Issue: Compliance/production of documents relating to grievance; Ruling Date: July 27, 2004; Ruling #2004-634; Agency: Department of Transportation; Outcome: agency must provide documentation

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
No. 2004-634
July 27, 2004

By letter dated February 25, 2004, the Department of Transportation (VDOT or the agency) requested a compliance ruling from this Department. VDOT asserts that the agency is in compliance with the grievant's requests for production of documents, and that his continuing requests have placed a major administrative burden on the agency. Management seeks to have the grievant move forward with his second step meeting.[1] The grievant seeks the production of certain documents that he asserts are relevant to his grievance and responsive to his initial May 2003 request to the agency.

FACTS

The grievant's original document request to the agency asked for the following:

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;

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

[1] The grievance procedure requires both parties to address procedural noncompliance through a specific process. 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 complaining party may request a ruling from this Department. *See Grievance Procedure Manual* § 6.1, pages 16-17. Here, the agency failed to notify the grievant in writing and give him the opportunity to correct the alleged non-compliance (i.e., proceed to his second resolution step meeting). While the grievant was not given proper notice, he did indicate to the facility's Human Resources Manager via email that he would not proceed to his second step meeting because to do so would show his acceptance of the documents provided to him thus far as full compliance by the agency. As the grievant has indicated he will not correct the alleged noncompliance, this Department will not require the agency to provide the notification in this instance.

any proposed and/or implemented discipline of any other VDOT employee resulting from or pertaining to the investigation;

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

4-6.[2] 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;

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);

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.

9. The grievant reserves the right to request additional documentation, at any time during this grievance procedure, that may he deems relevant.

In Rulings 2003-107 and 2003-419, this Department has previously addressed various issues related to the above requests, based on the facts and circumstances presented at those times. On January 12, 2004, the grievant notified the facility's Human Resources Manager that VDOT remained out of compliance with the grievance process and this Department's earlier Rulings, because VDOT's response to his document requests remained insufficient. The grievant provided VDOT with a more detailed description of the remaining documents needed in paragraphs 1, 2, and 3 of his original request. The described documents, to be addressed by this ruling, are:

Paragraph 1: grievant requests an explanation of the method of the audit of his Internet use (i.e., the number of logs, the total time period audited, how the

[2] To avoid repetition, Numbers 4 through 6 of the grievant's request were combined rather than listed separately.

months of July, August, October and November were selected, and how the four different weeks from these months were selected).[3]

Paragraph 2: grievant requests records related to his own DSIA [Department of State Internal Auditor or "Hotline"] investigation; and

Paragraph 3: with respect to the Internet investigations for 2002, the grievant notes that the redacted document (spreadsheet) provided by VDOT does not contain the number of hours per day each employee inappropriately accessed the Internet nor the type of Internet abuse for which the discipline was issued (for example, downloading or transmitting unlawful messages or images; permitting a nonuser to communicate third party messages; accessing pornographic material; other activities designated as prohibited, etc.) For each employee, he seeks the number of Internet logs, the total time spent on the Internet per day, and the reason for the discipline.[4]

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."[5] This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related documentation *must* be provided. Thus, a party has a duty to conduct a reasonable search to determine whether requested documents are available and, absent just cause, to provide the documents, if they exist, to the other party in a timely manner.

"Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process."[6] Examples of "just cause" include, but are not limited to (1) the production of these documents would be unduly burdensome or (2) the documents are protected by a legal privilege. Importantly, an agency's discretion pursuant to the Freedom of Information Act to withhold certain documents from disclosure does not automatically apply to requests for information under the grievance procedure.

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[3] We note that another of the grievant's original requests (Paragraph 8) had asked for information on his Internet use, specifically, documents showing his log on and log off times. During the investigation for this ruling, VDOT's IT Manager confirmed that the agency did not store log on and log off information in any form, thus documents containing this information do not exist and obviously cannot be produced.

[4] During the investigation for this ruling, the grievant advised the investigating consultant that this request seeks information with which he can compare the consistency of the agency's issuance of disciplinary actions, such as whether an employee received one or two written notices for alleged improper Internet activity, and which policy or policies were alleged to have been violated.

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

[6] *Grievance Procedure Manual* § 9, page 24.

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] 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."[8] However, a party is not required to create a document if the document does not exist.[9] 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.

In this case, management claims the agency is in compliance with the grievance procedure and has provided all relevant requested documentation to the grievant. The agency apparently views the grievant's persistence in seeking the documents originally requested as requests for *additional* documents, and asserts that the requests have placed a "major administrative burden on the agency."[10] As such, VDOT seeks a ruling that the grievant's document requests cease and that he move forward to the next step in the resolution step process. On the other hand, the grievant asserts the agency has intentionally failed to comply with his initial document requests and is therefore out of compliance with the grievance procedure.

Here, both parties claim the other party is in violation of the grievance procedure, but upon review, both claims lack merit. With respect to VDOT's assertion, most of the grievant's continuing requests do not appear to be for *new* documents, as intimated by the agency. Rather, the majority of the documents sought by the grievant fall within paragraphs 1-9 of his original request, which was submitted simultaneously with his Grievance Form A in May 2003. His subsequent requests to management are an attempt to gather information that relates to his grievance, which the agency has yet to provide from his original request. Significantly, this Department notes that the grievant's repeated requests for documents do not appear to have been made in bad faith, to delay the grievance process, or to harass the agency, but rather are the result of the agency's limited response to his original request.[11]

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[7] *Id.*
[8] *See* Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).
[9] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.
[10] Letter from the Commissioner to the Director of EDR, dated February 25, 2004. In part, the letter states: "Since [the grievant] filed his grievance the department has responded to documents requests three times including what was given to him at his due process meeting. Each request has increased significantly in the number of documents that we have been asked to provide."
[11] For example, in response to his original nine paragraph document request, management supplied only copies of his Written Notice, grievance and IT audit data (all which the grievant already had) and a chart with a list of the disciplinary actions in 2002 related to Internet abuse. The chart contained no information that could have appeared on redacted Written Notices of other employees, such as the nature of the Internet abuse and the number of minutes used by employees disciplined less harshly than the grievant.

While the agency could have responded more thoroughly to the grievant's requests, its failure to do so, at this point, will not be viewed as a violation of a substantial procedural requirement of the grievance procedure, as there is insufficient evidence that management acted intentionally to prevent the grievant from obtaining relevant documents. Rather, VDOT's initial failure to produce certain documents that fall within the scope of the grievant's initial request (e.g., redacted Group Notices of other employees disciplined for Internet abuse) appears to have resulted from a lack of understanding regarding the document production requirements of the grievance procedure, as well as the complexity of the grievant's requests. However, if in the future, management refuses to produce documents for improper reasons that have already been addressed by this Department and are wholly lacking in merit (e.g., claims that the discipline of similarly situated employees is irrelevant to another employee's grievance,[12] or that the attorney-client privilege protects the disclosure of written notices issued to employees[13]), the refusal to produce will be viewed as substantial noncompliance with the requirements of the grievance procedure, and will result in adverse inferences being drawn against the agency and/or a resulting decision against the agency on the merits of the grievance.

The remaining document production issues are discussed below:

Paragraphs 1 and 2

In paragraphs 1 and 2, the grievant seeks an explanation of the methodology used in the audit of his Internet use by VDOT's internal investigators and records related to the DSIA investigation. The threshold issue to be determined is whether these are relevant to the grievance.

In this case, 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. Information related to the investigation, the outcome of which resulted in his discipline, is relevant to whether the discipline was warranted. Having such documentation would permit the grievant not only a better understanding of how management determined that discipline was warranted, but would also allow him to review the consistency of the various reports and documentation. Therefore, if the documents exist, and absent just cause, the agency must provide the requested documentation to the grievant.

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[12] *See* EDR Rulings 2002-215, 2002-241, 2003-107, and 2003-419, in which the agency was repeatedly advised that documents containing information about the discipline of similarly situated employees (e.g., Written Notices with personally identifiable information redacted) were relevant to grievances challenging discipline for similar misconduct (e.g., Internet abuse).

[13] *See* EDR Ruling 2002-215. In this grievance, VDOT had claimed that Written Notices, which had been issued to its employees for disciplinary reasons, were protected from disclosure under the attorney-client privilege. Because the Notices were simply disciplinary documents that had already been distributed to employees outside the attorney-client relationship, VDOT's position clearly did not square with the law, as our Ruling pointed out.

Audit methodology

Management asserts that documentation containing the methodology used to conduct the audit of the grievant's Internet usage does not exist. Further, VDOT is not required to create a document describing the audit's methodology. Thus, the grievant is advised that VDOT has fully and properly responded to this request.

Investigative documents

On behalf of the DSIA following a "Hotline" call of alleged fraud, waste and abuse, VDOT's internal auditors investigated the allegations against the grievant, collected supporting documentation, and drafted a report of their findings based on that supporting evidence. Presumably VDOT's internal audit group maintains for its records a copy of its report and supporting documentation, which the grievant seeks for purposes of his grievance.

Management asserts, however, that VDOT is prohibited under the Freedom of Information Act (FOIA) from releasing that documentation to the grievant because it was produced for, and is the property of, the DSIA. In support of its position, management cites § 2.2-3705(A)(43) of the FOIA, which states that:

> [t]he following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law: Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the …(iii) Department of State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline.

The agency appears to assert that because a document is exempt from mandatory disclosure under FOIA, it is exempt from mandatory disclosure under the grievance statutes as well. But that is not the case. The fact that a document *may, but need not be* disclosed under FOIA does not lead to the automatic conclusion that "just cause" for nondisclosure exists under the grievance statutes.[14] For purposes of the grievance procedure, an independent inquiry is needed into whether "just cause" exists.

Here, this Department is keenly aware that confidentiality is fundamental to preserving the integrity of the "Hotline" investigation process. Disclosure of information provided in confidence to the DSIA could have the effect of chilling the reporting of misconduct. However, we are also cognizant of the statutory and constitutional rights of

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[14] A FOIA exemption does not create a privilege in other venues. Thus, a FOIA exemption would not prevent a court from issuing a subpoena for documents that are exempt from public inspection under the Act. *See* Frankel v. SEC, 460 F. 2d 813, 818 (2d Cir. 1972) (a denial of documents under FOIA does not prevent a party from obtaining documents under the discovery provisions of the Federal Rules of Civil Procedure). Analogously, a FOIA exemption alone does not permit an agency to withhold documents from a grievant.

a grievant to seek exculpatory evidence and to challenge evidence used by the agency in support of its disciplinary action.[15] In balancing these important competing interests within the facts of this case, we conclude that "just cause" exists for withholding from the grievant any investigative notes, correspondence, and information created for and furnished in confidence to the DSIA pursuant to a Hotline investigation. Evidence that is withheld from the grievant, however, cannot be used at hearing to support the agency's case.

Further, documents would *not* be shielded from disclosure simply because the agency provided them to the DSIA for the "Hotline" investigation, where the documents had not been *created for* the DSIA. For example, assume that an employee terminated for alleged theft initiates a grievance challenging his discharge, and consequently seeks documents relevant to his grievance. If the agency has conducted its own internal investigation (not at the direction of the DSIA) into the alleged theft, then the resulting documents -- including but not limited to any ensuing report, interview notes, and other related relevant materials -- had not been created for the DSIA, and therefore must be provided to the employee in a manner that protects the personal privacy of others.[16] If the DSIA subsequently conducts its own "Hotline" investigation into the alleged theft, the agency would still be required to disclose, upon request by the grievant, its own agency report, interview notes, and so on, even if those documents were subsequently provided to the DSIA pursuant to the DSIA's own Hotline investigation.[17]

In sum, under the specific facts of this case, VDOT will not be ordered to release to the grievant documents that were created for and provided to the DSIA for the "Hotline" investigation. Note, however, that if such documents are *not* produced for the grievant, in the interests of fairness and due process principles, the hearing officer should not allow them (or testimony as to their content) to be used to support the agency's disciplinary action.[18]

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[15] See Detweiler v. Va. Dept. of Rehab. Services, 705 F.2d 557 (4th Cir. 1983)(holding that a non-probationary state employee was not "at-will" and was entitled to due process under the 14th Amendment, which included the right to present evidence on his behalf and to challenge the agency's evidence at a grievance hearing).
[16] This example assumes that no other "just cause" exists for non-disclosure, such as attorney client privilege.
[17] The principal that relevant "facts" and/or materials otherwise discoverable are not to be shielded from disclosure is found in attorney client privilege, FOIA, and the common law deliberative process privilege. For instance, in Upjohn Co. v. United States, 449 U.S. 383 at 395-96 (1981), the United States Supreme Court ruled that the attorney-client privilege does not extend to facts, and that a client may not refuse to disclose any relevant fact within his knowledge merely because he had incorporated a statement of such fact into his communications to his attorney. Likewise, Virginia's FOIA, which excludes from mandatory disclosure the working papers of the Governor and other officials (Va. Code § 2.2-3705.7) expressly provides that "no record, which is otherwise open to inspection under this chapter, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence." Similarly, in Playboy Enterprises v. United States Dept. of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982), the court held that a fact report was not within the deliberative process privilege, in part because it was "not intertwined with the policy-making process."
[18] *Cf.* Garraghty v. Commonwealth, 52 F.3d 1274 (4th Cir. 1995)(noting that due process principles require the right to confront and examine witnesses at a disciplinary discharge hearing).

Paragraph 3

The grievant received a Group II Written Notice because his non-work related use of the Internet allegedly exceeded "incidental and occasional use."[19] In his grievance, he asserts that "timeframes, criteria, and standards used in the audit of [his] Internet usage were arbitrary and capricious, far exceeding any ever applied to any other VDOT employee who has been disciplined for Internet usage."[20]

In Rulings 2003-107 and 2003-419, this Department previously advised VDOT that information regarding the disciplinary actions of other similarly situated employees for alleged improper use of the Internet would be relevant to the overall issue of whether the grievant's discipline was warranted and appropriate under the circumstances. Therefore, information concerning the number of hours per day that other VDOT employees used the Internet for non-work related purposes, and how management disciplined those employees, could be relevant to the grievant's position that his discipline was unwarranted under the circumstances.[21]

VDOT has already given the grievant redacted copies of all written notices issued in 2002 for abuse of state time, misuse of state equipment, and failure to follow established written policy.[22] According to the agency, each written notice indicates the reason(s) the employee was disciplined. Additionally, some, but not all, of the written notices specify the time the employee was on the Internet. During the investigation for this ruling, management indicated that employees who exceeded approximately two

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[19] During the period when the grievant's Internet usage was monitored (July, August, October and November 2002), Internet use was governed by two policies: 1) until October 15, 2002, the agency's "zero tolerance" policy was in effect under VDOT's Information Technology Security Agreement (ITD-33B) and 2) after October 15, 2002, the agency instituted the Department of Human Resource Management's Policy No. 1.75 (Use of Internet and Electronic Communications Systems), which permits "incidental and occasional use" under certain circumstances. Neither state nor agency policy defines the terms "incidental" or "occasional."

[20] *See* Grievance Form A, Attachment A.

[21] In addition to the number of hours per day employees used the Internet, the grievant also requests the number of logs for each employee. While according to management, the agency used the number of logs as a parameter for determining whether Internet abused had occurred, the employees were disciplined (or not) based upon the number of minutes/hours on non-work related Internet sites and/or whether the site(s) itself was improper (e.g., pornographic). Therefore, as the grievant was not disciplined for the number of logs, but upon his Internet time, information concerning the number of logs is not <u>relevant</u> to his grievance and need not be disclosed.

[22] The grievant asserts that it is difficult to determine what information he possesses because the agency supplied him with *all* written notices, rather than only those concerning alleged Internet abuse. However, in paragraphs 4-6 of his original document request submitted simultaneously with his grievance, the grievant did request *all* documents pertaining to VDOT investigations into abuse of state time, misuse of state equipment and failure to follow established written policy. Significantly, the agency is not required to organize the documentation for the grievant.

hours per day of non-work related use (such as the grievant was alleged to have done) received one Group II Written Notice, and those employees who accessed pornographic websites received two Group II Written Notices.[23] Very few employees received lesser discipline.

Because the grievant seeks to establish that he was treated more harshly than other VDOT employees disciplined for Internet abuse, he is entitled to documentation regarding the Internet usage times of those employees who received a lesser level of discipline (i.e., those employees who were issued Group I Written Notices) or only received written reprimands.[24] Therefore, the agency must provide documentation to the grievant that reflects the number of minutes of personal computer use for those employees who received Group I Written Notices or written reprimands.[25]

CONCLUSION

In light of the all above, 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 no later than 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.

Within five (5) workdays of receipt of this ruling, the grievant shall either advance his grievance to the second resolution step or inform the agency's human resources department of his desire to close his grievance.

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[23] When the agency adopted DHRM's Internet Policy, which permits incidental and occasional use of the Internet, management stated that they also looked at employee lunch hours and break time to determine what would be permissible usage. For example, an employee is usually given 45 minutes to one hour for lunch and may be given two breaks up to fifteen minutes each at the discretion of the supervisor. Thus, such an employee may have up to one and a half hours of Internet time for personal use depending upon the circumstances.

[24] The amount of time spent on the Internet by employees who received Group II Written Notices would not assist the grievant with his claim that he was treated more harshly than other employees because those employees were obviously disciplined similarly. Significantly, based upon state policy, the appropriate level of discipline for misuse of state equipment and failure to follow established written policy is a Group II Written Notice. Thus, even if an employee spent three or four hours per day on the Internet versus the grievant's two hours, the appropriate discipline would still be a Group II Written Notice. Also, during the investigation for this ruling, the grievant indicated he was unsure as to which written notices were issued for accessing pornography, because that information is not specified on many of the written notices. However, if the grievant reviews the chart provided to him by management, he can identify those instances where management issued two Group II Written Notices.

[25] During the investigation for this ruling, management also claimed as just cause for the agency's failure to produce the requested documents that it was unduly burdensome to do so. While instances may exist where it could be unduly burdensome for an agency to produce documents, this is not the case here, where the agency has been directed to provide a relatively small number of documents.

If either party fails to comply with the terms of this ruling, the opposing party may seek a ruling from the Director of this Department regarding the noncompliance. Failure to follow the directives of this ruling without just cause could be viewed as a violation of a substantial procedural requirement of the grievance procedure which could result in a decision against the noncomplying party on any qualifiable issue.[26] This Department's rulings on matters of compliance are final and nonappealable, and have no bearing on the substantive merits of this case.[27]

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Claudia T. Farr
Director

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Susan L. Curtis
EDR Consultant

[26] Va. Code §2.2-3003(G).
[27] Va. Code §2.2-1001(5).