

Issue: Compliance/grievance procedure/documents; Ruling Date: August 31, 2006;
Ruling #2006-1386; Agency: Department of Corrections; 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 2006-1386
August 31, 2006

By letter dated June 20, 2006, the grievant has requested a compliance ruling from this Department. The grievant asserts that the agency has refused to produce information to which he is entitled under the grievance procedure.

FACTS

The grievant was employed by the agency as a counselor. On April 5, 2006, the agency issued the grievant two Group III Written Notices, charging the grievant with “[f]raternalization or non-professional relationships with offenders” and falsification of documents. In conjunction with these written notices, the grievant was terminated from employment effective April 5, 2006. On April 20, 2006, the grievant initiated a grievance challenging the two Group III Written Notices and his termination.

On or about April 7, 2006, prior to initiating a grievance, the grievant requested a number of documents from the agency. Many of these documents related to the discipline taken by the agency against other employees. On or about April 10, 2006, the grievant made another document request, for documents relating to himself as well as to another employee, with respect to the incident for which the grievant was disciplined.

In an undated letter, the warden responded to the grievant’s requests. Noting that the grievant had not yet initiated a grievance, and therefore § 8.2 of the *Grievance Procedure Manual* was inapplicable, the warden denied the grievant’s requests for documents relating to other employees, on the ground that personnel information is not subject to disclosure under the Virginia Freedom of Information Act.

The grievant made a subsequent request for documents on April 20, 2006, in conjunction with the initiation of his grievance. In that request, the grievant asked for copies of his personnel file, employee file, and investigation reports on him, as well for copies of the disciplinary actions taken against 15 other employees.

On or about May 5, 2006, the grievant advised the agency head that he considered the agency to be out of compliance with the grievance procedure, as he had not received the requested documents and had allegedly been advised by the warden that he would not

be given information “from another person’s personnel file.”¹ Subsequently, by letter dated May 10, 2006, the warden responded in writing to the grievant’s requests.² The warden denied the grievant’s requests for documents relating to other employees, on the ground that the requested documents were irrelevant, as they involved other incidents, as well as on the ground that the grievant had not received written waivers from the other employees giving him access to their personnel records.

On May 16, 2006, the agency responded in writing to the grievant’s May 5th letter of non-compliance, advising the grievant that with the warden’s May 10th letter, the agency was in compliance with the grievance procedure. That same day, the grievant made a written request to the warden for “a list of [G]roup III offenses” for the past five years for falsifying any records and fraternization or non-professional relationships with offenders. The grievant also requested “the disciplinary action taken in each case and if they have any prior disciplinary actions on file.” The grievant explained that he was not requesting any identifiable information on any other employee.

The warden responded to the grievant’s request by letter dated May 22, 2006. In his response, the warden noted that “during the past years,” 2 Group III Written Notices had been issued for horseplay with an inmate, 4 Group III Written Notices had been issued for falsifying documents, and 2 Group III Written Notices had been issued for fraternization with an inmate. The warden refused to release any information about prior disciplinary actions related to the Group III Written Notices described, because “[m]itigating circumstances for Group offenses should only reflect active groups, along with other factors pertaining to the incident.”

On or about May 23, 2006, the grievant wrote again to the warden. Stating that he was “somewhat unclear” in his May 16th letter, the grievant clarified that he also sought the punishment (i.e., suspension or termination) received for each Group III Written Notice. He also inquired whether the breakdown provided by the warden included the grievant or only other employees.

On June 20, 2006, the grievant sought a compliance ruling from this Department, noting, in part, that the agency had not replied to the May 23rd letter. The agency states that it responded to the May 23rd letter through the warden’s second-step response to the grievant’s April 20, 2006 grievance. That response, however, does not directly address the grievant’s May 23rd letter or his document requests.

¹ The grievant sent a similar letter of non-compliance, dated May 8, 2006, to the warden.

² In the grievant’s May 5, 2005 letter of non-compliance to the agency head, the grievant refers to a request for documents made on April 20, 2006. During the course of this Department’s investigation, the grievant was asked to provide a copy of that request, which he did. However, the request to which the warden apparently responded in his May 10th letter was not the April 20th request provided to EDR by the grievant, but rather another undated request by the grievant. That undated request sought many of the same documents as the grievant’s April 7th and April 10th requests.

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 the 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 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.

The grievant asserts that the agency failed to comply with the grievance procedure by not providing him with the information requested in his May 23rd letter—specifically, the nature of the punishment imposed and whether the grievant himself was included in the listing provided by the warden on May 22nd. The agency has not offered a reason why it has not produced the requested information, but instead asserts that it responded to the request through the second-step response. That document, however, does not address the pending document request or explain why the requested information was not being produced.

The information sought by the grievant is clearly relevant to his grievance, as it relates to the discipline received by other employees for possibly comparable offenses. While the grievance procedure does not generally require the production of a document not

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.

already in existence, in this case, the grievant is apparently seeking information in a summary or list format in an effort to respond to the agency's concerns about producing personally identifiable information about other employees. This Department has previously held that 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.⁷ Having refused to provide the grievant with the underlying documents, the agency may not now also refuse to provide him with the information he seeks in a summary format.

We note in this regard that the agency's reliance (as set forth in its May 10, 2006 letter) on the Virginia Freedom of Information Act (FOIA) in refusing to provide the grievant with documents relating to other employees was misplaced. 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 under the grievance statutes are no longer associated with the FOIA, and the FOIA alone cannot be used as the reason for refusing to produce documents.⁸ Thus, notwithstanding the FOIA personnel documents exemption, the agency must provide all requested relevant documents to a grievant, upon request, unless the agency can show just cause under the grievance statutes for not disclosing them.

Accordingly, the agency is directed to produce to the grievant the information requested in his May 23, 2006 letter within 10 workdays of the receipt of this ruling. This Department's rulings on matters of compliance are final and nonappealable.⁹

Claudia T. Farr
Director

⁷ See, e.g., EDR Ruling No. 2006-1312.

⁸ See EDR Ruling No. 2006-1312; see also <http://www.edr.virginia.gov/faqs.htm>.

⁹ Va. Code § 2.2-3003(G).