

Issue: Compliance/claims agency failed to provide documents and information related to grievance/grievant claims that agency failed to comply with the grievance procedure by not granting the first-step respondent decision-making authority; Ruling Date: October 12, 2004; Ruling #2004-853; Agency: Department of Corrections; Outcome: agency out of compliance with respect to documents relating to discipline of other employees, agency in compliance with respect to first-step decision-making authority



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-853
October 12, 2004

By memorandum dated August 9, 2004, the grievant requests a compliance ruling from this Department. The grievant claims that the Department of Corrections (DOC or the agency) has failed to provide him with requested documents and information related to his July 14, 2004 grievance. In addition, the grievant alleges that the agency failed to comply with the grievance procedure by not granting the first-step respondent decision-making authority.¹

FACTS

The grievant is employed by the agency as a Corrections Sergeant. On July 9, 2004, the grievant received a Group I Written Notice for inadequate or unsatisfactory job performance. The grievant alleges that in conjunction with this Written Notice, he was administratively removed from his position as Assistant Institutional Training Officer, removed from his position as Assistant Strike Force Commander, removed from the strike force, and assigned to work the night shift.

The grievant initiated a grievance challenging the agency's actions on July 19, 2004.² He alleges that the agency misapplied and/or unfairly applied policy by disciplining him in a manner disproportionate to the offense charged and inconsistent with the discipline given to other supervisory employees committing comparable or worse offenses, and by failing to consider mitigating circumstances. In addition, the grievant claims that the agency violated its policies by breaching his confidentiality and failed to make efforts to resolve the workplace conflict that resulted in discipline against him. He further charges that he was disciplined in retaliation for his efforts to give

¹ In the grievant's request for a compliance ruling, he identified two additional issues for review: (1) an alleged failure by the agency to accept his reply to the first-step response on the day he received that response, and (2) an alleged failure by the first-step respondent to provide an adequate written response. In the course of this investigation, however, the grievant clarified that he only seeks review of the agency's alleged noncompliance in responding to the grievant's request for documents and in failing to grant the first-step respondent full decision-making authority.

² Although the grievance is dated July 14, 2004, the grievant has stated that he submitted the grievance to the agency on July 19, 2004.

“constructive criticism” of two policies and practices adopted by the facility at which he works.

The same day that he initiated his grievance, the grievant made a written request to the agency for “all documentation . . . for the purpose of grieving the written notice given to me on 9 July, 2004” In addition to this general request, the grievant requested a number of specific categories of documents related to his grievance.

On July 27, 2004, after the agency had failed to respond to his request for documents, the grievant wrote to the agency head to give notice of the agency’s alleged noncompliance with the grievance procedure. Before giving written notice to the agency head, the grievant met with the Warden to inform her of his intent. The grievant states that during this meeting, the Warden showed him a number of documents in her file and asked if he had copies of those documents, but that she refused to show him three documents in the file. The grievant also alleges that during this meeting, he explained to the Warden that if the agency did not want to produce copies of documentation from personnel files, it could instead create a document compiling the requested information in a manner that would preserve the privacy of other employees.

By letter dated July 28, 2004, the Warden responded in writing to the grievant’s document requests. The following is a list of documents specifically requested and management’s response to each item:

1. Response from the EEO office in regards to [the allegation leading to discipline].

The agency replied, “At this time and according to the information that we know there is no formal written complaint that has been filed at the Department’s EEO Office.”

2. Any notes taken by any supervisory staff member during any counseling sessions, specifically the counseling session with the Chief of Security between June 14, 2004 and June 21, 2004.

The agency replied, “The meetings were not counseling meetings, they were investigative/fact-finding meetings and that documentation was provided to you at the disciplinary meeting held on July 9, 2004.”

3. Any notes from the counseling sessions with the Assistant Warden on or about June 22, 2004 and with the Warden on or about June 23, 2004.

The agency responded, “The meetings were not counseling meetings. They were meetings requested by you and no notes were taken.”

4. Any notes from the Assistant Warden taken during the disciplinary meeting on July 9, 2004.

The agency replied, “[The Assistant Warden’s] documentation was provided on the written notice issued to you.”

5. The outcome of any form of disciplinary action taken against supervisory staff (including members of the facility’s Executive Team) in response to allegations of harassment, inadequate job performance, or impropriety, during the period from January 1, 1996 to the present.

The agency responded, “The Agency does not maintain a formal listing of this information and therefore per the Grievance Procedure, page 21, Documentation Relating to a Grievance, ‘a party shall not be required to create a document if the document does not already exist.’”

On August 3, 2004, a human resources analyst at the agency’s headquarters wrote to the grievant. In her letter, she stated that she had been advised that the grievant had received a response to his request for documents and that this action had resolved the compliance issue. The grievant states that after he received this letter, he contacted the human resources analyst to advise her that he had not received the documents he had requested and that he still considered the agency to be in noncompliance. On the human resources analyst’s advice, the grievant subsequently submitted a second request for documents to the agency.

The agency responded to the grievant’s second request by letter dated August 13, 2004. In its response, the agency agreed to provide the notes requested by the grievant. The agency did not, however, provide any documents responsive to the grievant’s request regarding the EEO office, on the grounds that no such documentation exists. The agency also continued to refuse to provide the documentation requested by the grievant regarding discipline against other employees, on the ground that the agency does not maintain “a formal listing of this information.”

At the time the grievant notified the agency head of DOC’s alleged noncompliance with the grievance process, the first step of the resolution process had been completed, with the first-step respondent having denied the grievant’s request for relief. The agency resolution steps are currently stayed pending this Department’s resolution of the grievant’s claims of noncompliance.

DISCUSSION

Failure to Produce Documents

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, 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.”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.

This Department has also long held that 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.

In this case, the grievant challenges the agency’s failure to provide documentation relating to discipline given to other supervisory employees for comparable offenses. The grievant has also raised concerns that the agency has failed to produce requested documents relating to communications with the EEO office. These issues are addressed in turn below.

1. Documents Relating to Discipline of Other Employees

The grievant alleges that the agency has failed to comply with the grievance procedure by refusing to provide him with documentation showing the discipline other supervisory employees have received for comparable offenses during the period from January 1, 1996 to the present. The agency asserts that the information at issue is confidential personnel information and therefore not subject to production. The agency further claims that identifying the documents to be produced would be unduly burdensome, as the agency does not maintain a listing of conduct alleged and discipline

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.

imposed against employees, and some of the materials responsive to the grievant's request may have been archived in a trailer on the facility's grounds. Finally, in response to the grievant's suggestion that the agency provide a compilation of the requested information, rather than producing the documents themselves, the agency states that no such compilation presently exists and they are not required to produce one. The agency does not apparently dispute the relevance of the requested information to the grievant's claims.

With respect to the agency's blanket assertion that it is not required to produce personnel information regarding other employees, this contention is simply erroneous. Absent just cause, the grievant is entitled to receive any and all documents relevant to his grievance. The information he seeks regarding the discipline of other employees for comparable conduct is clearly relevant to his claim that the agency has misapplied and/or unfairly applied agency policy. The mere fact that the requested documents involve other employees does not constitute just cause for refusing to produce otherwise relevant information.

However, rather than providing the personnel documents themselves, the agency may elect to compile the information in a summary form to preserve employee privacy. While the agency is correct that the statute does not mandate the production of a document that is not already in existence, if it chooses not to present the requested information in a compilation format, the agency must instead provide to the grievant existing personnel documents, with personally identifying information redacted.

The agency further argues that production of the requested personnel information would be unduly burdensome, as it would require the agency to review the file of every supervisory employee assigned to the facility from January 1, 1996 to the present. Under the circumstances present in this case, we believe that limiting the scope of the grievant's request to those supervisory employees who were employed at the facility at the time the grievant initiated his grievance would be appropriate.

The agency is therefore ordered to produce information showing any disciplinary action taken against current supervisory employees (to include all Executive Team members, whether or not otherwise considered supervisors) at any point during the period from January 1, 1996 to the present for, or in response to allegations of, harassment, inadequate job performance, or impropriety. The agency may produce this information in a compilation format or it may produce the relevant personnel documents themselves, redacted to omit personally identifying information. The agency may charge the grievant its actual cost to retrieve and reproduce documents. The agency is to produce the information specified to the grievant within 10 work days of its receipt of this ruling

2. Documents Relating to Communications with the EEO Office

The grievant has also challenged the agency's failure to provide him with documents from its EEO Office. In particular, the grievant questions whether one of the three documents he claims the Warden refused to show him during his meeting with her regarding his document request is in fact a communication from the EEO office.

The agency has advised this Department that with a single exception, all the documents contained in the Warden's file on this matter have been produced to the grievant. That exception is an e-mail response to the Warden's request for the home address of the individual who made the complaint against the grievant, which led to his being disciplined. This document was not requested by the grievant and it is not relevant to his grievance. Moreover, there is no evidence which would call into question the agency's assertion that no documents responsive to the grievant's request exist.⁷ Accordingly, we find that the agency has complied with the grievance process with respect to this request.

Failure to Grant the First-Step Respondent Decision-Making Authority

The grievant further alleges that the agency failed to comply with the grievance procedure by not granting the first-step respondent decision-making authority. The grievant claims that the first-step respondent believed the grievant was entitled to the relief sought and took steps to investigate the grievant's claims of inconsistent treatment, but was instead ordered by the agency not to conduct an investigation and ultimately forced to deny the grievant's request for relief.

The grievance procedure allows workplace disputes to be grieved through up to three successive levels of agency management.⁸ While the grievance statute provides that each step respondent has the authority to provide some relief, it does not require that each management level be able to provide the *relief requested* by the grievant. However, all remedies are subject to review by the subsequent two respondents in the management resolution steps, generally an individual in an upper management position and the agency head. Indeed, the statutory language now in effect and at the time of the initiation of this grievance expressly states that "[e]ach level of management review shall have the authority to provide the grievant with a remedy, *subject to the agency head's approval.*"⁹

In this case, the grievant has alleged, in effect, that the first-step respondent was unable to give his desired relief to the grievant because upper management did not approve. As the grievance statute clearly conditions a step-respondent's ability to grant relief on approval by higher agency management, this Department cannot conclude that

⁷ It is unnecessary under these circumstances to decide whether, if the documentation requested by the grievant existed, it would be subject to production by the agency.

⁸ See *Grievance Procedure Manual* § 1.4.

⁹ Va. Code § 2.2-3003(D)(as amended effective July 1, 2003).

the grievant's allegations, even if proven, would constitute noncompliance with the grievance procedure.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant

¹⁰ Va. Code § 2.2-3003(G).