



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 Department of Motor Vehicles
Ruling Number 2020-4972
August 27, 2019

The Virginia Department of Motor Vehicles (“the agency”) 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 grievant to produce documents as ordered by the hearing officer or otherwise respond to the hearing officer’s order. For the reasons discussed below, EDR finds that the grievant has yet to comply with the hearing officer’s order.

FACTS

This case involves the grievant’s challenge to her termination by Group III Written Notice. On July 11, 2019, the hearing officer ordered the grievant to produce nine separate categories of documents, mostly related to the grievant’s banking records, communications with the grievant’s bank, and documents related to the grievant’s knowledge and conduct surrounding the issues involved in this case; and to redact those documents where appropriate. The grievant provided no documents or other response to the hearing officer’s order. The agency brought this matter to the hearing officer’s attention by e-mail on August 8, 2019. The grievant’s attorney responded on August 9, 2019, confirming that no records had been produced, but indicated that there were only two documents to produce. The hearing officer’s response indicated that he intends to address the matter of compliance with his order at hearing. Having still received no documents from the grievant, the agency requested this ruling on August 21, 2019, arguing that EDR should issue a default judgment against the grievant for noncompliance and close the grievance. Later on the same day, the grievant’s attorney responded to produce one document and indicated that the second document would be forthcoming within five workdays.

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.

DISCUSSION

While the hearing officer's order did not provide a date by which the documents were to be produced, the grievant has clearly exceeded a reasonable response time. Under the grievance procedure generally, documents are to be produced within five workdays.² The grievant has not presented any justifiable reason for the delay or a request for further time to respond. Thus, EDR finds that the grievant has failed to comply with the grievance procedure and the hearing officer's order.

Although the grievant has finally provided one document, her attorney has also admitted that at least one additional document has not yet been produced. The record is incomplete for EDR to determine whether there are any further records within the grievant's possession that are responsive to any of the nine categories of documents listed in the hearing officer's order. While the grievant's attorney states that there are only two records to produce, he has not made an affirmative representation that no other records exist. Consequently, to adequately respond to the hearing officer's order, the grievant must clarify whether there are additional documents responsive to all nine categories of documents that she has been ordered to produce.

The grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure.³ However, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. The grievant's actions in this case, while noncompliant, do not yet rise to the level that would justify a finding of substantial noncompliance or the extreme sanction sought by the agency in this case.⁴ Accordingly, the default judgment requested by the agency is denied.

The matter of the grievant's noncompliance must still be addressed, however. The grievant is ordered by EDR to comply with the hearing officer's order immediately. Further noncompliance should be addressed to the hearing officer or, if not adequately addressed by the hearing officer, to EDR as a compliance ruling request.

In addressing the grievant's noncompliance, EDR directs the hearing officer to consider the provisions of the *Rules for Conducting Grievance Hearings*.⁵ The hearing officer could, for example, strike the grievant's evidence, rule that the evidence is not admissible due to untimely production, or take adverse inferences against the grievant and in favor of the agency's position(s). While the records requested by the agency in this case might initially appear to only support the grievant's defense, that is not entirely the case. Some documents, if they exist, could be relevant to the misconduct at issue in the Written Notice, such as what the grievant knew and

² See *Grievance Procedure Manual* § 8.2.

³ *Id.* § 2.2-3003(G).

⁴ The agency cites to a past ruling in which EDR ruled against another agency for substantial noncompliance for failing to produce requested documents. See EDR Ruling No. 2007-1470. As reflected in that ruling, EDR ordered the agency to comply in that case multiple times before rendering a decision against the agency. *Id.* At this stage, the noncompliant actions involved in that case are not comparable to the noncompliance in this case.

⁵ *Rules for Conducting Grievance Hearings* § IV(F) ("A party's failure to comply with the grievance procedure or an order of [EDR] or the hearing officer regarding documents may result in the hearing officer ordering sanctions against that party." (citing *id.* §§ III(E) & V(B))).

when, which will necessarily inform whether her conduct was untruthful and/or misleading. Accordingly, because the negative impact of nonproduction of the documents does not solely fall on the grievant here, the hearing officer must give appropriate consideration to the proper consequences for any noncompliance. The consequences of the grievant's noncompliance, if not corrected properly, should not prejudice the agency.

EDR's rulings on matters of compliance are final and nonappealable.⁶



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁶ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).