

Issue: Compliance – Grievance Procedure (documents); Ruling Date: October 2, 2015; Ruling No. 2016-4225; Agency: Department of Criminal Justice Services; Outcome: Agency in Compliance (in part), Agency Not in Compliance (in part).



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

COMPLIANCE RULING

In the matter of the Department of Criminal Justice Services
Ruling Number 2016-4225
October 2, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) regarding alleged noncompliance with the grievance procedure by the Department of Criminal Justice Services (the “agency”) in relation to the production of requested documents.

FACTS

The grievant is employed by the agency as a Program Administrative Specialist II. On August 6, 2015, the grievant initiated a grievance with the agency to challenge alleged issues with her compensation and position classification. On August 17, the grievant submitted to the agency a request “to review” the following information:

1. Documents showing the “salary and benefits” of employees classified in her role from 2010 through 2015, to include “job position, job classification, and salary information.”
2. Current Employee Work Profiles (“EWPs”) of twenty-one specific employees who are classified as Program Administrative Specialist IIs and “any other individuals” classified in that role.
3. Information about any agency employees who “received a bonus, an increase in pay or wages, or . . . any other wage benefit” from 2011 to the present.¹

The grievant also requested that, if there was any cost for the production of the documents, the agency send her “a breakdown” including “estimation of any staff member’s time and billable wages”

The agency responded to the grievant’s request for documents on September 1, 2015. In its response, the agency provided an estimate of the cost to produce the documents, asked her to “specifically identify what benefit information” she was seeking, and requested payment from the grievant of the estimated cost if she wished to proceed. The agency calculated its cost to produce documents containing salary information that were responsive to Request 1 at \$47.91,

¹ For purposes of this ruling, we will refer to the grievant’s requests for documents as Request 1, 2, and 3.

EWPs responsive to Request 2 at \$67.29, and documents responsive to Request 3 at \$9.48, for a total estimated amount of \$124.68. The grievant requested a compliance ruling from EDR on September 2, alleging that the agency's request for payment was unreasonable and arguing that the agency had failed to comply with multiple provisions of the Virginia Freedom of Information Act ("FOIA") and the grievance procedure. The agency has provided EDR with a response in which it disputes the grievant's claims, asserts that some of grievant's requests are overly broad and seek irrelevant information, and asks EDR to determine what documents must be produced.

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," 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

Virginia Freedom of Information Act

As an initial matter, EDR must address the parties' claims and arguments relating to FOIA. For example, the agency's initial response to the grievant's request for documents

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.

⁶ *Grievance Procedure Manual* § 8.2.

indicated that it was invoking a provision of FOIA to extend the time within which it would respond to her request. Similarly, the grievant's request for a compliance ruling from EDR makes reference to many sections of FOIA with which she alleges the agency has failed to comply. 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.⁷ However, 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.⁸ Accordingly, this ruling will only address what documents must be provided to the grievant under the grievance procedure and whether the agency's cost estimate constitutes a reasonable amount consistent with the requirements of the grievance procedure. This ruling makes no determination as to whether any of the provisions of FOIA cited by the grievant are applicable or whether the agency is obligated to produce any of the requested documents pursuant to FOIA. To the extent the grievant alleges that the agency's production of documents was not consistent with the requirements of FOIA, she must seek redress for such claim(s) through the courts.⁹

Documents Requested by the Grievant

In its response to the grievant's request for a ruling, the agency claims that many of the documents sought by the grievant are not relevant to the management actions challenged in the grievance. For example, the agency asserts that salary information and EWPs responsive to Requests 1 and 2 that are "related to individuals outside [the grievant's] work unit" would be irrelevant because those employees' job duties are not "comparable or similar in nature to her position." It also disputes the relevance of "non-contemporary salary information" responsive to Request 1 from 2010 to 2015, some of which would apparently predate the grievant's own employment with the agency. The agency further argues that Request 3 is "overly broad" because "non-base pay salary action and non-monetary rewards do not have a relationship to establishing or adjusting the compensation of an employee."

Requests 1 and 2

In the grievance, the grievant alleges that there are issues with her compensation and position classification. Request 1 seeks information about the "salary and benefits" of employees classified in her role from 2010 through 2015, to include "job position, job classification, and salary information." Documents responsive to Request 2 would include EWPs for agency employees who are classified as Program Administrative Specialist IIs. Salary information and EWPs relating to other employees in the grievant's role are potentially relevant to her claims as they could show whether there are inconsistencies with the grievant's

⁷ 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.

⁸ See Va. Code § 2.2-3713.

⁹ To the extent any of the grievant's assertions regarding the agency's failure to comply with FOIA are not addressed specifically in this ruling, we find that they are not persuasive and/or have no bearing on EDR's decision.

compensation as compared to other similarly situated employees in her role. Indeed, internal salary alignment is one of the thirteen pay factors that must be evaluated by agencies in making compensation decisions.¹⁰ Though the agency may be correct that there is some variation in the job responsibilities of Program Administrative Specialists IIs across the agency, internal alignment is based on the relative “training and experience,” “duties and responsibilities,” “performance,” and “knowledge, skills, and abilities” of employees within a particular role.¹¹ Variation in job duties may not, by itself, demonstrate that other employees who are Program Administrative Specialist IIs are not similarly situated to the grievant for purposes of assessing her compensation.

However, we are unable to determine how information showing the benefits of other Program Administrative Specialist IIs would be relevant to the grievant’s claims about her salary and classification. EDR has not identified any claim(s) presented in the grievance that would relate to alleged issues with the grievant’s benefits as compared to other employees. It is unlikely that documents containing benefits information would tend to prove or disprove any of the grievant’s arguments as to why she is not properly compensated (as to her salary) and/or classified. Likewise, salary information of Program Administrative Specialist IIs from 2010 to 2014 would not be relevant to the issues presented in the grievance. Though historical salary data could be informative, it would not tend to demonstrate whether the grievant was improperly compensated comparatively at the time she initiated the grievance.

Accordingly, with respect to Requests 1 and 2, EDR concludes that the agency must provide salary information from 2015 and current EWPs for Program Administrative Specialist IIs employed by the agency. The agency is not required to provide the grievant with information about the benefits of those employees or salary data from prior to 2015.

Request 3

In Request 3, the grievant seeks information about any agency employees who “received a bonus, an increase in pay or wages, or . . . any other wage benefit” from 2011 to the present. Many documents that would be responsive to Request 3, and specifically those containing information about “any other wage benefit” other than a “bonus” or an “increase in pay or wages” would appear to have no connection to the grievant’s arguments about her compensation and classification. As examples of “other wage benefit[s],” the grievant stated that her request encompassed information about “Formal Recognition,” “Recognition Leave,” “Non-Monetary Awards,” and other agency actions that had no effect on the salary or total compensation of agency employees. As the central claims presented in the grievance relate to the grievant’s salaried compensation and classification, we find that many documents responsive to Request 3 would not be relevant because they would be unlikely to demonstrate whether there are issues with the grievant’s salaried compensation as compared with other similarly situated employees. However, information relating to bonuses or any “increase in pay or wages” for other agency employees who are employed as Program Administrative Specialist IIs could be relevant, to the

¹⁰ See DHRM Policy 3.05, *Compensation*.

¹¹ *Id.*

extent the agency may have approved salary increases or bonuses for one or more employees in such a way that compensation practices were applied differently from how they were applied to the grievant. As with the historical salary data discussed above in relation to Request 1, we find that documents responsive to Request 3 prior to 2015 need not be produced, as they would not demonstrate whether the grievant was improperly compensated at the time she initiated the grievance.

For these reasons, we find that the agency must produce documents to the grievant showing whether any employees who are classified as Program Administrative Specialist IIs received a bonus or salary increase in 2015 in response to Request 3. Other information relating to non-pay-related actions referenced by the grievant in Request 3 need not be disclosed.

Charges for the Cost of Production

The *Grievance Procedure Manual* provides that any party requesting documents “may be charged a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents.”¹² As stated above, EDR will look to other analogous laws and regulations for guidance if needed in interpreting this section, and principles and approaches arising FOIA are an immediately relevant resource. For instance, under FOIA, an agency may request payment of a deposit in advance before producing documents in certain cases.¹³ Such a practice would appear to be reasonably applicable and useable under the grievance process.¹⁴ However, EDR must also review whether the agency’s estimated charges are reasonable under the facts of this case. Furthermore, it must be noted as an initial matter that the agency’s proposed charge is presently an estimate only and is subject to modification after production is completed and the agency can calculate the actual time spent.

In this case, the agency assessed an hourly rate of \$31.14 to review all documents responsive to Requests 1 through 3. The agency estimated that it would require approximately 1.5 hours at that rate for Request 1, 1.75 hours for Request 2, and 0.25 hours for Request 3. The agency’s total estimated cost for the hours of work performed was \$108.99. The remainder of the estimated charge to produce the documents consists of copying charges, which were assessed at \$0.10 per page for approximately 157 pages, or \$15.70 in total. The grievant argues that the agency’s decision to charge an hourly rate of \$31.14 per hour to search, review, and redact confidential personnel information from the requested documents is unreasonable. She appears to claim that a “lesser paid” employee would be equally qualified to perform this task and that the charges are “excessive.” The grievant further asserts that she did not ask the agency to provide her with copies of the documents, but instead sought to review or inspect those documents. As a result, she appears to claim that the agency’s choice to estimate the cost of production to include the cost of copying the documents is also unreasonable.

¹² *Grievance Procedure Manual* § 8.2.

¹³ Va. Code § 2.2-3704.

¹⁴ See, e.g., EDR Ruling No. 2013-3642; EDR Ruling No. 2011-2921 n.6; EDR Ruling Nos. 2011-2787, 2011-2788; EDR Ruling Nos. 2010-2628, 2010-2629.

The grievance procedure provides that the agency may charge the grievant no more than the actual time spent on the document collection and production effort.¹⁵ Furthermore, while an agency is certainly free to have any employee that it chooses perform tasks related to the search for and production of documents, it would be unreasonable to allow the agency to pass on to a requesting party the salary cost of a high level manager when an employee with a lesser salary would be equally qualified to perform the task.¹⁶ The FOIA Advisory Council has opined that, while it is typically unreasonable to seek payment at the rate of a higher-level employee's salary for tasks that can be performed by clerical or administrative staff, it may be acceptable in certain cases so long as "there is some specific reason why the request must be handled by a higher-level person."¹⁷

In its response to the grievant's compliance ruling request, the agency has indicated to EDR that the hourly rate of \$31.14 in this case is based on the lowest-paid employee in its Human Resources Office. According to the agency, the documents sought by the grievant consist of "personnel information and records" that are maintained by its Human Resources Office, and "[t]here are no other employees with authorized access to" the documents. As a result, it calculated the hourly rate of production based on the least-paid employee who could perform the task. Considering all the facts and circumstances of this case, and in particular the nature of personnel documents requested and the comparatively short amount of time estimated as necessary to search for and prepare the documents for production, EDR concludes that the hourly rate of \$31.14 assessed by the agency is reasonable.

In addition, the grievant has requested to "review" the documents only. However, even if the applicable documents are simply made available for review rather than copied and produced, there could still be costs appropriately passed on to the grievant. For instance, EDR finds it appropriate that certain of the records cannot reasonably be made available for inspection. Thus, a degree of work will be required for the agency to process and/or create accessible documents reflecting the information sought by the grievant. Further, because the documents to be provided consist of personnel information, redaction may be required before they can be disclosed. The agency may seek reimbursement from the grievant for its cost to search for, review, and redact the documents, which could potentially include copying charges if it is a necessary part of the agency's redaction process. Depending on how the documents are made available for review or produced, the agency may need to revise its current cost estimate accordingly. The agency's estimated cost may also need to be revised downward from the current amount, if less staff time is needed to provide the documents for inspection rather than preparing copies to give to the grievant.

Alternate Format

If the agency determines that producing information responsive to any of the grievant's requests would require extensive redaction to protect the privacy of nonparties, it may elect to

¹⁵ *Grievance Procedure Manual* § 8.2.

¹⁶ See EDR Ruling No. 2011-2921.

¹⁷ Va. FOIA Council Adv. Op., AO-07-11 (Nov. 9, 2011); see Va. FOIA Council Adv. Op., AO-03-12 (Apr. 24, 2012).

compile that information in a summary form to preserve employee privacy, rather than disclosing the personnel documents themselves. This could save time and expense for the agency and also reduce 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 relevant personnel documents themselves, with personally identifying information redacted.

CONCLUSION

Based on the discussion above, the agency must reassess its estimate of the cost to produce relevant documents responsive to Requests 1 through 3 consistent with this ruling and determine whether modifications to the estimate are necessary. The agency must provide the grievant with a revised estimate of the cost of production **within five workdays of the date of this ruling.**

EDR's rulings on matters of compliance are final and nonappealable.¹⁸



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¹⁸ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).