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**COMPLIANCE RULING**

In the matter of the Department of Taxation  
Ruling Number 2020-4993  
November 14, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”)<sup>1</sup> regarding alleged noncompliance with the grievance procedure by the Department of Taxation (the “agency”) in relation to the production of requested documents.

FACTS

On July 9, 2019, the grievant initiated a grievance with the agency alleging “[p]ay inequality and possible pay discrimination” based on the agency’s use of a market study assessment to adjust pay practices, specifically hiring ranges and current salaries, for employees in different areas of the state.<sup>2</sup> The grievant essentially alleges that the agency improperly set lower hiring ranges and salaries for the region in which he worked, based on its consideration of the applicable compensation factors, as compared with other areas. At the second step meeting on August 6, the grievant verbally requested a map delineating the agency’s designation of areas for pay-related purposes. On the following day, August 7, the grievant sent an email to the agency requesting a copy of the market study assessment that prompted the adjustments to hiring ranges and salaries.<sup>3</sup>

The grievant continued to the third step while his request for these documents was pending, and received the third step response on August 30, 2019. The grievant then took no further action, presumably because he was waiting for the agency to produce the requested documents. The agency sent the grievant a notice of noncompliance on September 24, advising him that he was out of compliance with the grievance procedure because he had not advanced or

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<sup>1</sup> 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.

<sup>2</sup> While this ruling was pending, the grievant resigned from employment with the agency and transferred to another agency. This has no impact on EDR’s analysis of the compliance issues to be addressed.

<sup>3</sup> At the second step meeting, the agency apparently provided the grievant with copies of several pages of the market study, but did not share the full document with him. The pages given to the grievant appear to include a list of the market data used to complete the study, rather than the content of the study itself.

concluded his grievance within five workdays of receiving the third step response. The grievant requested a compliance ruling from EDR on September 26, alleging that the agency's failure to disclose the market study, along with a map identifying the pay-related regions created after the study, does not comply with the grievance procedure.

### 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>4</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>5</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>6</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>7</sup>

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 10 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 10 workdays from receipt of the document request.<sup>8</sup>

The agency has informed EDR that it has no objection to producing a map identifying the areas for which it has set different pay practices. To the extent it has not done so already, the agency must provide the grievant with that document **within 10 workdays of the date of this ruling.**

In support of his position that the agency should provide him with a copy of the market study, the grievant appears to argue that, based on the information he has received from the

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<sup>4</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

<sup>5</sup> *Grievance Procedure Manual* § 9.

<sup>6</sup> See, e.g., EDR Ruling No. 2020-4970; EDR Ruling Nos. 2008-1935, 2008-1936.

<sup>7</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

<sup>8</sup> *Grievance Procedure Manual* § 8.2.

agency, the data used to complete the study was ineffective and/or unreliable for the purpose of adjusting pay practices for different areas. The grievant believes that the agency should not have used the market study to adjust pay practices as it chose to do, and has requested a copy of the document to further support that assertion.<sup>9</sup>

According to the information provided to EDR by the agency, an outside vendor conducted the market study to assess issues with salaries and retention in a particular area of the state where the grievant did not work. The study was intended to address the agency's pay practices in that area only.<sup>10</sup> After reviewing the market study, the agency decided to evaluate its statewide pay practices more thoroughly. This additional review resulted in changes to hiring ranges and current salaries more broadly, including the region where the grievant worked. The market study, however, does not contain information that was used in that statewide analysis. Thus, the agency asserts that the market study assessment is not relevant to the issues raised in the grievance because it does not contain information that was used in its decision to change pay practices for the grievant's area. EDR has not reviewed, and the grievant has not presented, anything to suggest that the agency's description of the market study is inaccurate, or that it actually contains information that the agency used to assess its pay practices in the grievant's region. As a result, EDR finds that there is just cause for the agency to withhold production of the market study at this time because it is not relevant to issues raised in the grievance.<sup>11</sup>

### CONCLUSION

Based on the discussion above, the agency is directed to provide the grievant with a map identifying its designation of areas for pay-related purposes, if it has not done so already, **within 10 workdays of the date of this ruling**. With regard to the market study, there is no basis for EDR to conclude that the agency has failed to comply with the grievance procedure because there is just cause for withholding that document at this time.

It is EDR's understanding that, when the grievant requested this ruling, the grievance process was temporarily halted after the grievant received the third step response. After the grievant receives the agency's map of its pay areas, if he has not already, the grievant must either

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<sup>9</sup> The grievant has also raised concerns about the agency's notice of noncompliance after he received the third step response. Section 8.2 of the *Grievance Procedure Manual* provides that a party requesting documents "has the option of demanding, in writing, that the grievance process temporarily halt until the documents are provided." While the grievant's desire to await the agency's production of documents before proceeding is reasonable, he does not appear to have communicated that desire to management while the document requests were outstanding. In any event, because this ruling has resolved the remaining documents-related issues, the parties should therefore proceed with the grievance process as directed.

<sup>10</sup> The market study included a review of multiple types of positions within the agency, not only employees in the grievant's position.

<sup>11</sup> This ruling only determines that the agency need not produce the document at this time. The analysis to be conducted is potentially not the same when evaluating whether a grievant should have access to documents as a means of resolving a dispute during the management resolution steps as opposed to whether such documents may be necessary to prove a claim at a grievance hearing. Thus, this ruling does not necessarily serve as a prohibition on the disclosure of the document should the grievance later proceed to a hearing.

conclude the grievance or request qualification for a hearing from the agency head within five workdays of receiving the map.

EDR's rulings on matters of compliance are final and nonappealable.<sup>12</sup>



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<sup>12</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).