

Issue: Compliance – Grievance Procedure (documents and access to office equipment); Ruling Date: December 11, 2007; Ruling #2008-1861; Agency: Marine Resources Commission; Outcome: Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Marine Resources Commission
Ruling Number 2008-1861
December 11, 2007

By letter dated October 31, 2007, the grievant requests a compliance ruling from this Department. The grievant claims that her employer, the Marine Resources Commission (MRC or the agency), has failed to provide her with requested documents related to her September 12, 2007 grievance and with reasonable access to agency office equipment for grievance-related purposes.

FACTS

The grievant is employed by the agency as a Marine Patrol Officer. On August 17, 2007, the agency gave the grievant written "Notification of Charges and Allegations," which identified the following allegations pending against the grievant: (1) "Failure to report to work as scheduled without proper notice to supervision"; (2) "Falsifying any records such as, but not limited to: vouchers, reports, insurance claims, time records, leave records, or other official state documents, or knowingly making any false official statement"; and (3) "Insubordination or serious breach [sic] of discipline." In conjunction with this notice, the grievant was placed on what the agency terms "administrative leave."

On September 12, 2007, the grievant initiated a grievance challenging the allegations against her as well as her placement on leave, which the grievant characterizes as a "suspension." Subsequently, on September 20, 2007, the grievant asked the agency to provide her with copies of her "permanent personnel file," "all additional documents contained in any and all working files maintained by all levels of our Chain of Command," and "all investigative materials" concerning the agency's internal investigation of the grievant and her "subsequent suspension." In addition, she also requested "reasonable access to, and use of, agency office equipment, including computers, copiers, fax machines and telephones while participating in the grievance process."

On September 27, 2007, the agency responded by letter to the grievant's request. The agency advised the grievant that because no disciplinary action had been taken against her, it considered her grievance to be "concluded." As a consequence, the agency asserted, the grievant was not entitled to the requested documents or to reasonable access and use of agency equipment. The agency further explained that even if the grievance "had not been concluded," the grievant would not be entitled to the requested materials (other than her personnel file) because her requests were "vague and overly-broad" and the investigative materials sought were "part of an active Internal Affairs Investigation" and "considered confidential."

On October 4, 2007, the grievant gave written notice of non-compliance to the agency head, citing the agency's failure to provide requested materials and denial of reasonable access to agency equipment. On October 16, 2007, the agency's Human Resources Director responded to the grievant's notice of non-compliance, advising the grievant that the agency was in compliance and "the justification for this was articulated clearly in the letter dated September 27, 2007." On October 31, 2007, the grievant requested a compliance ruling from this Department regarding the agency's failure to provide the requested documentation and access.

DISCUSSION

Failure to Produce Requested Documents

Here the agency asserts, as an initial matter, that the grievant has no right to documents under the grievance procedure, as her grievance is considered by the agency to have been concluded. Specifically, the agency contends that the grievance is concluded because it was initiated while the investigation was ongoing and no formal charges had been brought, and because the grievant had been placed on "administrative leave with pay," rather than "suspended": in effect, the agency contends that the actions being challenged by the grievant are not "grievable."

Under the grievance procedure, while only certain issues may be qualified for a hearing, *any* issue can be grieved, at least through the management resolution steps, so long as the grievance is filed within 30 calendar days of the event being grieved; arises in the agency in which the employee works; pertains directly and personally to the employee's own employment; is not used to harass or disrupt agency business; has not been pursued through another state process; and, finally, does not challenge the same management action challenged by another grievance.¹ Here, it is clear that the alleged agency conduct challenged by the September 12th grievance directly and personally pertains to the grievant's employment. Moreover, the agency's justifications for considering the grievance to be concluded do not fall within the remaining five exceptions. As a result, the grievant has a right to proceed with her grievance through the management steps.

¹ *Grievance Procedure Manual* § 2.4.

Because the grievance is ongoing, the grievant has the right under the grievance procedure to request and receive documents from the agency. 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.”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 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.

Here, the grievant objects to the agency’s failure to produce two types of documents: documents in the “working files” maintained within the Chain of Command, and materials relating to the agency’s Internal Affairs investigation of the grievant. With respect to the first category, the agency asserts that the grievant’s request is “vague and overly-broad.” While we agree with the agency that the wording of the grievant’s request is somewhat unclear, fairly read in context, it would appear that the grievant is requesting documents relating to her which are not maintained in her personnel file but are maintained by her supervisors and managers in their individual working files. Such documents are arguably relevant to the grievant’s claims and must be produced by the agency absent just cause.

² Va. Code § 2.2-3003(E); see also *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.

With respect to the investigation materials, the agency states that the materials are “part of an active Internal Affairs matter and [are] confidential.” The agency has confirmed to this Department, however, that the investigation is complete and a written summary has been produced. As the investigation relates to the allegations against the grievant set forth in the August 17th Notice of Charges and Allegations, it is clearly relevant to her grievance. Further, the agency has not shown just cause to deny the grievant the requested materials.

Accordingly, the agency is therefore ordered to produce the requested information to the grievant within 10 work days of its receipt of this ruling. The agency may redact any personally identifying information (such as social security numbers, telephone number, and address), provided that information relevant to the grievance is not redacted. The agency may charge the grievant its actual cost to retrieve and reproduce documents.

Reasonable Use of Office Equipment

The grievant also challenges the agency’s refusal to allow her reasonable access to, and use of, agency office equipment while participating in the grievance procedure, in accordance with § 8.8 of the Grievance Procedure, which provides that “in processing grievances, parties and state employee representatives of parties may make reasonable use of agency office equipment including computers, copiers, fax machines, and telephones.” The agency asserts that the grievant is not entitled to such access because her grievance has been concluded. Because, as discussed above, the grievance remains active and has not been concluded, the grievant is entitled under the grievance procedure to reasonable use of agency office equipment in processing her grievance.

This Department’s rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁶ Va. Code § 2.2-3003(G).