

Issue: Compliance/management failed to provide documents relative to grievance; Ruling Date: September 27, 2004; Ruling #2004-704; Agency: Department of Health; Outcome: management is to redact requested documents in a manner consistent with this ruling



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Department of Health
No. 2004-704
September 27, 2004

By letter received on April 22, 2004, 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 March 24, 2004.

FACTS

The grievant is employed by the Virginia Department of Health (VDH or the agency) as an Environmental Engineer Consultant. He applied for the position of Technical Services Administrator with the agency, but was not the successful candidate. Four applicants were interviewed and the panel ranked the grievant third. Citing his experience and work history, the grievant states that he should have been one of the top two candidates.¹

On March 24, 2004, he initiated a grievance disputing the composition of the interview panel and alleging that management pre-selected the successful candidate. Additionally, he asserts management retaliated against him and created a hostile work environment. Simultaneous with the initiation of his grievance, he requested that the agency provide to him (i) the interview panel notes for the other three candidates, (ii) emails between specified individuals concerning the filling of the position, and (iii) a copy of the agency's pay action worksheet used to describe the selected applicant's qualifications.

In response to the grievant's request for production of documents, the agency provided redacted copies of the interview panel notes for the other candidates and a redacted copy of the selection summary sheet.² VDH asserts it has complied with the document production requirements of the grievance procedure by removing personally identifiable information from the requested documents to protect the privacy of other employees. Additionally, management denied the grievant's request for production of emails and the pay action worksheet. In

¹ The candidate ranked first was offered the position, but declined. Therefore, management offered the position to the candidate ranked second, who accepted.

² The grievant received the documentation after sending a letter of noncompliance to the agency head. The first resolution step respondent had denied the grievant's request for production of documents because they related to other applicants.

explanation, the agency notes that only one email exists between the named individuals that relates to the filling of the Technical Services Administrator position and it is not relevant to this grievance as it discusses the scheduling of a third panel member to participate in the interview process (rather than the substantive selection process). Furthermore, management claims that if any communications *did exist* regarding recommendations or deliberations related to the selection process, the communications would be privileged and exempt from disclosure. With respect to the pay action worksheet, management asserts it cannot provide the document in a manner that preserves personal privacy and, even if it were able to do so, the document is not relevant because the worksheet is not used to document the reasons for a hiring decision.

Because management redacted substantial portions of the interview notes (including the other applicant's educational background and prior work experience) and withheld the pay action worksheet entirely, the grievant claims the agency is out of compliance with the grievance process. The grievant also claims certain information denied to him was provided to many agency employees when management announced the hiring of the successful candidate. Asserting that the redacted information and the information contained in the pay action worksheet could support the allegations contained in his grievance, the grievant seeks a ruling from this Department on whether the agency has failed to comply with the grievance procedure.

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.”³ 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.”⁴ 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.”⁵ While a party is not required to create a document if the document does not exist,⁶ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects that the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. 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.

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

⁴ *Id.*

⁵ See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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. The documents sought by the grievant are discussed in turn below.

Emails

After searching its records, VDH located one email between the individuals named by the grievant in his document request. Because this email relates to the scheduling of a panel member rather than the substantive selection process, it is not relevant to the merits of this grievance and this Department agrees with management that the agency is not required to provide this email to the grievant. However, we disagree with management's claim that if any other email communications *did exist* between the named individuals regarding recommendations or deliberations related to the selection process, such communications would be privileged and exempt from disclosure. As we discussed at length in a recent VDH compliance ruling,⁷ the common law deliberative process privilege does not protect documents generated in every instance in which a government agency makes a decision. Indeed, documents that do not "discuss the wisdom or merits of a particular agency *policy*, or recommend new agency *policy*" are generally not afforded the privilege.⁸ Thus, in the present case, if relevant communications regarding recommendations or deliberations pertaining to the challenged selection process existed, they would most likely *not* be protected by the deliberative process privilege, and absent any other just cause, and the agency would be required to provide the documents to the grievant.

*Panel's interview notes and the selection summary*⁹

Relevance:

The threshold determination is whether the selection summary and the panel's interview notes for the other three candidates are relevant to the claims of pre-selection and retaliation by management. To support his claims, the grievant states that his experience and employment history should have resulted in his being ranked first or second by the panel and that management's actions resulted in the "hiring of an applicant with less overall experience and almost no relevant experience in drinking water treatment."¹⁰ Because interviewers' notes are an integral part of the selection process and the detailed selection summary explains the ranking of each candidate, these documents are clearly relevant to the grievant's assertions, at least as to the candidates ranked first and second. Access to this information will facilitate discussion

⁷ See EDR Ruling No. 2004-630.

⁸ See *Coastal States Corporation v. Department of Energy*, 617 F.2d 854; 199 U.S. App. D.C. 272 (D.C. Cir. 1980)(emphasis added).

⁹ The selection summary is a four page memorandum with a description of the position, the number of applications and interviews, the questions asked of the candidates, and each candidate's educational background, work history and interview performance. The memorandum also ranks each candidate.

¹⁰ See Grievance Form A, Attachment A.

between the grievant and management during the resolution step process and will assist the grievant with his determination of whether to proceed through the grievance process. Additionally, as both these candidates were offered the position, it is less likely that embarrassing information or information of a derogatory nature is contained in the documents.

With respect to the candidate ranked fourth, however, the grievant's need for the documents is less significant because the grievant asserts that he should have been ranked first or second. Thus, under these particular circumstances, comparisons with any candidates ranked below him are not crucial to his claims. Furthermore, unlike the candidates who were offered the position, disclosure of information about the candidate ranked last may subject this individual to needless embarrassment if any negative information or comments are contained in the documents.¹¹ Therefore, the agency does not have to provide the grievant with documentation related to this applicant.¹² Documentation to the first and second ranked candidate must be provided as described below.

Redaction:

While the interview notes and summaries for the top two candidates are relevant, this Department must also consider the grievance statute's mandate that nonprivileged, relevant documents must be disclosed, but in a manner that preserves the privacy of third parties. In doing so, we must construe and apply the grievance statute so as to give effect to both the disclosure and privacy provisions. Thus, how the agency must redact the documents it provides to the grievant is key. Redaction preserves the privacy of nonparties by removing personally identifiable information. Applicant's names, home addresses, personal telephone numbers, position numbers and social security numbers are clearly personally identifiable features that should be removed from documents prior to their release in virtually all cases. In some cases it may also be necessary to remove additional information, including, but not limited to, references to gender, geographic location, and job title. In this case, however, it appears VDH removed more information than was necessary to protect the privacy interests of others.

During the interview, each of the four applicants was asked the same ten questions. The first five questions cover the applicant's educational background and experience in the areas of drinking water, management of technical programs, supervision, and oral and written presentations. VDH redacted substantial portions of the answers to these questions, including the majority of information relating to work experience, educational experience and any degrees or professional credentials earned. While under the facts and circumstances presented here, the specific educational institutions attended are not essential to the grievant's claims and can be redacted, VDH should have provided the grievant with the candidates' general educational background (including the degrees earned and professional credentials held), working experience

¹¹ See *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir. 1984)(the court weighs the privacy interests of applicants for federal positions with the public's interest in disclosure and finds the government should have disclosed information requested under FOIA about applicants who obtained federal employment, but not information about unsuccessful candidates because disclosure could lead to harm or embarrassment for the applicants who failed to get jobs).

¹² While facts could exist which would result in a grievant's compelling interest in the documents to outweigh the privacy interests of unsuccessful candidates ranked below him, that is not the case presented here.

in the field of drinking water (including years of experience, type of experience, and job titles) and management experience in the area of technical programs (including years of experience).¹³ Additionally, the selection summary should be redacted in the same manner.¹⁴

VDH also redacted the interviewers' names from the top of their respective panel notes. In this case, the grievant alleges retaliation by one of the panel members. Information identifying the interview sheets with the interviewer is relevant to the grievant's claims of pre-selection and/or retaliation. Additionally, the interviewers have little privacy interest in the disclosure of their respective notes. Therefore, the grievant is entitled to this information.

Pay Action Worksheet

In this case, the Pay Action Worksheet for the selected applicant consists of two parts: Part IA (salary information) and Part II (factors used in reaching the pay decision). VDH asserts it cannot provide the document in a manner that preserves personal privacy and, even if it were able to do so, the document is not relevant because the worksheet is not used to document the reasons for a hiring decision. We disagree. While Part IA need not be provided to the grievant because it is limited to salary information not relevant to the grievance claims, Part II also contains the following relevant sections: agency business need, duties and responsibilities, performance, relevant education and work experience, KSAs, relevant training, and certification and license information. This information should be provided to the grievant, after redaction as discussed above in this ruling's section on redaction. Such information will assist the grievant in his determination of the consistency of management's statements regarding the reasons for selecting the successful candidate.

CONCLUSION

Although the agency provided the documentation requested by the grievant, management redacted more information than was necessary to protect the privacy interests of third parties. Accordingly, this Department directs agency management to redact the requested documents in a manner consistent with this ruling and provide them to the grievant within five workdays of receipt of this ruling. Within five workdays of his receipt of the requested documents, the grievant must either advance or conclude his grievance.

If the grievant is dissatisfied with management's response to this Department's ruling, he may raise the issue again at the qualification phase of the grievance. Furthermore, if the

¹³ *Compare* Barvick v. Cisneros, 941 F. Supp. 1015 (D. Kan. 1996)(where federal regulation makes available to the public a federal employee's name, present and past job titles, present and past grades, present and past salary, and present and past duty stations, court upholds release of information by federal agency pertaining to the successful candidates' educational and professional qualifications as well, including letters of commendation and award).

¹⁴ Much of the information concerning the successful candidate's educational background and work history was published by the agency via email to a group of VDH employees, including the grievant, when management announced his selection. Management asserts that the published information was redacted from the requested documents because, to do otherwise, would have given the grievant insight into which documents belonged to which candidates. While this is possible, the grievant should not be, in effect, penalized for management's decision to release information on the successful candidate.

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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 the information that should not have been redacted from the 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.

Finally, we wish to note that documents provided to the grievant in accordance with this ruling are to be used *only* for grievance purposes. This Department's rulings on matters of compliance are final and nonappealable.¹⁵

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¹⁵ Va. Code § 2.2-3003(G).