

Issue: Compliance – Grievance Procedure (documents); Ruling Date: December 18, 2007; Ruling #2008-1884; Agency: Department of Conservation and Recreation; Outcome: Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

RECONSIDERED COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling Number 2008-1884
December 18, 2007

The following ruling is in reconsideration of EDR Ruling No. 2008-1865. The grievant requests a compliance ruling, claiming that the Department of Conservation and Recreation (the agency) has failed to provide her with requested documents related to her grievance. This Department previously ruled in EDR Ruling No. 2008-1865 that the grievant's request for a compliance ruling was premature because the grievant had not provided the agency head with a written notice of noncompliance.¹ That ruling was based upon information provided by the grievant. However, since issuing EDR Ruling No. 2008-1865, EDR has received further information from the grievant indicating that she had provided sufficient notice prior to her ruling request. As such, this Department will now rule on the merits of the compliance matter because the grievant's request is not premature.

FACTS

The grievant filed a grievance to challenge her "transfer and demotion" and alleged gender discrimination. A portion of the second resolution step response stated that the grievant's supervisor had received three complaints about the grievant's performance. The grievant requested any such "comments or complaints received about [the grievant]" among other documents. The agency provided three written complaints purportedly made by two regional directors and a central office staff member. However, the agency substantially redacted these documents before providing them to the grievant. Large portions of the text were covered, along with the identity of the individuals who wrote the documents and the dates. The agency states that these complaints were never acted upon and played no part in the actions grieved by the grievant. The grievant has now requested this ruling, asserting that the agency redacted too much information from the documents. The grievant also alleges that she requested that the agency provide a

¹ See *Grievance Procedure Manual* § 6.3.

listing of the names of the people who were asked to provide negative comments about her. The agency has not provided this information on the basis that a document does not already exist detailing this information.

DISCUSSION

Creating New Documents

Section 8.2 of the *Grievance Procedure Manual* provides that “[a] party shall not be required to create a document if the document does not exist.” Therefore, the listing requested by the grievant of those employees asked to provide negative comments about her is not something that the agency must create under the grievance procedure. As such, the agency has not violated the grievance procedure in not providing this information because a document does not already exist, as stated by the agency. However, this information might be relevant to the grievance and potentially a proper subject of testimony at hearing if this grievance is eventually qualified.

Redacted Documents

The grievance statutes provide 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 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

The agency asserts that the redactions made to the three documents are consistent with this statutory provision for “preserving the privacy of the individuals not personally involved in the grievance.”⁴ However, it is this Department’s determination that the agency’s redactions were overly broad in that the three documents are not “documents pertaining to nonparties.” Rather, they are complaints specifically about the grievant’s work performance. These are not documents to which, in this Department’s interpretation, the statutory language cited above applies. As such, the documents must be provided in their unredacted forms.

² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

³ *Id.*

⁴ The agency also states that the complaints had nothing to do with the subject of the grievance and, thus, are irrelevant. Though the agency appears to maintain that the grievant’s transfer was the result of a departmental reorganization, the grievant is arguing that she was informally disciplined, i.e., that her performance may have played a role in these acts. Therefore, at this early stage in the grievance process, it cannot be said that these documents are entirely irrelevant.

This Department recognizes that this ruling is somewhat of a departure from certain past EDR rulings that, while requiring the production of relevant documents, permitted the agency to redact the names of nonparties.⁵ Upon further review of the statutory language at issue, we conclude that the correct result is that documents such as those at issue here must be provided without redaction. Additionally, due process and fairness under the grievance procedure require the full production of these documents. Certainly, there are times when information regarding nonparties must be redacted. For instance, in most cases an agency may redact personal information (such as the person's social security number, telephone number, and address), provided that information relevant to the grievance is not redacted. However, there are cases in which a nonparty's *name* must be provided to permit a grievance to proceed fairly. 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 hearing or properly challenge the information provided in a relevant document.⁶ 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.⁷

In EDR Ruling No. 2004-634, this Department, ruling on a different document-related issue, determined that an agency need not produce certain documents to the grievant, but that the agency could not rely upon any document (or testimony as to its content) to support its case at hearing if the document were withheld. This ruling was an attempt to strike the balance between preserving confidentiality of certain documents and negating any due process concerns. However, this Department recognizes that this result is not appropriate in many cases, including this one. For instance, an agency might decide not to rely upon a document because it contains information helpful to the grievant. If EDR ordered that the document could be withheld, the grievant would never have the opportunity to present the relevant and potentially exculpatory evidence at hearing.

The only result that preserves the fairness of the grievance process and hearing 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.⁸ This Department

⁵ See, e.g., EDR Ruling No. 2006-1312; EDR Ruling No. 2004-878.

⁶ 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 (4th Cir. 1973) (following *Goldberg* and requiring that discharged government employees be provided the opportunity to cross-examine at hearing their “nameless accusers”).

⁷ See Va. Code § 2.2-3000 (“[T]he grievance procedure shall afford an immediate and fair method for the resolution of employment disputes.”).

⁸ Again, in most cases an agency may still redact personal information of nonparties (such as the person's social security number, telephone number, and address), provided that information relevant to the grievance

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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. Therefore, the agency is ordered to produce the original versions of the requested documents to the grievant within ten workdays of its receipt of this ruling.

This Department's rulings on matters of compliance are final and nonappealable.⁹

Claudia T. Farr
Director

is not redacted. Such personal information does not appear to be included in the documents at issue in this case.

⁹ Va. Code §§ 2.2-1001(5), 2.2-3003(G).