

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 18, 2015; Ruling No. 2016-4222; Agency: Department of Social Services; Outcome: Agency Not in Compliance.



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

COMPLIANCE RULING

In the matter of the Department of Social Services
Ruling Number 2016-4222
September 18, 2015

The Department of Social Services (the “agency”) has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management regarding compliance with the grievance procedure in relation to the production of requested documents.

FACTS

The grievant is employed by the agency as a Licensing Administrator. In early 2015, the agency conducted an internal Compression Study of salaries for certain employees, including the grievant and other employees who are Licensing Administrators. The goal of the Compression Study was to “align salaries to the fullest extent possible agency-wide based on similar duties and using applicable pay factors.” The agency’s Human Resources Office determined that a salary increase was not justified for the grievant. The grievant’s Division Director, however, recommended that the grievant receive a salary increase. Agency management concurred with the Human Resources Office’s recommendation and did not approve a salary increase for the grievant, apparently on the basis that it would not help to correct the salary issues the Compression Study was intended to address.

The grievant initiated a grievance on or about July 10, 2015 alleging that the Compression Study was “flawed” because it was “based on incomplete information . . . that was too narrow in scope.” The grievant specifically disputes the agency’s assessment of her work experience and its decision that “other licensing administrators with less experience and less education” were “more qualified” than her, with the result that they received a salary increase and she did not. On the following day, July 11, the grievant submitted a request for documents relating to the Compression Study under the Virginia Freedom of Information Act (“FOIA”). The agency provided the grievant with a Pay Factor Consideration Form showing its assessment of her compensation for purposes of the Compression Study, but did not disclose any documents showing how it assessed the compensation of the other Licensing Administrators. The agency also produced a copy of the grievant’s employment application and an Employment Application Evaluation Sheet, both of which were apparently used in the Compression Study to evaluate her work experience and determine whether a salary increase was warranted.

The grievant submitted a second FOIA request on July 23, seeking documents relating to the agency’s analysis of the other Licensing Administrators’ compensation. The agency treated

the second FOIA request as a request for documents under the grievance procedure,¹ and on August 25 provided the grievant with Pay Factor Consideration Forms and a chart showing the overall salary adjustment results for the other Licensing Administrators whose salaries were reviewed. The grievant subsequently requested that the agency disclose the employment applications and Employment Application Evaluation Sheets used in the Compression Study to evaluate the work experience of the other Licensing Administrators. The agency sought a compliance ruling from EDR on August 31 to determine whether it is required to produce those documents. The agency has also requested a ruling from EDR “on [its] ability to charge for the time necessary to prepare the documents” for production, if they must be disclosed.

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.”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 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,”

¹ Section 8.2 of the *Grievance Procedure Manual* states that, “[o]nce a grievance has been initiated, an employee’s request for documents relating to his/her grievance, pursuant to [FOIA], shall also be treated by the agency as a request for documents under the grievance procedure.” The agency’s response to the grievant’s second request was consistent with the requirements of the grievance procedure. It appears the agency’s Human Resources Office was unaware of the July 11 FOIA request, and thus responded to that request pursuant to the requirements of FOIA. In this ruling, EDR will address the question of what documents must be provided to the grievant based on the requirements of the grievance procedure. To the extent there is any dispute as to whether the agency’s production of documents in response to the grievant’s July 11 or subsequent requests was consistent with FOIA, EDR has no authority to enforce the provisions of FOIA. A person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA’s provisions in a court of appropriate jurisdiction. *See* Va. Code § 2.2-3713(B).

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.

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

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

Documents Requested by the Grievant

In this case, the grievant seeks employment applications and Employment Application Evaluation Sheets for other Licensing Administrators whose salaries were reviewed as part of the 2015 Compression Study. Internal salary alignment was one of the pay factors considered by the agency when it conducted the Compression Study. The agency does not dispute that it assessed internal salary alignment by assessing the Licensing Administrators' "related years of experience" as reflected on their employment applications and Employment Application Evaluation Sheets.⁷ The employment applications and Employment Application Evaluation Sheets clearly played a role in the agency's decision-making process. Furthermore, the grievant specifically alleges that the agency's consideration of her work experience as a factor in its decision that she should not receive a salary increase was "flawed." Accordingly, there is no doubt that the documents are relevant to the challenged management actions, as they would tend to show whether the agency's assessment of the grievant's work experience, and the resulting decision that she should not receive a salary increase, was consistent with its assessment of the other Licensing Administrators' work experience and its effect, if any, on their compensation.

However, EDR's review of the grievance record also shows that, while the Licensing Administrators' employment applications were used to gather information about their work experience, it is also very likely that those employment applications could contain a significant amount of personal and personnel information that is confidential and irrelevant to the management actions at issue in the grievance. In addition, it appears that the agency merely compiled data relating to the Licensing Administrators' work experience from the employment applications and entered that information into the Employment Application Evaluation Sheets. The grievant has not alleged that the other Licensing Administrators' Employment Application Evaluation Sheets are inaccurate in any way. As a result, it appears that requiring the agency to disclose the employment application of each Licensing Administrator whose salary was reviewed would be repetitive and largely result in the production of cumulative information that would have little to no material value beyond what could be gained from the production of the Employment Application Evaluation Sheets.

Accordingly, we find that producing the employment applications for the other Licensing Administrators would impose an undue burden on the agency in this case, and the agency need not provide the grievant with the other Licensing Administrators' employment applications at this time. We also conclude that the Employment Application Evaluation Sheets are relevant because they contain information that was used by the agency as part of the Compression Study, and accordingly they must be disclosed to the grievant, in an appropriately redacted form.⁸

⁶ *Grievance Procedure Manual* § 8.2.

⁷ In the first step response, the first step-respondent informed the grievant that the Human Resources Office had also considered "agency business need, performance, . . . total compensation, budget, and current salary" before making its recommendations. This statement is consistent with the information documented on the Pay Factor Consideration Forms that were completed for each of the Licensing Administrators.

⁸ Section 8.2 of the *Grievance Procedure Manual* states that "[d]ocuments pertaining to non-parties 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."

Specifically tailored redactions should be able to adequately protect the privacy interests of the other Licensing Administrators in relation to the salary issues in this case. Indeed, the agency appears to have already produced similar information from those employees' redacted Pay Factor Consideration Forms and a table of salary change results.

Reimbursement for the Cost of Production

The agency has further requested a ruling from EDR on its "ability to charge for the time necessary to prepare the documents" for production, and specifically for the time needed to redact confidential information relating to employees who are not parties to the grievance from the documents to be disclosed to the grievant.⁹ Under the grievance procedure, a party who requests "documents may be charged a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents."¹⁰ EDR has previously ruled that it is acceptable for an agency to request payment from a grievant for the cost of redacting requested documents, so long as that amount is reasonable and does not "exceed the actual cost to retrieve and duplicate the documents."¹¹ However, the agency has not provided the grievant or EDR with any information about the potential cost of producing the Employment Application Evaluation Sheets. In the absence of such information, EDR cannot make a determination at this time as to what would constitute a "reasonable amount" that could be charged by the agency. If the agency requests payment from the grievant for production of the Employment Application Evaluation Sheets and there is a dispute over the reasonableness of that cost, the parties may request a ruling from EDR to address that issue, should it arise.

Alternate Format

If the agency determines that producing the Employment Application Evaluation Sheets would require extensive redaction to protect the privacy of nonparties, it may elect to compile the information relating to the other Licensing Administrators' work experience and any other relevant information from the Employment Application Evaluation Sheets in a summary form to preserve employee privacy, rather than disclosing the Employment Application Evaluation Sheets themselves. This could save time and expense for the agency and also reduce or eliminate its need to request payment for the cost of production from the grievant, thus potentially resulting in a more satisfactory outcome for both parties. While the grievance statutes do not mandate the production of a document that is not already in existence, if the agency chooses not to present the requested information in a compilation format, then it must instead provide the grievant with the Employment Application Evaluation Sheets themselves, with personally identifying information redacted.

⁹ *Grievance Procedure Manual* § 8.2.

¹⁰ *Id.*

¹¹ EDR Ruling No. 2014-3663. In addition, the FOIA Advisory Council, which issues advisory opinions regarding the interpretation of FOIA, *see* Va. Code § 30-179, has stated unambiguously that "a public body may charge for staff time spent redacting portions of records as part of the actual cost of supplying the records." Va. FOIA Council Adv. Op., AO-02-07 (March 14, 2007). In interpreting the document disclosure provisions of the *Grievance Procedure Manual*, EDR looks to other analogous laws and regulations for guidance if needed, and principles and approaches arising under FOIA are an immediately relevant and persuasive resource. *See, e.g.*, EDR Ruling No. 2014-3650; EDR Ruling Nos. 2012-3149 through 2012-3163; EDR Ruling Nos. 2012-3245 through 2012-3252; EDR Ruling Nos. 2012-3268 through 2012-3281; EDR Ruling Nos. 2010-2628, 2010-2629.

CONCLUSION

Based on the discussion above, the agency is directed to produce the requested Employment Application Evaluation Sheets, or a compilation of the information contained in those documents, **within ten workdays of the date of this ruling**. The agency must redact personally identifying information from the documents produced to protect the confidentiality of nonparties.¹²

EDR's rulings on matters of compliance are final and nonappealable.¹³



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¹² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹³ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).