

Issue: Compliance/second-step meeting/sending information to co-worker; Ruling Date: April 6, 2006; Ruling #2006-1312; Agency: Department of Social Services; Outcome: agency is ordered to schedule second-step meeting after providing documents; information issue not a grievance procedure issue.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2006-1312
April 6, 2006

By letter dated March 14, 2006, the grievant requests a compliance ruling from this Department. The grievant claims that the Department of Social Services (DSS or the agency) has failed to provide her with requested documents related to her February 21, 2006 grievance. In addition, she asserts that the agency has not scheduled the second-step meeting. Finally, the grievant asserts that the agency has violated state policy by sending information that pertains to her grievance to a co-worker.

FACTS

The grievant is employed by the agency as a Program Specialist II. The grievant asserts that on January 28 and 30, 2006, she obtained salary data for Licensing Inspectors through a Freedom of Information Act (FOIA) request. As a result, the grievant was purportedly able to confirm that she was being paid less than “multiple individuals that are of the male gender, or are younger, or have significantly less/no education and/or experience.”

On February 25, 2006, the grievant requested from the agency information on 13 named employees. The requested information included: (1) date of hire, (2) level of education at date of hire, (3) professional experience at date of hire, (4) any professional certifications/licenses at the date of hire, (5) age at the date of hire, (6) the posted position qualifications for their recruitment, (7) and their salary at the date of hire.

On March 3, 2006, the agency’s Employee Relations Manager responded to the grievant’s information request via e-mail asserting that FOIA “prohibits” the agency from providing the information that she requested. The e-mail was copied to one of the grievant’s co-workers.

On March 6, 2006 the grievant notified the agency head informing him of the agency’s failure to produce the requested information and failure to schedule the second-step meeting.

On March 10, 2006, the grievant clarified to the Employee Relations Manager that she was not requesting the information under FOIA, but rather under the grievance procedure. The Employee Relations Manager e-mailed her later that day, stating that:

“Ms. [grievant], because you have filed a grievance, that does not entitle you to information from personnel records of identifiable individuals. Further, establishment or revision of wages, salaries, position classifications, or general benefits do not qualify for a hearing under the grievance procedure.”

On March 14, 2006, the grievant requested a compliance ruling from this Department.

DISCUSSION

Document Request

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.”¹ “Just cause” is defined as “a reason sufficiently compelling to excuse not taking a required action in the grievance process.”² Examples of “just cause” include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege. 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

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 information about other Licensing Inspectors. As an initial point, we note the grievant requested certain “*information*” regarding the Inspectors. The grievance statute requires, absent just

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

² *Grievance Procedure Manual* § 9.

³ *Id.*

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

cause, that a party provide the other party with all relevant “documents” upon request, in a manner that preserves the privacy of other individuals. A party is not required to create a document if the document does not exist.⁵ However, 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.

The agency did not dispute the relevance of the requested information; rather, through its Employee Relations Manager, it objected to disclosure solely on the basis that providing the information would be a violation of the Freedom of Information Act (FOIA). As we have stated in prior rulings and have noted in the *Frequently Asked Questions* section of our website, because of a July 1, 2000 statutory change, document requests are no longer associated with the FOIA and that Act alone cannot be used as the reason for refusing to produce documents.⁶ Thus, notwithstanding the FOIA personnel documents exemption, the agency must provide all requested relevant grievance documents to the employee, upon request, unless the agency can show just cause for not disclosing them. The agency has not offered any just cause for not producing the documents, only the FOIA objection, which, we note, does not prohibit the agency from disclosing personnel information, but simply grants the custodian of personnel records the discretion to disclose or withhold such documents in response to a request under the Act.⁷ Thus, because

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

⁶ See EDR Ruling Nos. 2004-629 and 2004-634; see also <http://www.edr.virginia.gov/faqs.htm>.

⁷ See, Virginia Freedom of Information Advisory Council Opinion AO-28-01, dated May 31, 2001 which explains that:

[T]he section setting forth exemptions to FOIA including the personnel records exemption, states that *[t]he following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where disclosure is prohibited by law.* The Code does not prohibit the dissemination of personnel records to third parties. As such, the custodian of the personnel records may decide to release some or all of the information that it may otherwise properly withhold. (Emphasis in original.)

An agency custodian’s discretion under FOIA to disclose or not disclose personnel documents is tempered by state personnel policy, Department of Human Resources Management (DHRM) Policy 6.05. Under DHRM Policy 6.05 § III:

Certain personal information must be disclosed to third parties upon request and may be disclosed without the knowledge and consent of the subject employee. This information includes:

1. employee's position title; 2. employee's job classification title; 3. dates of employment; and 4. annual salary, official salary or rate of pay, if such pay exceeds \$10,000 per year.

Other personal information may not be disclosed to third parties without the written consent of the subject employee. This information includes, but may not be limited to:

1. performance evaluations; 2. mental and medical records; 3. credit or payroll deduction information; 4. applications for employment; 5. records of suspension or removal including disciplinary actions under the Standards of Conduct; 6. records concerning grievances or complaints; 7. scholastic records; 8. records of arrests, convictions, or investigations; 9. material relating to Workers' Compensation claims; 10. material relating to Unemployment Compensation claims; 11. retirement records; 12. confidential letters of reference or recommendation; 13. results of pre-employment tests; and 14.

documents containing the information requested by the grievant would appear to be relevant to a grievance asserting age and gender pay discrimination,⁸ and because the agency has provided no just cause for withholding such documents, we find that the agency failed to comply with the grievance procedure by withholding the requested documents.⁹

The agency is therefore ordered to produce the requested information to the grievant within 10-workdays of its receipt of this ruling. The agency shall redact any personally identifying information (such as names, social security numbers, telephone numbers, and addresses), provided that information relevant to the grievance is not redacted. Because redaction of the names will make the determination of gender difficult, if not impossible, the agency must identify the gender of the employee with each document produced. The agency may charge the grievant its actual cost to retrieve and reproduce documents.

personal information such as race, sex, age, home address, home telephone number, marital status, dependents' names, insurance coverage, or social security number.

However, as this Department has held, to the extent materials otherwise protected by DHRM Policy 6.05 are sought by a grievant in conjunction with the grievance process, DHRM policy is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents. *See* EDR Ruling No. 2006-1199.

⁸ Evidence is considered relevant when it would tend to prove or disprove a fact in issue—here, whether the agency has discriminated against Inspectors based on gender or age. *See* *Owens-Corning Fiberglass 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*, 14 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)). In this case, it is possible that the requested information will show that the agency has treated Inspectors inconsistently. On the other hand, the information might show that the agency’s actions were consistent regardless of age or gender. Because evidence is considered relevant when it would tend to *prove or disprove* a fact in issue, the information would appear to be relevant to this grievance.

⁹ To the extent that the Employee Relations Manager’s March 10, 2006 response (“[the] establishment or revision of wages, salaries, position classifications, or general benefits do not qualify for a hearing under the grievance procedure,”) is a reason for not disclosing the documents, this Department firmly rejects non-disclosure on that basis. First, the grievance procedure language cited by the Employee Relations Manager omits critical language preceding and following the quoted language. The *Grievance Procedure Manual* states that “[c]laims that relate *solely* to the following issues do not qualify for hearing . . . the establishment or revision of wages, salaries, position classifications, or general benefits assertion.” *Grievance Procedure Manual* § 4.1(c)(emphasis added). Furthermore, the *Grievance Procedure Manual* states that:

The fact that the claim challenges an action under this section does not preclude it from qualifying if (i) the grievance claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether the action constituted an adverse employment action that was improperly tainted by (1) misapplication or unfair application of policy, (2) discrimination, (3) arbitrary performance evaluation, (4) retaliation, or (5) unwarranted discipline.

(Id.) It is clear from the face of the Grievance Form A that the grievant is asserting that the agency’s salary actions are discriminatory. Thus, Employee Relations Manager’s response is irrelevant, at best. More importantly, whether or not a grievance can be qualified for hearing makes no difference as to an agency’s obligation to produce documents. Absent just cause, if documents are relevant, the agency must provide them to the grievant, even if the grievance would not ultimately qualify for hearing.

Failure to Schedule the Second-Step Meeting

The grievant asserts that the agency is noncompliant in that it has not scheduled the second-step meeting. It is evident that the agency has attempted to schedule the meeting; however, the grievant has, as is her right, insisted that the second-step meeting not take place until after she has been presented with the documents that she requested.¹⁰ Accordingly, the agency is ordered to schedule a second-step meeting with the grievant within 5-workdays of providing her with the documents discussed above.

Agency's Disclosure of Grievant's Personnel Documents to Co-Worker

The grievant asserts that state policy was violated when the Employee Relations Manager copied the grievant's co-worker on his March 3rd response to the grievant's document request.¹¹ The grievance procedure does not expressly prohibit the disclosure of personal grievance information. However, as discussed above, DHRM Policy 6.05 does. Accordingly, although this is not a question of compliance with the grievance procedure, as with any alleged misapplication or unfair application of policy, the grievant's complaint could form the basis of a new grievance, if timely initiated.

This Department's rulings on matters of compliance are final and nonappealable.¹²

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¹⁰ The grievance procedure allows the party requesting documents to request that the grievance process be temporarily halted until the documents are provided. See *Grievance Procedure Manual*, §8.2.

¹¹ We note that the information released by the Employee Relations Manager was not disclosed pursuant to a request under the grievance statute. As discussed, the grievance statute supersedes DHRM policy and, absent just cause, requires disclosure of relevant documents in a manner that preserves the privacy of others.

¹² Va. Code § 2.2-3003(G).