

Issue: Compliance/documents/recruitment, selection; Ruling Date: October 12, 2004;
Ruling #2004-683; 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
Ruling No. 2004-683
October 12, 2004

The grievant has asked for a compliance ruling from this Department. He alleges that the agency has failed to comply with the grievance procedure by not processing his grievance in a timely manner and by not providing him with documents he has requested and to which he believes he is entitled.

FACTS

The grievant is employed with VDOT as a Transportation Operator II. In October 2003, he applied for promotion to Transportation Operations Manager I. The grievant was interviewed for this position, but he was not selected.

On December 11, 2003, the grievant initiated a grievance challenging the agency's selection decision. The agency's first-step respondent responded to the grievance on December 16, 2003. On December 17, 2003, the grievant elected to advance his grievance to the second step. On December 19, 2003, the second-step respondent notified the grievant that due to vacation, he would be unable to respond to the grievant within the five-workday period specified by the Grievance Procedure Manual and asked that the grievant meet with him on December 29, 2003. The grievant received the agency's written second-step response on January 9, 2004, and advanced his grievance to the third step on January 14, 2004. On January 20, 2004, the grievant was advised that the third-step respondent was unable to meet with him during the prescribed five-day period and was asked to meet with the third-step respondent on February 3, 2004. The grievant subsequently agreed that the third-step respondent could have until February 20, 2004 to respond to the grievance. After the third-step respondent failed to grant the grievant his requested relief, on February 25, 2004, the grievant asked the agency to qualify his grievance for hearing. On March 10, 2004, the agency denied the grievant's request for qualification, and the grievant subsequently sought qualification from this Department. The grievant's request to this Department for qualification is currently pending.

During the agency resolution steps, the grievant asked the agency to provide him with a number of documents, including copies of the applications the agency received for the Transportation Operations Manager I position, the screening criteria the agency used

in the selection process, and interview notes. The agency initially refused to provide the grievant with any of these materials. During the course of this Department's investigation, the agency determined that its failure to provide the grievant with copies of his own application, screening, and interview materials was in error and subsequently provided the grievant with these documents, as well as a copy of the letter notifying him of his non-selection. The agency has refused, however, to provide the grievant with copies of documents relating to other individuals who applied for the Transportation Operations Manager I position, including the successful candidate.

During the course of this Department's investigation into the grievant's request for qualification of his grievance for hearing, he alleged that the agency had failed to produce requested documents and to process his grievance in accordance with the time periods set forth in the Grievance Procedure Manual, and he asked the Department to address these issues. The grievant had previously complained about the agency's alleged noncompliance to the agency's Employee Relations Manager in two memoranda dated March 16, 2004. To date, however, the grievant has not given the agency head written notice of noncompliance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ 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 or the opposing party to correct any noncompliance.² If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department.

In this case, the grievant's request for a compliance ruling is premature because the grievant has not notified the agency head of the alleged procedural violations and subsequently given the agency five workdays to correct any noncompliance, as required by the grievance procedure. Moreover, because the grievant did not give the agency written notice of noncompliance prior to the completion of the agency resolution steps, the grievant has waived any challenge he may have to the agency's purported failure to respond to his grievance in accordance with the time limits set forth in the Grievance Procedure Manual.

However, while we find that a compliance ruling in this matter would be premature, we believe it is important to correct an apparent misunderstanding by the agency. The agency has asserted, both to this Department and to the grievant, that DHRM Policy No. 2.10 precludes the agency from providing the grievant with

¹ *Grievance Procedure Manual* § 6.1.

² *Grievance Procedure Manual* § 6.3.

applications, screening criteria, and interview notes for other candidates for the Transportation Operations Manager I position. This policy provides, in relevant part, that applicants for a position do not have access to materials regarding other applicants for that position.

The grievance statute, however, 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....in such a manner as to preserve the privacy of individuals not personally involved in the grievance.”³ 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, with personally identifying information redacted.

To the extent materials otherwise protected by DHRM Policy 2.10 are sought by a grievant in conjunction with the grievance process, DHRM policy is overridden by this statutory mandate requiring parties to a grievance proceeding to produce relevant documents. Thus, where documents relating to a promotional decision are relevant to a grievance, the provisions of DHRM Policy No. 2.10 do not constitute just cause to deny access to documents. Accordingly, an agency may not deny a grievant access to otherwise relevant documents relating to a selection process on the ground that such disclosure is prohibited by DHRM Policy No. 2.10. An agency may, however, redact personally identifying information from such documents, provided that information relevant to the grievance is not redacted.

This Department’s rulings on matters of compliance are final and nonappealable.⁴

Claudia T. Farr
Director

³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁴ Va. Code §2.2-3003(6)