

Issue: Compliance/grievance procedure/documents; Ruling Date: October 13, 2006;
Ruling #2007-1446; Agency: Department of Corrections; Outcome: agency not in
compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2007-1446
October 13, 2006

By letter dated September 23, 2006, the grievant has requested a compliance ruling from this Department. The grievant asserts that the Department of Corrections (DOC or the agency) has failed to produce information in accordance with a previous EDR compliance ruling regarding his grievance.

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. 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. On August 31, 2006, this Department issued Ruling No. 2006-1386, which directed the agency to provide the grievant with the information requested in his May 23, 2006 letter within 10 workdays of the agency’s receipt of the ruling.³

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

² In the grievant’s May 5, 2006 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 for Ruling No. 2006-1386, 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.

³ Ruling No. 2006-1386 also noted that the agency’s reliance (as set forth in its May 10, 2006 letter) on the Freedom of Information Act (FOIA) in refusing to provide personnel documents was misplaced. However, as the grievant’s subsequent correspondence with the agency indicated that he was seeking a listing rather than identifiable information regarding other agency employees, this Department did not direct the agency to

On September 11, 2006, the agency responded to the grievant by certified mail. In its response, the agency provided summarized information regarding disciplinary actions and prior discipline, but did not advise the grievant whether the disciplinary action taken against him was included in this information.

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.”⁴ 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.

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. Where a party fails to comply with the grievance procedure, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its non-compliance. However, rendering such a decision is reserved for the most egregious of circumstances.

Certainly, there can be no question in this case that the agency has failed to provide information in accordance with this Department’s August 31, 2006 ruling. That ruling directed the agency to provide the grievant 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.⁵ While the agency provided the requested information about punishment, the agency did not advise the grievant whether the listing of disciplinary actions included the action taken against him.

Although we do not condone the agency’s failure to comply in full with this Department’s directives, we do not find the agency’s conduct to be so egregious as to warrant granting the grievant relief on the merits of his grievant. We are deeply concerned about the agency’s non-compliance, however, and strongly caution the agency that continued conduct of this nature, in this or other grievances, may result in EDR rendering a decision for a grievant.

produce the personnel documents at issue in the May 10th letter. To the extent the grievant still seeks these documents, he may ask the hearing officer appointed to his grievance to order their production.

⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

⁵ EDR Ruling No. 2006-1386 at 3-4.

Accordingly, the agency is directed to produce to the grievant the requested information regarding the inclusion of any disciplinary action taken against him. This information shall be produced to the grievant within 10 calendar days of the date of this ruling. To the extent the grievant seeks any additional documents, such requests should be directed to the hearing officer after his appointment. This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁶ Va. Code § 2.2-3003(G).