

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: August 4, 2015; Ruling No. 2015-4063; Agency: Department of Corrections; Outcome: Agency in Compliance.



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

**COMPLIANCE RULING**

In the matter of Department of Corrections  
Ruling Number 2015-4063  
August 4, 2015

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant’s claims of noncompliance against the Department of Corrections (“agency”).

FACTS

The grievant applied for a position with the agency but was not selected. He initiated a grievance challenging the selection process on October 31, 2014. In connection with his grievance, the grievant apparently asked the agency to provide redacted copies of the other candidates’ interview notes. The agency denied the agency’s request on the basis that policy prohibits the agency from disclosing other applicants’ recruitment/interview documents, even if redacted. The grievant now seeks a compliance ruling from EDR regarding the agency’s denial of his document request. In addition, the grievant asserts that the second-step respondent failed to comply with the grievance procedure by preparing his response prior to the second-step meeting.

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.”<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>

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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* § 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.

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>

In his grievance, the grievant asserts that the agency’s selection process was biased because one of the selected candidates received assistance in answering an interview question. In particular, the grievant asserts that after this selected candidate was unsuccessful in answering an interview question, he was give a second chance to answer it correctly. In contrast, the grievant states that he was not given another chance to answer the question, and that his own interview notes show that he had “no answer” for the question. The grievant has apparently requested the interview notes for the other candidates to demonstrate that the selected candidate was given preferential treatment.

During its investigation, EDR reviewed the documents at issue in this case. As an initial matter, we note that the agency’s contention that it has no obligation to produce interview materials under the grievance procedure is inaccurate. Notwithstanding general limitations on the disclosure of selection documentation,<sup>6</sup> a grievant may have access to certain relevant selection materials in a grievance about a selection process in which he competed. For example, when relevant, a grievant might be able to obtain copies of the results of applicant screening and/or interview notes for the successful applicant, with personally identifying information redacted appropriately. To the extent the parties do not agree on what documents are subject to disclosure under the particular factors in a given grievance, a compliance ruling can be requested from EDR. At that point, in determining whether documents must be produced during the management resolution steps, EDR will weigh the relevance—that is, the possible probative value—and materiality of the requested documents against possible competing interests, such as the privacy of other employees not involved in the grievance.

In this case, EDR’s review indicates that the documents sought by the grievant have no probative value to his claims of bias, as the interview notes for the selected candidate show that he, like the grievant, was unable to answer the question at issue. Accordingly, EDR concludes

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

<sup>6</sup> See DHRM Policy 2.10, *Hiring*.

that the grievant's interest in obtaining the requested interview notes is not sufficient to require production of those documents by the agency at this time.<sup>7</sup>

In addition to his claim regarding the nonproduction of the interview notes, the grievant also asserts that the second step respondent failed to comply with the grievance procedure by preparing a response prior to the second step meeting. As the grievant advanced his grievance to the third step prior to raising his claim of noncompliance, he has waived any objections regarding the second step.<sup>8</sup> The agency is advised, however, that the purpose of the second step meeting is fact-finding, and as such, a response should be issued only after consideration of the evidence presented by the grievant at the second step meeting.

EDR's rulings on matters of compliance are final and nonappealable.<sup>9</sup>



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<sup>7</sup> In the event this grievance is qualified for hearing, the grievant may renew the request for documents with the hearing officer. If this occurs, this ruling will not bind the hearing officer in making his or her decision regarding whether production is warranted under the grievance procedure.

<sup>8</sup> See *Grievance Procedure Manual* § 6.3 ("By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.")

<sup>9</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).