the grievant with this document. While the grievant claims that the document in his possession "lacks any reference to activities in the later portion of the investigation," he has presented no further explanation of what information may be missing or how that additional information might be relevant to the grievance. There is no basis, therefore, to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of certain email attachments

The grievant initially stated that he had not received attachments to two emails produced by the agency and requested that the agency provide these missing attachments. In response, the

¹⁴ To the extent that the grievant is actually in possession of any emails that were not produced in response to his current request, we note again that the agency was not required to produce those documents that it had given to the grievant previously. *See* EDR Ruling No. 2013-3642 n.11.

agency noted that one email (“Email B”) was outside the date range requested by the grievant and should not have been produced at all. The other email (“Email C”) had no attachment. The grievant subsequently seemed to modify his position with respect to Email C, stating that he sought “all relevant documents” related to it.

Email B was sent in June 2013, well outside the January 1, 2011 through March 23, 2013 date range of the grievant’s request. Consequently, the agency has not failed to comply with the grievance procedure by not producing the attachment to Email B, and we will not order the agency to do so.

The grievant’s claims regarding Email C are somewhat confusing. Although he initially argued that it was missing an attachment, he now states that the agency has not provided him with additional documents related to Email C, presumably in the form of additional correspondence before and/or after it was sent. He appears to believe that this particular email could not have “just materialized without prior or subsequent communications,” and that the agency must have improperly withheld these additional documents. The grievant has not, however, provided any specific information as to what this correspondence might be or how it might be relevant to the grievance. Furthermore, while it is possible that additional related emails may exist, they may not be responsive to his requests and/or may have been withheld for just cause. In the absence of any additional information indicating that there are, in fact, any responsive emails, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of “documents relative to” certain emails

The grievant claims that the agency has failed to produce documents “relative to” a certain email (“Email D”) in response to his requests. The agency states that no such documents exist. The grievant has provided no further information as to what documents are “relative to” Email D or how they may be relevant to the grievance. Consequently, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Production of documents related to Employee C

The grievant asserts that the agency has produced no emails from Employee C in response to his requests. The agency states that it has no responsive emails created by Employee C. The grievant has presented no further information as to what documents the agency may not have produced. Accordingly, there is no basis to find that the agency has failed to comply with the grievance procedure with respect to this claim.

Objection to redaction of certain documents


The grievant claims that he is “unable to determine” whether the agency properly redacted two documents produced by the agency and requested that EDR review these documents to ensure compliance with the grievance procedure. The agency volunteered to provide EDR with unredacted copies of these documents. After reviewing the documents in

their entirety, the redactions in the copies provided to the grievant comply with the terms of the grievance procedure relating to the protection of confidential information of nonparties.¹⁵

CONCLUSION

For the reasons set forth above, the grievant's ruling request is denied. The grievant has presented no basis to find that the agency has failed to comply with the grievance procedure.

EDR's rulings on matters of compliance are final and nonappealable.¹⁶



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁵ *Grievance Procedure Manual* § 8.2.

¹⁶ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).