

Issue: Compliance/documents; Ruling Date: June 10, 2004; Ruling #2004-522; Agency:  
Department of Juvenile Justice; Outcome: agency in compliance



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

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2004-522  
June 10, 2004

The grievant has requested a compliance ruling in his September 2, 2003 and November 10, 2003 grievances with the Department of Juvenile Justice. The grievant claims that the agency failed to provide relevant documents that have been requested.

FACTS

The grievant is employed as a Senior Correctional Officer with DJJ. On or about August 26, 2003, the grievant was placed on suspension without pay pending the outcome of an investigation regarding an allegation of inappropriate behavior leveled by a minor ward (Cadet) in the custody of the facility. The allegation was referred to the Office of the Inspector General and Child Protective Services Unit. The investigation was ultimately deemed "inconclusive" by the agency and the grievant was returned to work on September 8, 2003 with back pay and lost benefits.

The grievant challenged the agency's decision to suspend him in a September 2, 2003 grievance (Grievance 1). On December 9, 2003, this Department issued a ruling stating that Grievance 1 did not qualify for a hearing. On December 15, 2003, the grievant requested that this Department issue a compliance ruling re: documents he had requested from the agency but allegedly did not receive. The grievant appealed EDR's qualification decision to the circuit court. On January 12, 2004, the circuit court issued a decision upholding EDR's December 9, 2003 ruling.

The agency alleges that on September 28, 2003, the grievant made a threatening comment to the Cadet.<sup>1</sup> Again, the allegation against the grievant was referred to the Inspector General. After an investigation, the Inspector General determined that the grievant had engaged in unprofessional conduct with the Cadet on September 28, 2003. As a result, the agency issued the grievant a Group III Written Notice on October 24, 2003.

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<sup>1</sup> According to the agency, the grievant stated to the Cadet that he was going to "run up in your room," meaning that he would be searching the Cadet's room. See Inspector General's Report, OIG Case 89-2003, dated October 2, 2003.

On October 29, 2003, the grievant requested copies of the Inspector General's October 2, 2003 report re: the allegation of the threatening comment. The same day, the Inspector General refused to produce the reports "because the statements of too many other [facility] employees are quoted by name."<sup>2</sup> However, he stated that he would produce the reports and witness statements if compelled to do so by a hearing officer.<sup>3</sup>

The grievant challenged the Written Notice in a November 10, 2003 grievance (Grievance 2) claiming that the Inspector General's report was arbitrary and capricious. In connection with his grievances on December 31, 2003, the grievant notified the agency head that the agency was non-compliant based on its failure to provide copies of the Inspector General's reports of evidence in the investigations of the Cadet's allegations against the grievant.

On January 28, 2004, the grievant again notified the agency head of the agency's alleged noncompliance with the grievance procedure. The same day, the grievant notified this Department of the agency's alleged non-compliance. On February 13, 2004, the grievant requested that Grievance 2 qualify for a hearing, and his request was granted. Prior to his hearing, the grievant requested that the hearing officer issue orders for the production of documents, including the Inspector General's October 2, 2003 report and witness statements.<sup>4</sup> The grievance hearing took place on April 15, 2003, and a decision was issued on April 19, 2003, upholding the disciplinary action against the grievant.

### DISCUSSION

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 available upon request from a party to the grievance, by the opposing party."<sup>5</sup> Thus, absent just cause,<sup>6</sup> all relevant grievance related documents *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>7</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

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<sup>2</sup> Letter from Inspector General to Grievant, dated October 29, 2003.

<sup>3</sup> *Id.*

<sup>4</sup> The grievant also requested a videotape of the alleged incident.

<sup>5</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21 (emphasis added.)

<sup>6</sup> "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9, page 24. Examples of "just cause" include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.

<sup>7</sup> *Grievance Procedure Manual* § 8.2, page 21.

devices into reasonably usable form.”<sup>8</sup> However, a party is not required to create a document if the requested document does not exist.<sup>9</sup>

To summarize, absent just cause, a party must provide the other party with all existing relevant documents upon request, in a manner that preserves the privacy of other individuals. A party has a duty to conduct a reasonable search to determine whether the requested documentation is available and to provide the documents, as well as any related “just cause” objections for not providing any documents, to the other party in a timely manner.

### *Grievance 1*

The grievance procedure also requires that all claims of party noncompliance be raised immediately.<sup>10</sup> Thus, if Party A proceeds with the grievance after becoming aware of Party B’s alleged procedural violation, Party A may waive the right to challenge the noncompliance at a later time.<sup>11</sup> Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Here, the grievant claims that an alleged procedural violation occurred when the Inspector General failed to produce his investigation reports in October 2003. Although he was aware of a possible procedural error in October 2003, he failed to request a compliance ruling from this Department until after EDR had ruled that the grievance did not qualify for hearing. As such, the grievant waived his right to challenge the agency’s alleged noncompliance during the management resolution steps.<sup>12</sup>

### *Grievance 2*

Under the grievance procedure “[a] challenge to EDR will normally stop the grievance process temporarily.”<sup>13</sup> However, in this case, the grievant continued to advance Grievance 2 through the management resolution steps and then to hearing. Once appointed, the hearing officer, who presides over the hearing, is called upon to make

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<sup>8</sup> See Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).

<sup>9</sup> Va. Code § 2.2-3003(E).

<sup>10</sup> *Grievance Procedure Manual* § 6.3, page 17.

<sup>11</sup> *Id.*

<sup>12</sup> It should be noted that this Department has the authority to rule on compliance regarding the production of documents during the management resolution steps. See *Grievance Procedure Manual* § 8.2, page 21. Once EDR denies qualification and the employee appeals an EDR qualification ruling to the circuit court, the court has the authority over such matters and “may receive other evidence at its discretion.” See *Grievance Procedure Manual* § 4.4, page 12.

<sup>13</sup> *Grievance Procedure Manual* § 6.1, page 16.

relevancy determinations on *all* evidence presented at hearing. Any 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 or abused his authority, or failed to comply 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 this case, when the grievant advanced his grievance to hearing, the request for the Inspector General's evidentiary report and witness statements became an issue for the hearing officer to address. The grievant properly raised the compliance issue with the hearing officer and the documents were made available to the grievant prior to his hearing date.<sup>14</sup> The grievance record reflects that the grievant's request for documentation was addressed by the hearing officer. The grievant did not object to the hearing officer's ruling regarding the documents, and the grievant did not request any ruling on the hearing officer's decision regarding the requested documents. Therefore, this Department cannot conclude that the agency's actions were, as a whole, non-compliant with the grievance procedure.<sup>15</sup> This Department's rulings on matters of compliance are final and nonappealable.<sup>16</sup>

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Director

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<sup>14</sup> The agency submitted the Inspector General's October 2, 2003 investigation report, as well as six witness statements. *See* Exhibits 4-10, Case No. 642.

<sup>15</sup> It should be noted that the agency's initial objection to turning over the Inspector General's report – that too many employees were quoted by name – would not in this case justify withholding the report. The report was of limited length, 3 pages, and the names could have been redacted to protect the privacy of those not directly involved with the grievance.

<sup>16</sup> Va. Code § 2.2-1001(5).