

Issue: Compliance/documents; Ruling Date: October 1, 2003; Ruling #2003-107;
Agency: Department of Transportation; Outcome: agency to produce documents



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
No. 2003-107
October 1, 2003

By letter dated May 30, 2003, the grievant requests a compliance ruling from this Department. The grievant claims that management has failed to provide him with documents and information requested relative to his grievance initiated on May 3, 2003.

FACTS

The grievant is employed as an Assistant Facilities Manager with the Virginia Department of Transportation (VDOT or the agency). On June 16, 1998, the grievant signed the agency's Information Technology Division Security Agreement (ITD-33B), which prohibited the use of VDOT equipment and the Internet for personal use. Subsequently, on October 16, 2002, VDOT instituted the Department of Human Resource Management's (DHRM) Policy 1.75, "Use of Internet and Electronic Communications Systems." The grievant signed an agreement to abide by this policy on October 31, 2002. According to the policy, incidental and occasional use of the Commonwealth's Internet or email systems is permitted; however, personal use is prohibited if it interferes with productivity or work performance, adversely affects the efficient operation of the computer system, or violates any provision of the policy or any supplemental policy.¹ VDOT claims that an audit of the grievant's usage of the Internet for four different weeks during the months of July, August, October, and November of 2002 indicates that he abused state time by using the Internet to frequently visit non-work related sites. Thus, on March 5, 2003, management issued the grievant a Group II Written Notice for abuse of state time, misuse of state equipment, and failure to follow established written policy.

¹ See DHRM Policy 1.75, page 2 of 5.

In response to the Group II Written Notice, the grievant initiated a grievance on May 3, 2002.² The grievant claims that the Written Notice is unwarranted because it is the result of: (1) an arbitrary and capricious unfair application and misapplication of policies, procedures, rules and regulations; (2) continuous retaliation against him for his refusal to participate in, condone, or ignore illegal activities, violations of Commonwealth policies, the Code of Virginia and VDOT policies and ethical practices; (3) continuous retaliation against him for his compliance with legal requirements, Commonwealth policies, the Code of Virginia, VDOT policies, and ethical practices; (4) a concerted effort to circumvent his position, responsibilities, authorities, and legal responsibilities; and (5) a concerted effort to discredit his personal credibility, qualifications, integrity, and character.

Simultaneous with the initiation of his grievance, he also requested documents which he claims are relevant to his grievance.³ Following is the list of documents requested and management's response to each item:

1. All relevant documents relating to this grievance, including but not limited to, all records, documents, reports, emails, notes of discussion, policy statements, and explanations of methods, criteria, and/or data pertaining to any proposed and/or implemented discipline;

(The agency stated that copies of the Written Notice, grievance, and the IT audit data have been provided, but if the grievant is requesting additional copies of those documents he should please advise.)

2. All relevant documents relating to the "Hot Line" investigation, proposed to be the initiation of the audit noted in the charges, including but not limited to, all records, documents, reports, emails, notes of discussion, policy statements, and explanations of methods, criteria, and/or data pertaining to any proposed and/or implemented discipline of any other VDOT employee resulting from or pertaining to the investigation;

(The agency responded that information relevant to an investigation by the State Internal Auditor must be requested by filing a request with the SIA, and provided the SIA's name and address.)

3. All relevant documents, including but not limited to, all records, documents, reports, emails, notes of discussion, policy statements, press releases, and explanations of methods, criteria, and/or data pertaining to any proposed and/or implemented discipline of any other VDOT employee for the

² The parties had mutually agreed to extend the 30 calendar day filing period to 60 calendar days.

³ Grievance Form A, Attachment D.

calendar year 2002 resulting from or pertaining to investigation into Non-Work Related Use of the Internet;

(The agency provided a redacted chart with a list of the disciplinary actions issued in 2002 relevant to Internet abuse.)

- 4-6.⁴ All relevant documents, including but not limited to, all records documents, reports, emails, notes of discussion, policy statements, press releases, and explanations of methods, criteria, and/or data pertaining to any proposed and/or implemented discipline of any other VDOT employee for the calendar year 2002 resulting from or pertaining to investigation into (1) Abuse of State Time, (2) Misuse of State Equipment, and (3) Failure to Follow Established Written Policy;

(The agency stated that there is no report available detailing the information requested and also noted that management is not required to create such reports. During this Department's investigation, the agency further indicated that the information is irrelevant to the issues presented in the grievance.)

7. The established written policy or policies, distributed to all VDOT employees, that contain a written definition of the following terms, as they relate to VDOT employees: Abuse of State Time, Misuse of State Equipment, Incidental, Occasional, Personal Purposes (In the context of USER RESPONSIBILITIES Policy 1.75);

(The agency replied that a written definition of these terms does not exist in state policy.)

8. Documentation of each and every time the grievant logged on or off of his computer every workday of the calendar year 2002. Data to include the total amount of elapsed time from the first log on to the last log off for each day.

(The agency stated that there is no report available detailing the information requested and also noted that management is not required to create such reports.)

On May 12, 2003, the grievant notified the agency head in writing that the agency was out of compliance with the grievance procedure by failing to provide the requested

⁴ To avoid repetition, Numbers 4 through 6 of the grievant's request have been combined rather than listed separately.

documents. By letter dated May 21, 2003, the agency head denied the grievant's allegations of agency non-compliance, stating that the response provided to the grievant was accurate, complete, and timely.⁵ As a result, the grievant seeks a ruling from the Department on whether the agency has failed to comply with the grievance procedure.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁶ 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.⁷ If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department. Should this Department find that the party has violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may render a decision against the noncomplying party unless that party can establish just cause for its noncompliance.⁸

The grievance statute also provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party."⁹ 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."¹⁰ Documents, as defined by the Rules of the Supreme Court of Virginia, include "writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."¹¹ However, a party is not required to create a document if the document does not exist.¹² To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

⁵ See Letter to grievant from the Director of Policy and Organizational Development, responding on behalf of the Commissioner of VDOT.

⁶ See *Grievance Procedure Manual* § 6.1, pages 16-17.

⁷ See *Grievance Procedure Manual* §6.3, page 17. In a case where the agency is purportedly out of compliance, the notification of non-compliance is directed to the agency head.

⁸ *Id.*

⁹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2, page 21

¹⁰ *Id.*

¹¹ See Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).

¹² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.

This Department 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.

In this case, the agency's responses to the grievant's request for production of documents with respect to numbered paragraphs 2, 3 and 7 are in compliance with the requirements of the grievance procedure.¹³ However, this Department concludes that additional documentation is due the grievant based upon his requests in paragraphs 4-6, 8 and 1.

Paragraphs 4 through 6: The grievant requests relevant documents pertaining to any proposed and/or implemented discipline of any other VDOT employee for the calendar year 2002 resulting from or pertaining to investigation into (1) Abuse of State Time, (2) Misuse of State Equipment, and (3) Failure to Follow Established Written Policy. The agency disputes the relevancy of proposed and/or implemented discipline of other employees to the issues presented in his grievance. Under the grievance procedure, the grievant is generally entitled to all documents that are relevant to the actions being grieved.¹⁴ Thus, the threshold issue to be determined is whether the information sought by the grievant is relevant to his claims.

In support of his challenge to his Group II Written Notice, the grievant seeks to prove that the agency's investigation of his Internet usage was flawed and that the resulting decision regarding his discipline was a misapplication and/or unfair application of policy, unwarranted and/or retaliatory. Significantly, this Department has previously held that disciplinary actions (or lack thereof) against other employees stemming from the same investigation by VDOT for possible Internet abuse *are* relevant to the overall issue of whether a grievant's discipline was warranted and appropriate under the circumstances.¹⁵ Therefore, while the agency need not provide documentation concerning *all* proposed and/or implemented discipline involving Abuse of State Time, Misuse of State Equipment, and/or Failure to Follow Established Written Policy as requested by the grievant, VDOT must supply the grievant with documentation of such with respect to

¹³ In paragraph 7, the grievant requested that the agency provide the written policies containing the definitions of terms used in his Written Notice, to which VDOT replied none exist. During the investigation for this ruling, the grievant clarified that he is seeking documents that would show how management determined what constitutes (i) abuse of state time, (ii) misuse of state equipment, (iii) incidental use, (iv) occasional use, and (v) use for personal purposes. Because these requests as clarified are encompassed within the document request in paragraph 1, they will be addressed in this ruling's discussion of paragraph 1.

¹⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2, page 21.

¹⁵ See EDR Ruling No. 2002-215, dated December 17, 2002.

investigations of *Internet abuse* by other VDOT employees. The parties should note that this determination of relevancy has no bearing on the underlying merits of the grievance itself.

Additionally, the time frame of the information requested by the grievant spans the period of an entire year, rather than only the months of July, August, October, and November 2002 when his Internet usage actually was investigated. However, in light of VDOT's ongoing effort to monitor and eradicate Internet abuse within the agency (which resulted in numerous employees being issued Written Notices in 2002), the consistency of the issuance of discipline to other similarly situated employees within a reasonable span of time is relevant to the overall issue of whether the grievant's discipline was warranted and appropriate. Therefore, the request of documents for the period of one year does not appear unreasonable based upon the facts and circumstances presented here.

The agency further claims that no reports exist detailing the information requested in numbered paragraphs 4 through 6, and that it is not required to create such reports.¹⁶ Here, VDOT is correct that the statute does not mandate the production of a document that is not already in existence. Thus, the agency is not obligated to summarize information for the grievant or create a chart detailing the requested information. However, the agency must provide to the grievant existing documents, which have been redacted to preserve personal privacy, that contain information relevant to his grievance (such as copies of Written Notices received by other employees as a result of the agency's Internet investigations during 2002). 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.

Paragraph 8: The grievant seeks documentation showing each time he logged on or off his computer for every workday of the calendar year 2002. He requests this information to support his position that he has consistently exceeded a 40-hour work week and, thus, his time spent on the Internet for the weeks in issue did not rise to abuse of state time or misuse of state equipment. In response, the agency again submits that no existing report details the requested information, and that management is not required to create a report for the grievant. Further, during the investigation for this ruling, VDOT indicated that providing such information to the grievant could be an undue burden to the agency.

Here, the information sought by the grievant is arguably relevant to his attempt to establish that his Group II Written Notice was unwarranted. Additionally, because data compilations fall within the definition of "documents" as defined by the Rules of the

¹⁶ The agency distinguishes the grievant's request in paragraphs 4-6 from that in paragraph 3 because the agency possessed a chart that had been created prior to the grievant's request concerning its investigation into improper use of the Internet by VDOT employees.

Supreme Court of Virginia,¹⁷ and because the agency apparently has the ability to compile detailed computer usage information (as exhibited by its tracking in detail the Internet usage of numerous employees over various spans of time), it does not appear that it would be unduly burdensome for the agency to provide the requested information to the grievant concerning his log on and off times. Thus, if the agency is able to access the requested information, they must provide such to the grievant.

Paragraph 1: The grievant appears to have included a ‘blanket’ or ‘catch-all’ document request in which he seeks “[a]ll relevant documents relating to this grievance,” including emails, reports, policy statements, notes of discussion, and explanation of criteria pertaining to proposed or implemented discipline. In response, the agency offers only to provide additional copies of his Written Notice, the IT audit data, and his grievance form. Accordingly, the agency appears to have responded rather narrowly to what is a broad request for documentation that would provide an explanation of the criteria used by VDOT in determining what constitutes Internet abuse within the agency, as applied to the grievant’s discipline. Thus, in accordance with the general principles discussed above pertaining to the requests in paragraphs 4, 5, 6, and 8, if the agency possesses any remaining *relevant* documentation requested by the grievant, it must provide those documents in a manner that preserves personal privacy.

In sum, the agency must conduct a reasonable search to obtain documentation required to be produced in accordance with this ruling. Any documentation provided to the grievant must be redacted, where appropriate, to protect the legitimate privacy interests of third parties and shall be produced within five (5) workdays of receipt of this ruling. Additionally, as a general rule, an agency may charge a grievant its actual cost to retrieve and duplicate requested documents.

If the grievant is dissatisfied with management’s response to his request – its production of documents, any further written response to this request, and/or its cost assessment -- he may raise the issue again at the qualification phase of the grievance. Furthermore, if the grievance qualifies for a hearing, the issue may be raised again, if need be, at a prehearing conference with the hearing officer. Absent just cause, the agency’s failure to provide the grievant with any of the requested documents could result in adverse inferences drawn against the agency during the qualification and/or hearing stages. For example, if documents are withheld absent just cause, and those documents could resolve a disputed material fact pertaining to the grievance, this Director at the qualification stage or a hearing officer at the hearing stage could resolve the factual dispute in the grievant’s favor.

¹⁷ See Rules of the Supreme Court of Virginia, Rule 4.9(a)(1). Documents are defined to include data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.

CONCLUSION

This Department directs agency management to respond to the grievant's May 3, 2003 document requests 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 qualification 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.¹⁸

Claudia T. Farr
Director

Susan L. Curtis
EDR Consultant

¹⁸ Va. Code § 2.2-3003(G).