

Issue: Compliance/Documents; Ruling Date: September 27, 2005; Ruling #2006-1093;
Agency: Norfolk State University; Outcome: agency not in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Norfolk State University
Ruling Number 2006-1093
September 27, 2005

The grievant has requested a ruling in her July 16, 2005 grievance with Norfolk State University (NSU or the university) on whether the university is out of compliance with the grievance procedure. The grievant contends that the university has violated the grievance procedure by refusing to provide requested information.¹

FACTS

The grievant is employed by the university as an Administrative Support Manager. On June 16, 2005, the university issued the grievant a Group II Written Notice for failure to follow her supervisor's instructions and perform assigned work. At the same time, the grievant was given a memorandum from her supervisor (Dr. Y) entitled "Work Performance and Habits." In conjunction with the Written Notice, the grievant was placed on suspension without pay from June 17, 2005 through June 20, 2005, and from July 5, 2005 through July 13, 2005.² The Written Notice form stated that the grievant was to return to work on July 14, 2005.

The grievant states that when she returned to work on July 14th, she was advised that she was not to return until July 15th. According to the grievant, her supervisor indicated that the July 15th date could be found in a "letter," which her supervisor suggested she read. The grievant subsequently left work and returned the following day. The university agrees that the grievant was asked to go home on July 14th, but it states that she was paid for that day.

On July 16, 2006, the grievant initiated an expedited grievance challenging the Written Notice and suspension.³ In an attachment to her grievance, the grievant requested a number of documents, including the letter allegedly extending her suspension to July 15th. On July 19, 2005, the grievant wrote to the university president to advise him that Dr. Y, who is not the second-step respondent, had taken the grievance home with her on July 18, 2005.

¹ The grievant's ruling request also raised concerns regarding an alleged delay in the second-step respondent receiving her grievance. However, the grievant has not requested a ruling on this issue.

² The university states that the grievant had previously scheduled leave from June 20, 2005 through July 5, 2005.

³ The grievant states that she sent her Grievance Form A to the university by certified mail. The university apparently received the grievance on July 18, 2005.

The grievant also reiterated her request for documents and asked that the documents be provided by July 22, 2005.⁴

On July 21, 2005, the grievant wrote to the Director of Human Resources to complain again about her grievance being in the hands of Dr. Y rather than the second-step respondent (Dr. X),⁵ and to advise the university that she considered the grievance process to be “temporarily on hold” until she received the requested documentation. The Director of Human Resources responded in writing that “there is no additional information/documentation relevant to your grievance,” but that the university would nevertheless provide copies of pictures taken of the grievant’s office space.

That same day, the grievant met with the Director of Human Resources, Dr. Y, and and Dr. X (who is also Dr. Y’s supervisor) to discuss her document requests. The grievant states that she was advised at that meeting that with the exception of the photographs being provided later that day, there was no other documentation remaining to be produced. Following this meeting, the grievant wrote again to the university president to complain that the university still had not produced all the documents she had requested.⁶ In addition, the grievant made several new requests for additional documents.

By letter dated July 26, 2005, the grievant requested a compliance ruling from this Department with respect to the university’s alleged failure to provide documents. On July 28, 2005, the university’s president replied to the grievant’s July 21st letter of noncompliance. In his response, the president indicated that the university had provided the grievant with the requested documentation. As the grievant disagrees with this assertion, she has asked that this Department proceed with her request for a compliance ruling.

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.”⁷ 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

⁴ The grievant wrote, “...I further request that all documentation be provided to me as requested on page five (5) of Attachment I of the [grievance] package, for review prior to any face to face meeting within the procedure requirement of five (5) days, counting July 18, 2005 as day one.”

⁵ The second-step respondent addressed this issue in a memorandum to the university president dated July 20, 2005, a copy of which was provided to the grievant.

⁶ The grievant indicated in her July 21, 2005 letter to the university president that her grievance was in the possession of the second-step respondent.

⁷ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

individuals not personally involved in the grievance.”⁸ 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.”⁹ While a party is not required to create a document if the document does not exist,¹⁰ 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 alleged failure to provide the following documents:

1. the letter that allegedly extended her suspension one additional day without pay;
2. copies of the documentation allegedly provided to the grievant informing her that her suspension was not extended and that she was paid for July 14, 2005;
3. a written explanation detailing the 106 items to which Dr. Y referred in an e-mail of July 16, 2005;
4. a “fully executed copy” of the Interim Evaluation dated June 6, 2006;
5. copies of the “analyses, findings, frequency and purpose” of the audit purportedly conducted on the grievant’s work;
6. a copy of the “agency’s investigative reports, findings and final decision which notified [the grievant] of the intended disciplinary action and evidence of the offense for which the disciplinary action was contemplated”;
7. a copy of “the written documentation that provided [the grievant] a reasonable opportunity to respond before suspending [her] with leave without pay”;
8. a copy of the PMIS entries related to her suspension without pay; and
9. a copy of the memorandum that her supervisors reviewed on July 15, 2005.¹¹

⁸ *Id.*

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

¹⁰ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹¹ During the course of this Department’s investigation, the grievant provided a list of those documents she contends have not been provided by the agency. Although it appears that several of these documents were never specifically requested from the agency by the grievant, in the interest of efficiency, this ruling will address all of the documents identified by the grievant to date.

Documentation Regarding Length of Suspension

The grievant alleges that the agency has failed to provide her with a copy of the letter to which her supervisor referred on July 14, 2005 when she attempted to return to work. She further claims that the agency has not produced documentation referenced in the university's July 28th letter which indicated that her suspension was not extended and that she was in fact paid for July 14th.

The university agrees that the grievant was sent home from work on July 14, 2005, and that Dr. Y advised her at that time to read the Written Notice and letter given to her on June 16, 2005.¹² The university denies, however, that either of these documents extended the length of the grievant's suspension. The university further denies that there is any documentation advising her that her suspension was not extended.

A party's duty is to produce relevant documentation already in existence: a party is not required to create a document if the document does not exist.¹³ The university has provided the grievant with a copy of the Written Notice and memorandum to which Dr. Y apparently referred, as evidenced by her submission of these documents with her ruling request, and there is no evidence that there is any other letter extending the length of the grievant's suspension. Moreover, the grievant's request for documentation advising her that her suspension was not extended appears to arise from a misunderstanding of the university's response to her letter of noncompliance. In that response, the university explained, "Your suspension without pay was not extended. Although you were asked to go home on Thursday, July 14, 2005, you were paid for that day. The written notice provided to you on June 16, 2005 was not modified. Documentation has been provided." We do not understand this statement to advise the grievant that she had received documentation advising her that her suspension was not extended: to the contrary, we understand the university to be advising the grievant that the only document setting forth the length of the suspension was the Written Notice, a copy of which the grievant has received.

Accordingly, we cannot conclude that the university was out of compliance with the grievance procedure in failing to produce the documentation requested by the grievant. While we understand the grievant's concern regarding the possible inconsistency between the language of the Written Notice and having been asked to go home on July 14th, these concerns go to the merits of the underlying grievance and cannot be resolved through a compliance ruling. In this regard, we note that by concluding that the university did not violate the grievance procedure with respect to the requested documentation, we are in no way ruling on the merits of the grievant's underlying allegations regarding her suspension.

¹² Although termed a "letter" by the grievant's supervisor, the document at issue is apparently the memorandum from Dr. Y to the grievant dated June 16, 2005, which was given to the grievant at the time she received her Written Notice.

¹³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

The grievant further asserts that to the extent requested documents do not exist, the university was required to give her written notification of the document's non-existence. With respect to the requested documentation regarding the length of the grievant's suspension, on July 21, 2005, the university advised the grievant verbally and in writing that all documentation responsive to her requests had been produced. In a July 28, 2005 memorandum, the university specifically addressed the grievant's request for the letter "suspending [her] suspension without pay" and explained, "Your suspension without pay was not extended. . . . The written notice provided to you on June 16, 2005 was not modified. . . ." Moreover, the university has explained to this agency that no letter exists that extends the grievant's suspension or advises the grievant that her suspension was not extended, as it is the university's position that the length of the grievant's extension was not changed. Under these circumstances, we cannot conclude that the university failed to comply with the grievance procedure with respect to the requested documentation regarding the length of the grievant's suspension.

Written Explanation

The grievant also charges that the university failed to provide her with a written explanation of the documents produced to her. The grievant alleges that on June 16, 2005, she received an e-mail from Dr. Y noting that she had been given 106 pages of supporting documentation with the Written Notice. As the Written Notice only identified 91 pages of attached documentation, the grievant questioned this discrepancy. On July 20, 2005, Dr. Y clarified that the grievant had received 91, rather than 106, pages of documentation with her Written Notice, and that she had received other documentation at the "re-entry meeting" on her return from suspension. The university states that the discrepancy was caused by the elimination of duplicate copies. The grievant now seeks a "written explanation detailing the specific items which make up the total 106 items referenced in the e-mail."¹⁴

The university states that there is no description or listing of the 106 documents currently in existence, and the grievant has not offered any evidence to the contrary. Accordingly, because the grievance procedure does not require a party to create a document in order to respond to a document request, the university did not violate the grievance procedure by failing to produce the written explanation sought by the grievant.

June 6, 2005 Interim Evaluation

The grievant asserts that the university has failed to provide her with a "fully executed copy of the current Interim Evaluation allegedly conducted June 6, 2005." The university

¹⁴ In her initial request for documents, the grievant asked the university to produce the attachments referenced in the June 16th email. In her request for a compliance ruling, the grievant acknowledged that the university had explained the discrepancy between the e-mail and the Written Notice and had in fact given her a total of 158 pages. In the course of this Department's investigation, the grievant clarified that she was seeking a "written explanation" of the 106 items to which Dr. Y referred in her e-mail, rather than copies of the documents themselves.

states that it gave the grievant a signed copy of the Interim Evaluation, along with a revised Employee Work Profile (EWP), on July 20, 2005.

Because the parties dispute whether the Interim Evaluation has already been produced, we cannot find the university to be out of compliance with the grievance procedure. However, in the interest of fairness and efficiency, and regardless of whether a copy was previously produced, we direct the university to provide a copy of the Interim Evaluation to the grievant within five workdays of receipt of this ruling.

Audit Materials

The grievant also alleges that the university has failed to provide her with “a copy of the analyses, findings, frequency and purpose” of any audit conducted on her work. The university states that there is no written analysis or “findings” of any audit conducted on the grievant’s work.

According to the university, the grievant’s supervisor reviewed all contracts and contract-related documents prepared by the grievant for correct salaries and appropriate academic ranks. The university states that copies of those documents with “major errors” and which could result in “potential liability and embarrassment to the [u]niversity” were given to the grievant at the July 15th meeting,¹⁵ but that Dr. Y did not prepare any written analysis of her findings. Accordingly, we conclude that the university did not fail to comply with the grievance procedure with respect to this request.

With respect to the grievant’s claim that the university was required to provide written notification of a document’s non-existence, the grievant asserts that the audit information fell within her more general request for “[a]ny and all information, correspondence, recordings, transcripts and pictures kept by [her] supervisor on [her.]” On July 21, 2005, the university informed the grievant verbally and in writing that all responsive documentation had been produced. That same day, the grievant reiterated her request for “any and all investigation reports, findings, recommendations and witness statements.” On July 28, 2005, the university advised the grievant in writing that she had been “provided with all findings pending [her] suspension on June 16, 2005.” Under these circumstances, we cannot conclude that the university failed to comply with the grievance procedure with respect to the audit information.

Investigative Reports, Findings and Final Decision

The grievant asserts that the university violated the grievance procedure by failing to provide her with “a copy of the agency’s investigative reports, findings and final decision which notified [her] of the intended disciplinary action and evidence of the offense for which the disciplinary action was contemplated.” The university states that the only documents responsive to this request are the Written Notice issued to the grievant and a memorandum

¹⁵ The grievant admits that she has received approximately 158 pages of documentation from the university, 67 of which were provided after the grievant received the Written Notice.

given to the grievant on June 16, 2005, as well as the 91 pages of documentation attached to the Written Notice. The grievant has copies of the Written Notice and the June 16th memorandum, both of which were submitted with the grievant's request for a compliance ruling, and she admits that she received 91 pages of attachments with the Written Notice. Accordingly, we conclude that the university did not fail to comply with the grievance procedure with respect to this request.

Written Documentation Providing Notice

In addition, the grievant alleges that the university has failed to provide her with "a copy of the written documentation that provided [her] a reasonable opportunity to respond before suspending [her] with leave without pay." The university responds that the grievant has been provided with a copy of the documentation which resulted in the decision to suspend her. As there is no basis on which to question the university's assertion—to the contrary, it appears that the grievant does not contend that the specific requested documentation in fact exists—we conclude that the university did not fail to comply with the grievance procedure in regard to this request.

In regard to the grievant's claim that the university was required to advise her in writing of the non-existence of a requested document, the grievant asserts that the documentation showing a "reasonable opportunity" was requested as part of two more general requests for information kept by her supervisor and in her personnel file. As previously noted, on July 21, 2005, the university advised the grievant verbally and in writing that all documentation responsive to her requests had been produced.

PMIS Entries Related to the Disciplinary Salary Action

The grievant also asserts that she is entitled to copies of the PMIS entries showing the days on which she was suspended without pay. The grievant apparently seeks this information in relation to her concerns regarding the length of her suspension. The university argues that the requested PMIS entries are not relevant to the grievant's claim.

The Personnel Management Information System (PMIS) is a database containing personnel information about state employees. According to the Department of Human Resource Management (DHRM), the information maintained in PMIS includes the dates on which an employee was suspended, as entered by the employing agency. As one of the issues raised by the grievant is the length of her suspension, the PMIS entry (or entries) related to her suspension are clearly relevant to her grievance. The university is therefore directed to provide the grievant with copies of PMIS records showing the dates of her suspension within five workdays of receipt of this ruling. While this Department does not condone the university's failure to provide these documents, the failure is not so egregious in nature as to justify an award on the merits on the grievant's behalf. Accordingly, we deny the grievant's request that she be awarded the full relief sought in her grievance as a remedy for the university's noncompliance.

Copy of July 15, 2005 Memorandum

The grievant claims that the university has failed to provide her with a copy of the memorandum that Dr. Y reviewed with her during her re-entry meeting. The university states that a copy of this memorandum was provided to the grievant at the time of the meeting, and a review of the memorandum indicates that it was addressed to the grievant from Dr. X.

Given the dispute between the two parties regarding whether or not the July 15th memorandum was produced, we do not find that the university's actions were out of compliance with the grievance procedure. However, in the interests of fairness and efficiency, and because providing the grievant with a copy of this document will impose little burden on the university, we direct the university to provide a copy of the July 15, 2005 memorandum to the grievant within five workdays of receipt of this ruling.

This Department's rulings on matters of compliance are final and nonappealable.¹⁶

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¹⁶ Va. Code §2.2-3003(G).