



EMILY S. ELLIOTT
DIRECTOR

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

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

COMPLIANCE RULING

In the matter of the Virginia Information Technologies Agency
Ruling Number 2020-4970
August 30, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) in relation to the alleged failure of the Virginia Information Technologies Agency (the “agency”) to produce requested documents. For the reasons discussed below, EDR finds that the agency has complied with the grievance procedure.

FACTS

As described in his grievance, on or about March 22, 2019, the grievant submitted a complaint to the Office of the State Inspector General’s (“OSIG’s”) Fraud, Waste and Abuse Hotline alleging that his supervisor was misusing their agency’s audit process to punish the audited entity (the supervisor’s former employer). On May 16, 2019, the grievant filed a grievance alleging that his supervisor had engaged in a pattern of retaliatory behavior toward him. Documents the agency produced at the grievant’s request in connection with the grievance prompted the grievant to initiate a second grievance on or about June 20, 2019. In connection with the second grievance, the grievant sought “all emails” between his supervisor and next-level supervisor (“the manager”). In response to this request, the agency produced only one document, on the ground that no other requested records existed related to either grievance.² Disputing this representation, the grievant requests a compliance ruling from EDR.

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,

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² The second grievance alleges multiple issues that are the same or similar to those identified in the first grievance; namely, retaliation and alleged violations of DHRM policies on the documentation and dissemination of personnel information. Accordingly, the primary topics of emails sought by the grievant substantially overlap with respect to the issues raised in the two grievances.

upon request from a party to the grievance, by the opposing party, in a timely fashion.”³ 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.”⁴ For purposes of document production, examples of just cause include, but are not limited to, the circumstances that (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.⁵ The grievance statutes further provide 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.”⁶

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.⁷

In this case, the grievant sought all emails between his supervisor and the manager. All such e-mails, however, would not necessarily be related to the actions grieved and, therefore, subject to production under the grievance procedure.⁸ The agency’s initial response was that there were no “grievance-related” emails, or emails about the grievant, between the supervisor and manager – other than one, which was produced. Since its initial response, the agency has also represented to EDR that no emails between the grievant’s supervisor and the manager exist that pertain to the grievant’s performance and/or the OSIG complaint. Records regarding these issues appear to cover adequately the actions grieved in this matter.⁹

Under the grievance procedure, a party is not required to create documents that do not exist.¹⁰ Thus, to the extent there were verbal communications between the supervisor and the manager about these topics, the agency is not required to create records to reflect such conversations. EDR generally considers the nonexistence of responsive documents to be just

³ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁴ *Grievance Procedure Manual* § 9.

⁵ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

⁶ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁷ *Grievance Procedure Manual* § 8.2.

⁸ This ruling does not address whether such records would be otherwise properly subject to a request for records under the Freedom of Information Act.

⁹ The main issues alleged in the second grievance relate to the grievant’s claim of retaliation for contacting OSIG (reasserted from his first grievance) and the grievant’s work performance and any conversations or records related thereto.

¹⁰ Va. Code § 2.2-3003(E).

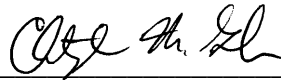
cause that excuses a party's failure to provide requested information.¹¹ While EDR recognizes that the grievant distrusts the agency's representations, EDR has reviewed nothing to suggest that documents responsive to the grievant's requests do in fact exist and have been improperly withheld by the agency. Accordingly, EDR finds no basis at this time to conclude that the agency has improperly withheld documents from the grievant without just cause.

CONCLUSION

For the reasons set forth above, EDR concludes that the agency has complied with the grievance procedure with respect to the grievant's request for documents. It appears that, when the grievant requested this ruling, the grievance process was temporarily halted after the grievant had received the third step response. The grievant is, therefore, directed to either request qualification of his grievance for hearing or conclude his grievance **within ten workdays of the date of this ruling**, if he has not done so already.

Lastly, while this ruling was pending, the agency submitted a request to administratively close this grievance¹² because the grievant has submitted his resignation, which is apparently effective September 10, 2019. As the grievant is still employed by the agency, this request is premature and will not be addressed in this ruling. Should the agency wish to resubmit the request after the grievant is no longer employed by the agency, EDR will consider the request at that time.

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



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹¹ Under some circumstances, an act of bad faith by a party could negate a claim of just cause based on the nonexistence of requested documents. However, EDR perceives no such circumstances in this case.

¹² It is unclear whether the grievant was also sent a copy of the request.

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