

Issue: Compliance/Documents; Ruling Date: December 17, 2002; Ruling #2002-215;
Agency: Department of Transportation; Outcome: Agency out of compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2002-215
December 17, 2002

The grievant has requested a compliance ruling on his October 31, 2002 grievance. The grievant claims that the Virginia Department of Transportation (VDOT) has failed to provide him with documents and information requested relevant to his grievance.

FACTS

The grievant was an Engineering Technician III with VDOT until his termination on October 4, 2002. During the week of April 8, 2002, VDOT conducted an internal audit of computer use within the agency. As a result of the audit, the agency disciplined approximately 90 employees on the charge of excessive computer use. In addition, sixteen of those employees, including the grievant, were terminated on the charge of accessing sexually explicit material on the Internet using state computers.¹ The grievant challenged his termination on October 31, 2002, claiming that he did not access improper Internet sites and that the disciplinary action against him was unwarranted.

On the day he filed his grievance, the grievant also requested that the agency provide him with all relevant documents pertaining to his grievance. The request included "all records, documents, reports, emails, notes of discussions, policy statements, press releases, and explanations or descriptions of methods, criteria, and/or data *pertaining to any proposed and/or implemented discipline of any VDOT employee(s) resulting from or pertaining to investigation into Non-Work Related Use of the Internet in April of 2002.*"² The grievant received a copy of his personnel file on November 6. Moreover, on November 12, VDOT provided information about the April investigation. The agency refused to provide information about other employees for whom discipline was considered and/or issued as a result of the April 2002 investigation, citing the attorney-client privilege. During this Department's

¹ During this Department's investigation, the agency stated that those employees who were found to have spent significant time on the Internet received a Group II Written Notice. In addition, those employees who searched sexually explicit Websites received a second Group II Written Notice with termination.

² See Notice of Noncompliance, dated November 6, 2002, from the grievant's attorney to the Agency Head.

investigation, the agency further stated its belief that the information on proposed and/or implemented discipline of other employees is irrelevant to the issues presented in the grievance.

The grievant requested a compliance ruling on November 14, claiming that the information sought is relevant and that VDOT did not have just cause for withholding it from him. Specifically, he objected to the agency's assertion of the attorney-client privilege, stating that there was no basis for this privilege. The grievant also claimed that the agency violated the grievance procedure when it failed to provide him with the requested documents in a timely manner, given that he has filed an expedited grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ That process assures that the parties first communicate with each other about the noncompliance and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the party fails to correct the alleged noncompliance, the other party may request a ruling from this Department. Should this Department find that the party violated a substantial procedural requirement, this Department *may* resolve the grievance in the other's party favor unless the party can establish just cause for its noncompliance.⁴

Request for Records

The grievance statute provides that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia,⁵ relating to actions grieved shall be made available, upon request from a party to the grievance, by the opposing party.”⁶ This Department's interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance 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.”⁷ However, a party is not required to create a document if the document does not exist.⁸

³ *Grievance Procedure Manual* § 6.1, pages 16-17.

⁴ *Grievance Procedure Manual* § 6.3, page 17.

⁵ See Rules of the Supreme Court of Virginia, Rule 4.9(a)(1) (defining documents as “writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”)

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

VDOT claims that any documents relating to the proposed and/or implemented discipline of other VDOT employees resulting from the April 2002 investigation are not relevant to the grievant's claim, because the behavior of those employees (and whether discipline resulted) had nothing to do with the grievant's termination. However, in support of his challenge to his Group II Written Notices and termination, the grievant seeks to prove his contention that the agency's April 2002 investigation was flawed and the resulting decision regarding whether to discipline him, in light of such decisions regarding other similarly situated employees, was inconsistent and unwarranted. The disciplinary actions (or lack thereof) against other employees stemming from the same investigation are relevant to the overall issue of whether the grievant's discipline was warranted and appropriate under the circumstances, an issue which may include questions surrounding its consistency and reasonableness in light of the investigation itself and/or other similarly situated employees. Therefore, absent a showing of just cause, VDOT must provide the grievant with the information sought in a manner that preserves the privacy of other individuals. The parties should note that this determination of relevancy has no bearing on the underlying merits of the grievance itself.

Just Cause

In this case, the agency asserts that "just cause" exists for withholding the materials pertaining to the proposed and/or implemented discipline of other VDOT employees due to the April 2002 investigation, on the basis that disclosure of materials violates the attorney-client privilege. In support of its position, VDOT states that management consulted with legal counsel during the course of the Internet abuse investigation and in considering appropriate discipline for the affected employees.

The purpose of the attorney-client privilege is to protect confidential communications between attorneys and their clients.⁹ The attorney-client privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.¹⁰ The privilege acknowledges that an attorney needs to know all information relating to the client's representation so that the attorney may carry out his or her professional mission.¹¹ In other words, the purpose of the attorney-client privilege is to "encourage clients to make full disclosure to their attorneys."¹² The protection of the privilege extends *only to confidential communications between attorney and client*, and does not extend to underlying facts or evidence.¹³ Moreover,

⁹ Wells v. Liddy, 2002 WL 331123 (4th Cir. 2002 (unpublished opinion.)), citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

¹⁰ Swindler & Berlin v. United States, 524 U.S. 399, 403 (1998).

¹¹ *Upjohn*, 499 U.S. at 389.

¹² *Id.*

¹³ *Id.*

disclosure to a third party may waive the privilege, not only to the transmitted data but also as to the details underlying that information.¹⁴

Certainly any confidential communications, written or otherwise, between VDOT management and its legal counsel in this case are protected by attorney-client privilege, absent any waiver. However, any counseling, corrective actions, or disciplinary actions that were administered to VDOT employees for Internet abuse are not attorney-client communications and thus are not protected by the attorney-client privilege; indeed, those employees are third parties outside the attorney-client relationship between VDOT and its legal counsel. Thus any written counseling, corrective action and/or discipline received by VDOT employees as a result of the April 2002 investigation is not protected by the attorney-client privilege. Likewise, with the exception of documents containing confidential communications between VDOT management and its legal counsel, any documents pertaining to VDOT's action or inaction with respect to such employees, are not protected by the attorney-client privilege. The agency is therefore directed to provide all such documents to the grievant within five work days of receipt of this ruling. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate and redact the documents. In the alternative, the parties may agree that VDOT may organize the same information in a single chart or other format for production to the grievant, omitting any personally identifying information.

Timeliness of Agency's Production of Documents

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 reasonably timely manner.

Here, the grievant requested a number of documents, many of which were technical in nature. Under the facts and circumstances of this case, it does not appear that VDOT was unreasonable in its production of the requested documents. Therefore, the agency did not violate a substantial requirement of the grievance procedure with respect to its production of documents.

¹⁴ Wells v. Liddy 2002 WL 331123 (4th Cir. 2002)(unpublished opinion).

CONCLUSION

This Department directs agency management to respond to the grievant's October 31, 2002 document request in accordance with this ruling, within five workdays of its receipt of this ruling. Within five workdays of his receipt of the agency's response, the grievant must either advance or conclude his grievance. Any additional issues concerning the production of documents may be raised at the qualifications stage of the grievance, and if the grievance is qualified, with the hearing officer at the prehearing conference. This Department's rulings on matters of compliance are final and nonappealable.¹⁵

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¹⁵ Va. Code § 2.2-1001(5).