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COMPLIANCE RULING

In the matter of George Mason University
Ruling Number 2021-5250
April 27, 2021

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

FACTS

The grievant submitted a grievance on April 6, 2021 regarding his “administrative suspension with pay.” The university is currently undertaking an investigation into alleged misconduct concerning the grievant. The grievant maintains that he is entitled to “written notification of the intended corrective action and a summary or description of the evidence of the offense for which the corrective action is being contemplated.” The university wants to interview the grievant pursuant to its investigation, but the grievant is apparently refusing to be interviewed until he receives the requested information. The grievant challenges the university’s alleged failure to provide a “summary or description of the evidence of the offense” as a substantive issue of his grievance and as an issue of noncompliance with the document request provisions of the grievance procedure. The university states that it has no documents responsive to the request as the investigation is still ongoing. The university indicates that “if the administrative investigation results in the agency contemplating corrective action, then it will draft and provide [the grievant] a summary or description of the evidence of the offense.” As the grievant has not been provided the documents sought, this compliance ruling has been requested.

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, in a timely fashion.”¹ EDR’s interpretation of the mandatory language “shall be made available” is that, absent just cause, all

¹ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

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.”² 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.³ 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.”⁴

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.⁵

In this case, the grievant sought a “summary or description of the evidence of the offense.” The university represents that there are no such records. Under the grievance procedure, a party is not required to create documents that do not exist.⁶ EDR generally considers the nonexistence of responsive documents to be just cause that excuses a party’s failure to provide requested information.⁷ The university’s position on this issue appears to be reasonable and understandable. The university has undertaken an investigation to determine whether there has been an offense of misconduct committed. EDR is unclear how the university could provide notification for an offense that it has not yet determined occurred. As such, EDR cannot find that the university has failed to comply with the document request provisions of the grievance procedure at this time.

The grievant cites the language in Section C(1)(a) of the *Standards of Conduct* policy as placing the university under a duty to generate a summary or description of the evidence of an offense for which corrective action is intended. Whether the university is in compliance with this provision is not a question of compliance with the grievance procedure and, accordingly, is not for EDR to determine in this ruling. However, EDR will observe that the language cited appears to mirror the notice required during pre-disciplinary due process, when the employee must receive notice of an offense, an explanation of the agency’s evidence, and an opportunity to respond.⁸ The

² *Grievance Procedure Manual* § 9.

³ *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936.

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

⁵ *Grievance Procedure Manual* § 8.2.

⁶ Va. Code § 2.2-3003(E).

⁷ 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.

⁸ DHRM Policy 1.60, *Standards of Conduct*, § E.

language in Section C(1)(a) requiring an agency to provide the summary or description of the evidence of an offense appears to be triggered when the agency is providing an employee written notification of an intended corrective action.⁹ At this point, there is no intended corrective action about which to notify the grievant. As the university has described, it will provide such a notice when and if there is such an intended corrective action. The grievant will then have an opportunity to respond and, if a disciplinary action is issued, he will be able to challenge it through a future grievance or other complaint process.

CONCLUSION

For the reasons set forth above, EDR concludes that the university has complied with the grievance procedure with respect to the grievant's request for documents. It appears that, when this ruling was opened, the grievant had forwarded the grievance to the agency head to request qualification for a hearing. The university is, therefore, directed to provide the grievant with the agency head's response to this request **within five workdays of the date of this ruling**, if it has not done so already.

EDR's rulings on matters of compliance are final and nonappealable.¹⁰

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⁹ The full text of this section is: "As soon as possible after an employee's removal from the work area for reasons stated above, management must provide the employee with written notification of the intended corrective action and a summary or description of the evidence of the offense for which the corrective action is being contemplated, and when applicable, that an administrative investigation of the employee's conduct is underway. Employees must be provided a reasonable opportunity to respond before taking any formal corrective action." DHRM Policy 1.60, *Standards of Conduct*, § C(1)(a).

¹⁰ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).