

Issue: Compliance/documents, second-step meeting, non-disciplinary transfer, retaliation for participating in the grievance process, whistleblowing; Ruling Date: October 18, 2004; Ruling #2004-851; Outcome: agency out of compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2004-851  
October 18, 2004

The grievant has requested a compliance ruling regarding his July 18, 2004 grievance with the Department of Corrections (DOC or the agency). The grievant claims that the agency has violated a substantial requirement of the grievance procedure, without just cause, by (1) failing to provide information during the second-step meeting relating to his transfer, and (2) failing to address the issues of his grievance in the second-step written response. In addition, the grievant asserts that he has not yet received documents that he requested that pertain to his grievance.

FACTS

The grievant is employed as a Corrections Captain. On June 17, 2004, he was notified of his reassignment to another correctional unit, effective on June 23. On July 18, 2004, he initiated the present grievance to challenge the reassignment.<sup>1</sup> The grievant contends that during the fact-finding meeting on July 26, the second-step respondent refused to provide information relating to his grievance. On August 2, the grievant notified the agency head by fax of the alleged noncompliance.<sup>2</sup> Later on the same date, he received the written second-step response by mail. The grievant contends that the written response failed to address the issues of his grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>3</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without

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<sup>1</sup> Specifically, the grievant asserts that his original correctional unit (1) endangers officers by negating a significant number of charges (citations) against inmates, which diminished officers' authority and control of inmates and (2) retaliates against officers who have raised concerns regarding this practice to the attention of administrative staff. The grievant claimed retaliation by his immediate supervisor, and therefore, initiated the grievance with the next level supervisor who normally serves as the second-step respondent. (*See Grievance Procedure Manual* § 2.4)

<sup>2</sup> Although the grievant has provided a copy of his faxed letter of notification, with cover letter, and the transmission record, the agency asserts that it has no record of the documents being received.

<sup>3</sup> *Grievance Procedure Manual*, § 6.

this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>4</sup> For example, if the grievant believes that an agency has not properly conducted the second-step meeting or adequately responded to the issues of his grievance (as the grievant believes in this case), a grievant must notify the agency head of the alleged noncompliance.

Before seeking a compliance ruling from this Department, the grievant must allow the agency five workdays after receipt of the written notice to correct any noncompliance. If after five workdays the grievant believes that the agency has failed to correct the alleged noncompliance, the grievant may request a ruling from this Department. Furthermore, should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance. Although the agency does not acknowledge the receipt of the notification of noncompliance faxed by the grievant on August 2, 2004, this Department will assume that it was received for the purpose of this ruling.<sup>5</sup>

### Second-step Meeting

At the second resolution step, a face-to-face fact-finding meeting must be held.<sup>6</sup> Under the grievance procedure, the issues and relief raised in the grievance are discussed at the second-step meeting and addressed in the second-step response.<sup>7</sup> While the parties may question each other regarding disputed facts, the meeting should not be adversarial or treated as a hearing.

The grievant contends that during the second-step meeting, the warden refused to address (1) the reason he was transferred and (2) who authorized the transfer.<sup>8</sup> Although the facts are in dispute as to the exact content of the meeting, the second-step respondent contends that the grievant had already been informed in the June 17, 2004 letter of the reason for his temporary transfer—to remove him from the facility while his complaints of wrongdoing against the administrative staff were being investigated. In addition, the second-step respondent did not believe that it was necessary to disclose who authorized the transfer.

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<sup>4</sup> *Grievance Procedure Manual*, § 6.3.

<sup>5</sup> The documents provided by the grievant reflect that the notification letter was transmitted to the correct telephone number of the fax machine located in the office of the agency head. The transmission record indicates that the documents were received at 6:38 a.m. on August 2, 2004.

<sup>6</sup> See *Grievance Procedure Manual* § 3.2. Only if both parties agree to waive the second-step meeting may it be omitted.

<sup>7</sup> See *Grievance Procedure Manual* § 3.2.

<sup>8</sup> In the August 2, 2004, notification to the agency head, the grievant expanded the list of information items to also include "all notes, witness statements, investigation documents, and any other information pertaining to my grievance." At time of the second-step meeting, the grievant had not submitted a document request.

As an initial point, the June 17<sup>th</sup> letter does not clearly explain why the grievant was transferred. The letter simply states that:

You are being temporarily assigned to [another] Correctional Unit. You should report to [that] Unit at 8:00 a.m. Wednesday, June 23, 2004. The Inspector General's Office, Special Investigative Unit, has been contacted. You will be seen by a Special Agent in the near future to review your issues and concerns regarding [your current] Correctional Center.

The June 17<sup>th</sup> letter does not explain why he was being moved, only that he would be. Moreover, even if the letter had provided insight into the reason for the transfer, the second-step respondent would not be relieved of his obligation to provide, at the second-step meeting, reasonable responses to the issues raised in the grievance, one of which was the purported retaliatory transfer. In a case such as this, where the grievant asserts that management ordered an allegedly retaliatory transfer, the agency's proffered business reason for the transfer as well as the identities of the decision-makers are relevant, indeed central, to a grievance challenging that transfer. Thus, the grievant should have been provided reasonable responses to those questions at the second-step meeting.<sup>9</sup>

Accordingly, within 5-workdays of receipt of this ruling, the second-step respondent is ordered to re-schedule the second-step meeting. Both parties to this meeting shall, in good faith, provide appropriate information in response to relevant questions regarding the issues raised in the grievance, bearing in mind that the agency's reason for the transfer and the identities of those who were involved in the transfer decision are essential questions surrounding the grievant's claim of retaliation.

#### Adequacy of Second-step Response

Under the grievance procedure, the second-step respondent must provide a written response within five workdays of receipt of the employee's grievance. The written response must address the issues and relief requested and should notify the employee of his procedural options.<sup>10</sup> While the second-step respondent is not required to respond to each and every point or factual assertion raised by the employee, the respondent must address each issue raised and the requested relief.

In his grievance, the grievant claimed that the facility (1) endangers officers by negating a significant number of disciplinary charges (citations) against inmates, thereby diminishing officers' authority and control of inmates and (2) retaliates against officers, including him, who have brought a policy discrepancy to the attention of administrative staff.

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<sup>9</sup> To the extent that the second-step respondent stated or implied in the second-step meeting that the reason for transfer was because the Inspector General's office was beginning an investigation, such an explanation, standing alone, is inadequate. If the transfer was a result of the investigation, the second-step respondent should have explained how the investigation made necessary the transfer.

<sup>10</sup> See *Grievance Procedure Manual* § 3.2.

As relief, the grievant requests (1) an investigation by an external agency, (2) that the three officers affected by retaliatory transfer be restored to their former positions and shifts, and (3) removal of present incompetent administrative staff.

The second-step respondent partially addressed the issues and requested relief by stating in the response that a review of seven inmate disciplinary charges presented by the grievant determined that all were appropriately dismissed. However, the written response does not address the grievant's claim regarding the agency's alleged retaliatory practices. While the second-step response states that "an appropriate DOC investigation is ongoing," the response did not clarify whether this investigation seeks to explore the agency's alleged negation of inmate disciplinary charges, or the grievant's claim of retaliation, or both.<sup>11</sup> More importantly, notwithstanding any ongoing investigation, the response fails to address the retaliation-related issues of why the grievant was transferred and who was involved in the decision to move him.

Accordingly, to be in compliance with the grievance procedure, at the conclusion of the re-scheduled second-step meeting, the written second-step response must address why the grievant was transferred and who was involved in that decision.

#### Document Request

The grievant asserts that he has requested documents relating to his grievance which have not been provided.

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>12</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>13</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>14</sup> While a party is not required to create a document if the document does not exist,<sup>15</sup> 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

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<sup>11</sup> The Office of the Inspector General has since stated that the investigation addresses both issues.

<sup>12</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>13</sup> *Id.*

<sup>14</sup> See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

<sup>15</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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, the grievant's non-compliance letter to the agency head contained a request for all notes, witness statements, investigation documents, and any other information pertaining to the grievance.<sup>16</sup> The grievant has not yet received any documents from the agency.

The documents requested by the grievant appear to be relevant to his grievance. The agency has acknowledged that it instituted an investigation, one that is examining the grievant's assertions relating to inmate discipline and retaliation against those challenging the inmate discipline practices. Thus, the requested investigation documents would appear to be related to the grievance. Accordingly, within 5-workdays of receipt of this ruling, the agency shall provide the requested documents to the grievant in a manner that protects the privacy of non-parties. If the agency believes that it has "just cause" for withholding any of the requested documents it must state with particularity the reason for withholding each document not provided to the grievant. If the grievant believes that any of the reasons set forth by the agency do not constitute "just cause," the grievant may seek a ruling from EDR.

#### CONCLUSION

For the reasons set forth above, this Department has determined that the agency is out of compliance with the procedural requirements of the grievance procedure. Within 5-workdays of receipt of this ruling, the second-step respondent is ordered to re-schedule the second-step meeting at which both parties shall participate in good faith. Within five days of the conclusion of the meeting, the second-step respondent will provide a response that addresses the issues raised in the grievance, including the charge of retaliation. Also, within 5 workdays of receipt of this ruling, the agency shall provide the requested documents or state with particularity the "just cause" for any non-disclosure. This Department's rulings on matters of compliance are final and nonappealable.<sup>17</sup>

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Claudia T. Farr  
Director

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<sup>16</sup> The agency contends that it never received the August 2, 2004, non-compliance letter and request for documents. The grievant has since renewed his request on September 20, 2004, seeking "all documentation, statements, investigations and any correspondence between any one in the Department of Corrections and Inspectors Generals [sic] Offices pertaining to my temporary transfer on June 17, 2004."

<sup>17</sup> See Va. Code § 2.2-1001(5).

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