

Issue: Compliance/documents; Ruling Date: March 16, 2005; Ruling #2005-954;
Agency: Virginia Employment Commission; Outcome: agency ordered to produce
documents as per ruling instructions



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Employment Commission
Ruling Number 2005-954
March 16, 2005

By memorandum dated January 21, 2005, the grievant requests a compliance ruling from this Department. The grievant claims that the Virginia Employment Commission (VEC or the agency) has failed to provide him with requested documents and information related to his December 20, 2004 grievance.

FACTS

The grievant is employed by the agency as a manager. On December 9, 2004, the agency advised the grievant that he had not been selected for promotion to Position A. The grievant initiated a grievance challenging his non-selection for Position A on December 20, 2004. In his Grievance Form A, the grievant charges that the agency discriminated against him on the basis of his gender, age, political affiliations and/or veteran disability status; misapplied and/or unfairly applied applicable "policies, procedures, rules and regulations"; and showed a "complete disregard for an existing Executive Order(s) of the Governor of the Commonwealth of Virginia and applicable federal law." The grievant also suggests that the selection decision was, in whole or in large part, the result of bias and discrimination by the hiring manager.

On January 4, 2005, the grievant made a written request to the agency for information relative to the education, work experience, training and professional affiliations of both the successful candidate and the hiring manager, excluding resume and applications. After the agency did not provide the grievant with any information responsive to his request, the grievant gave written notice of noncompliance to the agency head pursuant to § 6.3 of the Grievance Procedure Manual.

In a memorandum dated January 10, 2005, the agency responded to the grievant's letter of noncompliance. The agency advised the grievant that it would not produce information regarding the hiring manager because this information was "not germane" to the grievance. The agency also declined to produce additional information regarding the successful candidate, explaining that the information requested was "not available at all, or is only partially available, or when available is only listed in her job application, resume or in her personnel file." The agency

further declined to produce documentation relating to the successful candidate on the grounds that such disclosure was prohibited under Virginia Code § 2.2-3801 and that it would not be possible to disclose information regarding a single candidate while still preserving that candidate's privacy. Nevertheless, on January 13, 2005, the agency produced the interview notes from the selection process.

On January 21, 2005, the grievant requested a compliance ruling from this Department. The parties subsequently resolved their dispute regarding information relating to the successful candidate, but there remains a dispute regarding the grievant's right to receive information relating to the hiring manager's education, work experience, training and professional affiliations.¹

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.”² 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.”³ 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.”⁴ While a party is not required to create a document if the document does not exist,⁵ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects 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

¹ On February 17, 2005, the undersigned consultant wrote to the parties to clarify an apparent misunderstanding of the grievant's right to request and receive the successful candidate's resume and application. This letter did not address the question presented by this ruling of whether the agency was required to produce information relating to the hiring manager.

² Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

³ *Id.*

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

⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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 the hiring manager. The grievant apparently seeks the information to prove his belief that the successful candidate and the hiring manager were employed by the agency at the same time and have worked in the same office throughout their careers with the agency, as well as to determine if they have any other connections, such as membership in the same professional organizations. He argues that this information is relevant to his claim that the selection process was not based on merit, but rather was based on bias or discrimination. The agency, in response, argues that information regarding the hiring manager is not relevant to the grievant's claim and therefore not subject to production.

Evidence is considered relevant when it would tend to prove or disprove a fact in issue - here, the role of bias or discrimination in the hiring decision.⁶ In this case, while it is possible that the requested information will not assist the grievant in proving his claims, it is also possible that the requested information will show that the hiring manager and successful manager share common backgrounds or have a significant history of interactions and connections. Such a history, while certainly not dispositive, would be relevant to the disputed issue of the hiring manager's motivation, as it relates to the propriety of his hiring decision under state policy and related law. Because an agency has a duty to produce relevant information to a grievant upon request, absent a showing of just cause, we find that VEC failed to comply with the grievance procedure in refusing to provide the grievant with the requested information regarding the hiring manager.

The agency is therefore ordered to produce information showing the hiring manager's education, work experience, training, and professional affiliations. The agency may produce this information in a compilation format or it may produce the relevant personnel documents themselves, redacted to omit any personally identifying information (such as the hiring manager's social security number, telephone number, and address). 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.

⁶ See *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, (413 S.E. 2d 630, 636 1992) ("We have recently 'defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'"' (citations omitted)); *Morris v. Commonwealth of Virginia*, 4 Va. App. 283, 286, (416 S.E. 2d 462, 464 1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citations omitted)).

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This Department's rulings on matters of compliance are final and nonappealable.⁷

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⁷ Va. Code § 2.2-3003(G).