

Issue: Compliance/5 day rule/documents; Ruling Date: October 8, 2003; Ruling #2003-161 and 2003-170; Agency: Department of Transportation; Outcome: Agency in compliance with 5 day rule; documents issue to be decided in hearing process by hearing officer.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Transportation/ No. 2003-161, 2003-170  
October 8, 2003

The grievant has requested a compliance ruling from this Department (or "EDR"). The grievant claims that (1) the first step respondent to his July 29, 2003 grievance failed to properly respond to the issues in his grievance, (2) the agency failed to schedule a second step meeting in his July 29 grievance in a timely manner, and (3) the agency failed to provide him with documents and information requested relative to his grievance initiated on July 23, 2003.

FACTS

The grievant was a Resident Engineer with the Virginia Department of Transportation (VDOT). On July 1, 2003, the agency issued the grievant two Group III Written Notices for falsifying state records and one Group II Written Notice for misuse of state property.<sup>1</sup> As a result of these Written Notices, the agency terminated the grievant's employment, effective July 1, 2003. The grievant challenged his termination by filing a grievance on July 23, 2003 (Grievance #1).<sup>2</sup> The grievant filed a second grievance on July 29, 2003 (Grievance #2), alleging that VDOT wrongfully terminated him while he was on Family Medical Leave.<sup>3</sup>

In response to Grievance #2, the grievant's immediate supervisor, who served as the agency's first step respondent, stated that "I did not make the decision to terminate you, nor did I determine that you would be terminated on July 1, 2003 while you were on sick leave. As that decision was made by higher authority, *I do not have the power to*

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<sup>1</sup> The agency claims that the grievant signed travel reimbursement forms stating that he was attending conferences in another city, when he did not attend the conferences. One of the grievant's Written Notices states that the grievant wrongfully received \$70 in travel reimbursements. The agency further claims that the grievant falsely authorized another employee's travel reimbursement form. Finally, the agency alleges that the grievant used state equipment and a state employee to work on his motorcycle.

<sup>2</sup> Grievance Expedited Form A, filed July 23, 2003. The grievant claims that his termination was "without just cause based upon unfair application or misapplication of policies, procedures, rules and regulations, for reasons that are arbitrary and capricious and based upon mistakes of fact." *Id.*

<sup>3</sup> Grievance Form A, filed July 29, 2003. The grievant claims that, because he was on Family Medical Leave at the time of his termination, he is entitled to twelve weeks of pay.

*grant the relief you request.”*<sup>4</sup> The grievant claims that this response does not comply with the grievance procedure and requested a compliance ruling from this Department on September 9, 2003. In support of his compliance ruling request, the grievant cites to the grievance statute, which states that “[e]ach level of management review shall have the authority to provide the employee with a remedy.”<sup>5</sup>

On August 20, the grievant notified the Chief Engineer of Operations, his Second Step Respondent, that his supervisor’s First Step response did not comply with the grievance procedure. The letter further stated that the grievant, “in an abundance of caution, has advanced his grievance to the second step.”<sup>6</sup> In his September 9 compliance ruling request, the grievant further alleged that VDOT was out of compliance with the grievance procedure for failing to schedule the second step meeting in a timely manner.

In connection with Grievance #1, on August 20, 2003, the grievant requested a number of documents which he claims are relevant. The following is a list of documents requested and management’s response to each item:

1. A complete copy of grievant’s personnel file.

(The agency stated that the grievant’s personnel file would be made available for review at the VDOT Central Office in Richmond).

2. A copy of all complaints or accusations of misconduct concerning the grievant in this case.

(The agency replied that the grievant had already been provided with copies of the Written Notices. The agency did not state whether or not additional complaints had been made against the grievant).

- 2.<sup>7</sup> A complete copy of each personnel policy that VDOT claims the grievant violated in this case.

(The agency provided a copy of VDOT’s travel policy and referred the grievant to Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct).

3. All documents relating to VDOT interpretation and/or enforcement, issued before or after grievant’s discharge, of all personnel policies grievant is alleged to have violated in this case, including specifically any documents relating to VDOT’s interpretation or enforcement of any personnel policies relating to misuse of state resources/property/personnel.

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<sup>4</sup> First Step Response to July 29, 2003 Grievance, dated August 6, 2003 (emphasis added).

<sup>5</sup> Va. Code § 2.2-3003(D).

<sup>6</sup> Letter from grievant’s attorney to Chief Engineer of Operations, dated August 20, 2003.

<sup>7</sup> The original document request included two paragraphs numbered “2.”

(The agency claims that it has provided copies of the grievant's Written Notices).

4. All disciplinary actions of VDOT personnel for falsifying state records, misuse of state resources/property/personnel, theft, or dishonesty for the three-year period immediately preceding the date of grievant's termination of employment.

(The agency states that these personnel documents are privileged and irrelevant to the charges against the grievant. The agency later reported that no other Resident Engineers have been charged with violations identical to the grievant's alleged violations).

5. All records, documents, reports, e-mails, notes of discussions, policy statements, press releases and explanations or descriptions of any proposed discipline and/or implemented discipline concerning grievant in this case.

(The agency claims that the grievant's copies of his Written Notices are a sufficient response to this request. VDOT later stated that there were no press releases).

6. The investigation report of the Virginia State Police relating to allegations of criminal misconduct made against grievant and all records, documents, reports, e-mails, notes of discussions, policy statements, press releases and explanations or descriptions relating to the investigation of the Virginia State Police concerning allegations of criminal misconduct made against the grievant.

(VDOT referenced an August 15, 2003 letter to the grievant from the former Chief Engineer of Operations).

7. The full audit report prepared by the Office of the Inspector General relating to the grievant in this case and all records, documents, reports, e-mails, notes of discussions, policy statements, press releases and explanations or descriptions of the audit report prepared by the Office of the Inspector General relating to the grievant in this case.

(VDOT again referenced the August 15, 2003 letter to the grievant from the former Chief Engineer of Operations).

8. All documents as defined by the Rules of the Supreme Court of Virginia relating to actions grievant in this case and specifically relating to requests 1 through 7 above.

(The agency stated that additional relevant documents would be provided prior to hearing. The agency further referenced its responses to the grievant's other document requests, outline above).

On September 9, 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 documents. By letters dated September 15 and 26, 2003, the agency, through its attorney, provided the responses outlined above. In a later correspondence, dated September 26, the agency's attorney denied the grievant's allegations of agency noncompliance, stating that the responses provided to the grievant were accurate and complete. The September 26<sup>th</sup> letter further stated that "as the Agency attorney discovers more such [responsive] documents during his investigation of the case, they will be provided, if they are not objectionable."<sup>8</sup> As a result, the grievant seeks a ruling from this Department on whether the agency has failed to comply with the grievance procedure. In particular, the grievant argues that VDOT has failed to respond to his requests in good faith and objects to the agency's position that certain documents requested in paragraph #4 are privileged and irrelevant.<sup>9</sup>

On September 8, the grievant checked the box on his Expedited Form A, requesting qualification of Grievance #1. By letter dated September 23, VDOT notified the grievant that the agency head had qualified Grievance #1 for hearing and that the agency had requested the appointment of Hearing Officer.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>10</sup> 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

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<sup>8</sup> See Letter from VDOT attorney to the EDR Director, dated September 26, 2003, pages 2-4.

<sup>9</sup> One of the grievant's claims is that VDOT has inconsistently applied discipline to its employees and Document Request #4 concerns disciplinary actions against other VDOT employees for similar offenses. In support of his request for these documents, the grievant cites to an earlier EDR ruling. See EDR Ruling 2002-215. In that ruling, which involved another VDOT employee, this Department stated that "the disciplinary actions (or lack thereof) against other employees . . . 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 . . . other similarly situated employees." *Id.* That ruling further stated that such documents are not privileged and may be redacted to protect the privacy of third parties. *Id.* Because EDR Ruling 2002-215 involved VDOT, the grievant claims that "VDOT should be familiar with this rule." See Compliance Ruling Request from Grievant's attorney to the EDR Director, dated September 19, 2003, page 7. The grievant asserts that the agency has acted in bad faith in its refusal to provide a response to Request #4, because EDR has, in the past, addressed this issue in the grievance of another VDOT employee. See Compliance Ruling Request from Grievant's attorney to the EDR Director, dated September 19, 2003, page 5.

<sup>10</sup> *Grievance Procedure Manual* § 6.1, pages 16-17.

for the opposing party to correct any noncompliance.<sup>11</sup> 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.<sup>12</sup>

*First Step Response – Grievance #2*

In this case, the request for a compliance ruling on this issue was premature because the grievant did not (1) notify the agency of the alleged procedural violation and (2) give the agency five workdays to correct the alleged noncompliance, as required by the grievance procedure.<sup>13</sup> However, in the interest of procedural efficiency, this Department will rule on the issue of the agency's compliance at this time.

In support of his claim that the first step response to his grievance was not in compliance with the grievance procedure, the grievant cites to grievance statute, which states -- in part -- that “[e]ach level of management review shall have the authority to provide the employee with a remedy.”<sup>14</sup> In reliance on those words from the statute, the grievant views the first step response of “not having the power to grant the relief” requested<sup>15</sup> as a violation of the procedure.

The grievance procedure allows workplace disputes to be grieved through up to three successive levels of agency management.<sup>16</sup> While the grievance statute provides that each step respondent has the authority to provide some relief, it does not require that each management level be able to provide the *relief requested* by the grievant. A “remedy” may include a recommendation to higher levels of management.<sup>17</sup> However, all remedies are subject to review by the subsequent two respondents in the management resolution steps, generally an individual in an upper management position and the agency head. Indeed, the statutory language now in effect and at the time of the initiation of this grievance expressly states that “[e]ach level of management review shall have the authority to provide the grievant with a remedy, *subject to the agency head's approval.*”<sup>18</sup>

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<sup>11</sup> *Grievance Procedure Manual* § 6.3, page 17. In a case where the agency is purportedly out of compliance, the notification of noncompliance is directed to the agency head.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* The grievant notified the Chief Engineer of Operations of the alleged noncompliance on August 20, 2003. However, the grievance procedure requires that notice of noncompliance be provided to the agency head.

<sup>14</sup> Va. Code § 2.2-3003(D).

<sup>15</sup> See First Step Response, dated August 6, 2003.

<sup>16</sup> See *Grievance Procedure Manual* § 1.4, page 4.

<sup>17</sup> See EDR Ruling No. 2001QQ, page 6, dated March 23, 2001.

<sup>18</sup> Va. Code § 2.2-3003(D)(as amended effective July 1, 2003); see also *Dept. of Mental Health, Mental Retardation, and Substance Abuses Services v. Horner*, 40 Va. App. 338, 342 (April 22, 2003). The Court of Appeals held that a lower-level supervisor does not have more authority on disciplinary matters than an agency director. *Id.*

Here, the agency's first step respondent did not state that he did not have the authority to grant *any* remedy, only that he did not have the power to grant the grievant's *requested relief*. Indeed, the first step respondent had the authority to provide a recommendation to the subsequent step respondents, however, he chose not to do so.<sup>19</sup> Therefore, this Department cannot conclude that the agency violated any substantial requirement of the grievance procedure.

*Failure to Schedule Second Step Meeting – Grievance #2*

The grievant claims that VDOT has violated the grievance procedure by not scheduling a second step meeting to discuss the issues in Grievance #2. Yet at the time he notified the agency of this alleged noncompliance, he had just advanced his grievance to the Second Step Respondent. He stated in his September 9 request for a compliance ruling that the agency had not yet scheduled the second step meeting.

According to the grievance procedure, “[w]ithin 5 workdays of the second-step respondent’s receipt of the grievance, the second-step meeting must be held.”<sup>20</sup> However, the grievance procedure further states that “[a] challenge to EDR will normally stop the grievance process temporarily.”<sup>21</sup> Because the grievant has sought a compliance ruling from this Department challenging the first resolution step response, the process was stayed, and the agency was not out of compliance with the grievance procedure for failing to schedule a second step meeting at that time. Moreover, as discussed above, the grievant’s ruling request is premature, because he had not provided the requisite notice to the agency head and a 5 work day period for correcting any alleged noncompliance prior to requesting a ruling from this Department.<sup>22</sup>

The parties are reminded that the grievance process will resume with the issuance of this ruling.<sup>23</sup> Assuming that the grievant intends to advance this grievance, within five workdays of receipt of this ruling, the second-step respondent will schedule and hold the second-step meeting.

*Request for Documents – Grievance #1*

The grievance statute 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

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<sup>19</sup> During this Department’s investigation, the grievant claimed that the First Step Respondent chose not to provide a remedy to avoid conflict and that he should be able to respond to the grievance without the agency’s interference. However, the respondent’s motivation for choosing not to provide a recommendation is immaterial to the issue of whether he had *authority* to provide a remedy. In any event, any recommendation provided by the First Step Respondent would not be binding upon the subsequent step respondents.

<sup>20</sup> *Grievance Procedure Manual* § 3.2, page 8.

<sup>21</sup> *See Grievance Procedure Manual* § 6.1, page 16.

<sup>22</sup> *Grievance Procedure Manual*, § 6.1, pages 16-17.

<sup>23</sup> *Id.*

available upon request from a party to the grievance, by the opposing party.”<sup>24</sup> 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.”<sup>25</sup> Documents, as defined by the Rules of the Supreme Court of Virginia, include “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.”<sup>26</sup> However, a party is not required to create a document if the document does not exist.<sup>27</sup> 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.

Under the grievance procedure “[a] challenge to EDR will *normally* stop the grievance process temporarily.”<sup>28</sup> However, in a case such as this where the agency has requested the appointment of a hearing officer, it makes little sense to halt the grievance process so that EDR can sort out the document production dispute. At this late stage in the grievance process, the *only* purpose for which the requested documents have any bearing is the grievance hearing. Moreover, the hearing officer who will preside over the hearing will be called upon to make relevancy determinations on *all* evidence presented at hearing. For both the hearing officer and this Department to rule on the document issues *at this stage in the grievance process* would be redundant and an inefficient use of state resources. Thus, allowing the hearing officer to make the determination of whether a particular document should be produced, once the grievance has been qualified, is simply a matter of administrative efficiency.<sup>29</sup>

Accordingly, all remaining disputes relating to the production of documents should be presented to the hearing officer for his determination. If either party to this grievance later believes that the hearing officer exceeded his authority or failed to comply

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<sup>24</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.

<sup>25</sup> *Id.*

<sup>26</sup> Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).

<sup>27</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.

<sup>28</sup> *Grievance Procedure Manual* § 6.1, page 16 (emphasis added).

<sup>29</sup> If the grievance were still at the resolution steps stage of the grievance process or even at the agency head’s qualification stage, the grievance process would have halted as the requested documents may have had some bearing on an agency respondent’s response or the agency head’s determination. Because this grievance has proceeded through all resolution steps and has been qualified for hearing, the requested documents could have no bearing on any agency management action. Therefore, there was no reason to stop the grievance process. We note also that § 8.2 of the *Grievance Procedure Manual* states that if documents are denied prior to the appointment of a hearing officer, the requesting party *may* seek relief from this Department. This provision is intended to provide general guidance to parties as to whom they should direct their request for relief. This provision does *not* divest from this Department the discretion to pass to the hearing officer the *initial* determination of document relevancy *when, as in this case, the grievance has passed through each of the resolution steps and has been qualified for hearing.*



with the grievance procedure by ordering or failing to order the production of specific documents, that party may then request a compliance ruling from this Department in accordance with the provisions of the Grievance Procedure Manual. This Manual can be downloaded from EDR's Web site at [www.edr.state.va.us](http://www.edr.state.va.us). In addition, both parties are advised that they, or their representative may call EDR's toll-free AdviceLine at 1-888-23ADVICE for confidential, one-on-one information and guidance on the requirements of the grievance procedure and hearings process.

The parties are further advised to contact the hearing officer prior to the scheduled hearing date to request and discuss the production of documents in this matter. This Department's rulings on matters of compliance are final and nonappealable.<sup>30</sup>

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Director

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<sup>30</sup> See Va. Code § 2.2-1001(5).