

Issue: Compliance – Grievance Procedure (Documents and Resolution Steps); Ruling Date: April 7, 2008; Ruling #2008-1870; Agency: George Mason University; Outcome: Agency Not In Compliance (Documents), Agency In Compliance (Resolution Steps).



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of George Mason University  
Ruling Number 2008-1870  
April 9, 2008

By letter dated November 9, 2007, the grievant has requested a compliance ruling with regard to his October 19, 2007 grievance with George Mason University (GMU or the University). The grievant asserts that GMU has (1) failed to provide him with documents requested relevant to his grievance; and (2) failed to comply with the grievance procedure in its designation of who will serve as the grievant's management resolution step-respondents at the second and third management resolution steps of the grievance process.

FACTS

At the time he initiated his October 19, 2007 grievance, the grievant was a Safety Compliance Officer with GMU.<sup>1</sup> In his October 19<sup>th</sup> grievance, the grievant challenges a University reorganization that resulted in a new reporting relationship for him; the alleged prejudice exhibited against him by the newly appointed Director of Safety, Ms. Z; and alleged barriers put in place by Ms. Z that prevented him from competing for the position of Director of Safety. The grievant also challenges a University investigation into his behavior as a result of complaints lodged by his co-workers, and asserts that a member of University management told him that one of those complainants was Ms. Z.

According to the University, it had received several complaints from employees regarding the grievant's alleged "unusual" behavior. As a result, the University police department interviewed the complainants and gathered information that was later entered into a computer program that, based on the information entered, assessed the level of threat the grievant posed to himself and others. The University refers to the investigation into the grievant's behavior as a "threat assessment." From this "threat assessment," a confidential threat assessment report was apparently generated, which the grievant now seeks.<sup>2</sup> More specifically,

---

<sup>1</sup> According to the agency, the grievant resigned from his position with GMU effective November 26, 2007.

<sup>2</sup> In this case, the grievant was not deemed an imminent threat to himself or others and as such, the University did not take any action against him as a result. However, the University has stated that although no action was taken against the grievant as a result of the investigation, this does not mean that the threat assessment generated deemed him to be a completely non-threatening to himself or others.

the grievant requests “a full written report from University Police of who they spoke with and their true findings” and “a written explanation as to why I was never interviewed.” The University has refused to provide the grievant with the documentation he requests. As a result, the grievant seeks a compliance ruling from this Department regarding the University’s alleged non-compliance with the grievance process by failing to provide him with documents requested relevant to his grievance.

Moreover, the grievant claims that the University has failed to comply with the grievance procedure in its designation of who will serve as the grievant’s management resolution step-respondents at the second and third management resolution steps of the grievance process. Further, the grievant challenges the University’s selected individual to accompany the second step-respondent to the second step meeting. These issues are discussed below.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>3</sup> That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without EDR’s involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the party fails to correct the alleged noncompliance, the other party may request a ruling from EDR. Should EDR find that the agency violated a substantial procedural requirement, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its noncompliance; rendering such a decision is reserved for the most egregious of circumstances. For instance, if a party ignores a previous compliance order from EDR, a ruling in favor of the opposing party may be granted.

#### *Failure to Produce Requested Documents/Information*

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.”<sup>4</sup> This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause,<sup>5</sup> all relevant grievance-related information *must* be provided.<sup>6</sup> The grievance statute further states

---

<sup>3</sup> See *Grievance Procedure Manual* § 6.3.

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

<sup>5</sup> “Just cause” is defined as “a reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9. 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.

<sup>6</sup> 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

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.”<sup>7</sup>

In this case, the grievant has requested information regarding the threat assessment conducted by University Police into the grievant’s behavior. In particular, the grievant requests “a full written report from University Police of who they spoke with and their true findings” and “a written explanation as to why I was never interviewed.” As stated above, the October 19, 2007 grievance challenges in part the University’s investigation into complaints lodged by the grievant’s co-workers about the grievant’s alleged threatening behavior. Accordingly, the threat assessment report requested by the grievant would appear to be relevant to his October 19<sup>th</sup> grievance and as such must be produced unless the University can establish “just cause” to withhold the documents.

In support of its claim that it should not have to provide the grievant with the information and documents requested, the University does not dispute the relevance of the documents, but rather asserts the following:

The University Police Department strongly believes it is not appropriate to provide the requested documentation and information to [the grievant]. The report he references is a confidential threat assessment report prepared on behalf of the University’s police department in response to concerns raised by University employees after interactions with [the grievant]. As part of this assessment, the police department received confidential statements from these employees. It is standard police practice not to interview the subject of the threat assessment. Virginia’s Freedom of Information Act... provides the University discretion in releasing information regarding such matters, for the requested report was submitted to the University’s police department in confidence.

For the sake of argument, even if FOIA did not apply to the instant case, the University would still refuse to provide the grievant the requested documentation. Each witness was interviewed under the promise that the information provided would remain confidential for these people felt threatened by [the grievant] and would not have felt comfortable being forthcoming otherwise. If this information were released, it would significantly harm the police department’s ability to conduct confidential investigations in the future, while providing minimal benefit to [the grievant], particularly given the fact that no adverse employment action was taken against [the grievant] as a result of this report.

First, we note that the University’s reliance on the Virginia Freedom of Information Act (FOIA) in refusing to provide the grievant with documents is misplaced. As we have long stated in prior rulings and have noted in the *Frequently Asked Questions* section of our website,

---

requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner.

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

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.<sup>8</sup> Thus, notwithstanding any FOIA exemption, the agency must provide all requested relevant documents to a grievant, upon request, unless the University can show just cause under the grievance statutes for not disclosing them. Moreover, the University's promise of confidentiality to witnesses is not binding on this Department, and as such, the University's promise to witnesses during the course of an investigation does not necessarily constitute just cause for failure to produce the documents requested relevant to a grievance. Further, although the University asserts that the threat assessment would be of "minimal benefit" since no employment action was taken against the grievant as a consequence of the investigation, there appears to be a question of fact as to this issue. In particular, it appears that the grievant is arguing that his failure to compete for the position of Director of Safety was related to the contemporaneous investigation into his alleged "unusual" behavior and as such, the investigation did, in fact, affect his employment with the University.<sup>9</sup> Based on the foregoing, this Department concludes that the University has failed to establish "just cause" for not producing the document on the bases stated above.<sup>10</sup>

Because the University has failed to establish "just cause" for withholding the threat assessment, this Department concludes that the grievant must be provided with a copy of this report. The only question remaining is whether the threat assessment must be produced in its entirety or whether it may be redacted to some extent. As stated above, "[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."<sup>11</sup> The threat assessment in this case contains information regarding complaints specifically about the grievant's behavior. As such, it is this Department's determination that the threat assessment is not a document "pertaining to a nonparty" and as such, must be provided without redaction.<sup>12</sup> And while we understand the University's reluctance to provide the names of witnesses due to the "chilling effect" it may pose, the only result that preserves the fairness of the grievance process is that documents like those at issue here, i.e., documents not pertaining to nonparties, must be provided without redacting the names of the nonparty witnesses.<sup>13</sup> Without knowledge of the identity of an individual who may possess information relevant to the grievance, a grievant would be unable to call this person as a witness at the second step meeting or hearing, or properly challenge the

---

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

<sup>9</sup> The grievant has indicated to this Department that he desires a copy of the report so that he may prove its existence to upper levels of management and demonstrate to upper management that the investigation was unjustified and a mere attempt to discredit the grievant while the University reorganization was taking place and to prevent the grievant from being offered a position to which he was entitled as part of the reorganization.

<sup>10</sup> This Department notes however that a finding of "just cause" might be warranted if the University were to demonstrate that the grievant poses some sort of an actual threat to the complainants. This Department concludes that the University has not made such a showing here. More specifically, during this Department's investigation, the University admitted that the threat assessment determined the grievant did not pose an imminent threat to those in the workplace and no employment action was taken against him.

<sup>11</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>12</sup> See EDR Ruling 2008-1884.

<sup>13</sup> Again, in most cases an agency may still and, indeed, must redact personal information of nonparties (such as the person's social security number, telephone number, and address), provided that information relevant to the grievance is not redacted. Such personal information does not appear to be included in the documents at issue in this case.

information provided in a relevant document.<sup>14</sup> There could be particular facts regarding the specific individual or the grievant's relationship with that individual that would be relevant in placing the contents of a document in context. Moreover, permitting an agency to withhold potentially relevant grievance-related information about a grievant simply because a nonparty provided it is inconsistent with the purpose of the grievance procedure and prevents a full exploration of the facts.<sup>15</sup> Accordingly, the agency is ordered to produce the requested documents to the grievant without redaction within **ten workdays of its receipt of this ruling**.

With regard to the grievant's request for a written explanation as to why he was not interviewed as part of the investigation of employee complaints regarding his behavior, the University is not required to create a document if the document does not exist.<sup>16</sup> Moreover, in its December 4, 2007 letter to this Department, the University has provided a written explanation as to why the grievant was not interviewed, (i.e., "[i]t is standard police practice not to interview the subject of the threat assessment."). However, if there is an existing University policy/procedure that states that the subject of the threat assessment will not be interviewed, the University is ordered to provide the grievant with a copy of any such policy/procedure within 10 workdays of its receipt of this ruling unless "just cause" exists for not disclosing any such policy/procedure.

#### *Step-Respondents and Second Step Meeting Attendees*

Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency's Human Resources Office and is also available on EDR's website. Each designated step respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.<sup>17</sup> Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management resolution step respondents are appropriate, are known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly.

An agency's careful designation of step respondents, and consistent adherence to those designations, is crucial to an effective grievance process. Step respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances, such as extended illness or serious injury. Further, if a step respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step respondent and should put any agreement in writing.

---

<sup>14</sup> Cf. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *McNeil v. Butz*, 480 F.2d 314, 321-25 (4<sup>th</sup> Cir. 1973) (following *Goldberg* and requiring that discharged government employees be provided the opportunity to cross-examine at hearing their "nameless accusers").

<sup>15</sup> See Va. Code § 2.2-3000 ("[T]he grievance procedure shall afford an immediate and fair method for the resolution of employment disputes.").

<sup>16</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>17</sup> See Va. Code § 2.2-3003(D).

The University has identified an employee's step-respondents by division: Academic, Non-Academic or Physical Plant. In this case, only the Academic and Non-Academic divisions are relevant. If the employee works in the Academic Division, his first step-respondent is his immediate supervisor, his second step-respondent is the "Dean or Director" and the third step-respondent is the "Provost (or Designee - Associate Provost for Personnel & Budget)." If the employee works in the Non-Academic Division, his first step-respondent is his immediate supervisor, his second step-respondent is the Associate/Assistant VP and the third step-respondent is the VP or Executive VP.<sup>18</sup>

Here, GMU claims that "[t]his is a situation in which a management member from the academic side of our institution and a management member from the non-academic side jointly oversee the broad area of Environmental Health and Safety of which [the grievant] was a member." Accordingly, GMU has taken the position that both the designated second step-respondent from the non-academic division and the designated second step-respondent from the academic division should be involved in the second step meeting. Apparently recognizing that having two designated second step respondents would be inappropriate, the University has indicated that the designated second step-respondent from the non-academic division, i.e., the Associate/Assistant VP, will be the designated second step-respondent in the grievant's case and the designated second step-respondent from the academic division will be the individual selected by the designated second step-respondent to accompany the designated second step-respondent to the meeting. This is entirely appropriate under the grievance procedure. Both the grievant and the designated second step respondent may elect to have a person of their choice accompany them to the second step meeting.<sup>19</sup> The second step respondent has the sole authority to choose who he will accompany him to the second step meeting. Likewise, the grievant has the sole authority to decide who will accompany him to the second step meeting.

However, it should be noted that this Department has taken the position that the individual selected to accompany either the grievant or the second step-respondent to the second step meeting is generally not entitled to be an active participant in the second-step meeting, although an agency is certainly free to allow such participation if it chooses. Unless permitted by the agency, the selected individual may not directly ask questions of the witnesses, make opening or closing arguments, answer questions on behalf of a grievant, or in any other way directly participate in the meeting. However, if the second-step respondent permits his selected individual to participate, the grievant's selected individual must also be allowed to participate in the meeting to the same extent.

The grievant and the agency should be mindful that the second-step meeting is a meeting between parties to a grievance, and that both sides bring to that meeting their perspectives, experiences and understandings. Although a step-respondent should conduct the meeting in an even-handed manner and with an open mind, he or she is a member of management, and like the grievant, is not a neutral party. Indeed, the management resolution phase of the grievance process was designed to allow the parties to the dispute to exchange information and attempt to

---

<sup>18</sup> This Department approved the University's designation of positions to serve as management step respondents on August 27, 2004.

<sup>19</sup> *Grievance Procedure Manual* § 3.2.

resolve the issues themselves, without the assistance of a neutral third party. Disqualifying step respondents because of their managerial actions and/or involvement with the underlying issues grieved would undermine that purpose. Further, while the resolution step process involves only the parties to a grievance, the hearing process, if a grievance is qualified, allows grievants an opportunity to present claims to a neutral, third-party hearing officer for resolution.

As a final note, the grievant has raised the issue of who will serve as the designated third step-respondent given the University's position that the designated step-respondents for both the academic and non-academic division should be involved in addressing his grievance as a result of the unique reporting relationship in this case. As indicated above, it would be inappropriate under the grievance procedure to have two designated third step-respondents responding independently to this grievance. Accordingly, this Department orders the University to designate one individual, either the Executive VP or the Provost, to respond to the grievance at the third management resolution step in this case. However, we would like to point out that as is the case at all other levels of the management resolution steps, the designated third step-respondent may confer with whomever he/she deems necessary in order to fully respond to the grievance.

This Department's rulings on matters of compliance are final and nonappealable.<sup>20</sup>

---

Claudia T. Farr  
Director

---

<sup>20</sup> Va. Code § 2.2-3003(G).