Issues: Compliance – Grievance Procedure (Documents and Other Issue); Ruling Date: April 18, 2008; Ruling #2008-1935, 2008-1936; Agency: Department of Motor Vehicles; Outcome: Agency In Compliance (meeting notes), Agency Not In Compliance (interview notes and other issue).

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2008-1935, 2008-1936
April 18, 2008

The grievant has requested a compliance ruling regarding her September 26, 2007 and October 14, 2007 grievances with the Department of Motor Vehicles (the agency). The grievant claims that the agency has failed to address certain issues raised by her grievances and has not provided requested documents.

FACTS

On August 28, 2007, the grievant received a Group I Written Notice regarding her allegedly "insulting, loud and disruptive" behavior in team meetings.[1] The grievant challenged this disciplinary action by initiating a grievance on September 26, 2007. While that grievance was pending, the grievant received her annual performance evaluation on October 12, 2007. Though she was rated as an overall "Contributor," the grievant was rated "Below Contributor" in one core responsibility because of her conduct in team meetings. The grievant initiated a grievance to challenge this performance evaluation on October 14, 2007.[2] In addition, the grievant asserted that she was not being given "an equal opportunity based on age and race." The grievant also alleges that her prior grievance was "connected with this issue." However, the grievant is alleging that the agency has failed to address her discrimination claim at either the second or third resolution step.

On January 3, 2008, after she met with the second step-respondent, the grievant requested that the agency provide two sets of documents. First, the grievant requested a copy of the questions that the second step-respondent asked her during their meeting and a copy of her answers. According to the agency, there were questions developed and written prior to the meeting, but not all questions on the list were asked, and other

[1] As a part of this Written Notice, the grievant was also removed from work on a particular project and disallowed from working with a work center.
[2] This date appears on the Form A next to the grievant's signature. There is also an unsigned note indicating that the grievance may have been received by management on November 14, 2007. The precise date the grievant initiated her grievance is not a material issue to this ruling. For purposes of this ruling only, and for ease of reference, it will be assumed that the grievant initiated her grievance on October 14, 2007.

questions not on the list were also posed to the grievant during the meeting. The agency has refused to provide documents related to the meeting because they are "work product."

The second set of documents the grievant sought concerns the second step-respondent's apparent interviews of certain agency employees. The grievant asked for a copy of the statements these employees provided, i.e., any notes that may have been taken by the second step-respondent in these interviews. The agency has also refused to provide any of these notes to the grievant. In response to the document request, the agency stated,

> *If any [notes] taken are to be provided to a grievant, than* [sic] *it is reasonable to believe notes will not be created, and interviews will not be conducted. Or the quality and credibility of any notes will be so jaded as to become a red herring. An order to provide work products would have a chilling effect on the procedure.*
>
> *The production of such work products would not assist in reaching a resolution to a dispute. The quality and content of such notes are just as likely to aggravate and unnecessarily complicate a dispute.*

The grievant has now sought a compliance ruling regarding the agency's alleged noncompliance in these matters.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[3] That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department'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.[4] If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department.[5]

In this case, the grievant provided a notice of noncompliance to the agency head, which is dated January 16, 2008. The memo only listed as an issue of noncompliance the agency's alleged failure to respond to the grievant's discrimination claim. The memo did not state that the agency had been noncompliant in refusing to provide the requested documents. However, the agency is aware of the matter, has had ample time to respond, and has provided its response. Moreover, the documents issue was specifically identified in the grievant's request for a compliance ruling to this Department, and the agency received a copy of that letter. Even though the grievant's notice of noncompliance to the agency head did not identify the documents issues, as a matter of efficiency it makes

[3] *Grievance Procedure Manual* § 6.
[4] *Grievance Procedure Manual* § 6.3.
[5] *Id.*

sense to address these matters in this ruling. As such, EDR will consider all the raised compliance issues in this ruling.

Adequacy of Response

Under the grievance procedure, a step-respondent must provide a written response within five workdays of receipt of the employee's grievance absent an agreement between the parties to extend the deadline. The written response must address the issues and relief requested and should notify the employee of his or her procedural options.[6] While the step-respondent is not required to respond to each and every point or factual assertion raised by the employee, the respondent must address each issue raised and the requested relief.

The grievant's Form A in her October 14, 2007 grievance clearly asserts a claim of being treated differently based on her age and race. The agency states that the reason there was no response to the discrimination issue was that the grievant provided no support for her claim and there was nothing to which the agency could respond. While there is certainly very little information on the Form A, there is also no requirement under the grievance procedure that a grievant must include every fact in support of a claim on the Form A or an attachment to properly raise the claim. Therefore, because the grievant has properly asserted a discrimination claim to which the agency provided no response, the agency has failed to comply with the grievance procedure. The grievance must be returned to the third step-respondent so that he can properly address the discrimination issue. Moreover, it would appear that further discussion with the grievant about her claim would likely be required so that the agency can respond appropriately. Indeed, it is difficult to understand how the agency could respond substantively to the allegations without additional input or explanation from the grievant.

Work Product – Interview Notes

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."[7] "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."[8] 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. 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

[6] *E.g., Grievance Procedure Manual* § 3.3.
[7] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[8] *Grievance Procedure Manual* § 9.

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.

One set of documents the grievant has requested are the notes the second step-respondent allegedly took during interviews with other agency employees. According to the second step response, there were at least "nine different people" interviewed regarding the grievant's conduct at staff meetings. The reported subject of these interviews is the precise matter for which the grievant was disciplined and evaluated unfavorably. There is no question that the notes regarding these interviews, which in effect amount to witness statements, are related to the actions grieved and, absent just cause, are subject to disclosure by the agency. The information gathered in these interviews was relied upon by the second step-respondent in making his determination.

In response to the grievant's document requests, the agency has asserted that the documents are "work product" and must not be disclosed. The work product doctrine has been generally recognized by courts to provide protection to "documents prepared by or for counsel with a view to litigation."[9] The discovery rules of many courts have also expanded the scope of what is considered work product to include trial preparation documents "prepared in anticipation of litigation" by a party or that party's representative.[10] However, the protection afforded by the work product doctrine does not provide absolute immunity. Indeed, work product is discoverable if the party seeking the documents has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[11] The court rules have also protected from disclosure a party's representative's mental impressions, opinions, or legal theories concerning the litigation.[12] While the common law and court rules are instructive, they address discovery in civil litigation and are not controlling in state grievance proceedings.[13]

This Department has not established in the *Grievance Procedure Manual* or in a ruling the parameters of the work product doctrine for purposes of the grievance procedure. Because the EDR Director has the authority to establish the grievance procedure and issue final rulings on all matters of compliance with the grievance procedure, EDR has the discretion to develop a qualified work product doctrine for

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[9] Hickman v. Taylor, 329 U.S. 495, 510-12 (1947). Because the notes at issue in this case were not prepared with the involvement of an attorney, they would not be considered work product under this common law "work product privilege." *See, e.g., id.*

[10] *See, e.g.,* Fed. R. Civ. P. 26(b)(3); Va. Sup. Ct. R. 4:1(b)(3).

[11] *See, e.g.,* Va. Sup. Ct. R. 4:1(b)(3); *see also* Rakes v. Fulcher, 210 Va. 542, 546, 172 S.E.2d 751, 755 (1970) (noting that the doctrine "does not offer absolute immunity, and discovery will be permitted where a showing of necessity greater than the normal requirement for good cause is made") (citing *Hickman*, 329 U.S. at 511-12).

[12] Fed. R. Civ. P. 26(b)(3); Va. Sup. Ct. R. 4:1(b)(3).

[13] *See, e.g.,* Va. Sup. Ct. R. 4:0.

grievances.[14] The parameters of the doctrine must be guided by the strong public policy evinced by the grievance statutes that "all documents … relating to the actions grieved shall be made available upon request."[15] In light of this public policy, "just cause" exceptions to the disclosure of relevant information, such as a work product doctrine, must be closely scrutinized and narrowly applied.

Significantly, the grievance process is different from a court case. A grievance is not true "litigation," but rather an alternative process to provide resolution to employee problems and complaints in an immediate and fair method.[16] In contrast, the civil litigation work product doctrine exists in a system with full discovery rights, to include document production, depositions and interrogatories. In grievances, however, discovery is limited to document production, thus parties will often be unable to obtain the substantial equivalent of documents requested from the opposing party because broader civil litigation discovery tools are unavailable.

For purposes of this case only, assuming without deciding that the interview notes are work product, they would not be protected even by the terms of the court-based work product doctrine. The grievant has a substantial need for the interview notes in this case. The facts discovered in these interviews were relied upon by the agency in evaluating the grievant's conduct and used by the second step-respondent to make his decision. Moreover, the documents specifically address the factual issue[17] of what the grievant said in meetings that caused her to be disciplined. Further, the grievant could not obtain from another source, or in another way, the substantial equivalent of these interview notes. Though the grievant might be able to interview the witnesses herself informally, she cannot compel their deposition under oath and there is no expectation that she would be able to obtain the same information from these witnesses that the agency, as the employer, could order the witness-employees to provide. Moreover, the specific statements made by the witnesses to the second step-respondent are particularly important because that evidence was relied upon in the second step decision. Contrary to the agency's arguments, there are substantial considerations that would require the production of the interview notes. Thus, even assuming the work product doctrine available in courts applied to the interview notes, it would not protect these documents from disclosure within the context of the grievance procedure.

The agency's other arguments against production of the documents are not persuasive. The agency, in effect, argues that if the documents must be turned over, an agency would not investigate employment matters, or would take notes that would be "jaded" and without value. We cannot conclude, however, that a responsible agency would refuse to undertake such basic duties needed to manage a workplace --

[14] *See* Va. Code § 2.2-1001(2), (4), (5).
[15] Va. Code § 2.2-3003(E).
[16] Va. Code § 2.2-3000; *Grievance Procedure Manual* § 1.1.
[17] Because these documents are factual in nature, it would be difficult to imagine a case in which factual documents would be protected from disclosure by the work product doctrine because of the peculiarities of the grievance process.

investigating employee misconduct and behavior -- simply because the related documents would be subject to disclosure in a grievance. The agency would have a difficult time establishing the appropriateness of future disciplinary actions at grievance hearings if it did not disclose the evidence to support its actions.

The agency also suggests that disclosure of these documents will aggravate and complicate the dispute. On the contrary, the discovery of additional facts can aid in the appropriate resolution of grievances. Only with full knowledge of the facts, which may support the agency's position or be potentially exculpatory, can the parties view their positions clearly and management or a hearing officer reach the correct outcome. In sum, we conclude there are no just cause reasons justifying the protection of the interview notes and they must be produced.

Second Step Meeting Notes

The other documents the grievant has requested are the questions the second step-respondent asked during his meeting with the grievant and her answers to those questions, as they were recorded in the notes of the second step-respondent.[18] However, the grievant has not shown why the second step meeting notes are relevant in this case. The grievant states that she needs the second step meeting notes because there were issues left out of the second step response. However, the grievant has not provided any rationale of why that fact might be relevant to the merits of her case. The grievant has not stated why the agency's version of the meeting's events is important here. The grievant has provided no other explanation of the relevance of the meeting notes.[19] In this case, when the grievant has provided no indication why the requested documents are relevant, the meeting notes of the second step-respondent are not subject to disclosure.[20]

CONCLUSION

[18] There does not appear to be any other agency document to which the grievant's request applies. The agency also created a document before the meeting that listed questions to be asked during the second step meeting. According to the agency, some of these questions were asked, but others were not. Whether the documents were created before or during the meeting, the grievant's request is for the questions asked and her answers to those questions. In effect, the grievant is requesting agency documents concerning what was said during the meeting. For ease of discussion, these types of documents will be referred to as the second step meeting notes.

[19] In another document the grievant sent to the agency, the grievant appears to indicate that a reason she needs the second step meeting notes was the importance of her responses during the meeting. It is unclear why the grievant would need the second step meeting notes to establish her responses given that the grievant would be able to provide the same responses she made at the meeting again later in the grievance process or during hearing. Additionally, the grievant has provided no explanation of why these responses are relevant or probative in this case.

[20] However, in a case where a party provided some indication of the relevance of these types of notes, the documents could be discoverable. For instance, if the agency were holding something the grievant said at the meeting against him or her, the notes of management during this meeting would be much more probative as to what was said by the grievant in a meeting and management's understanding of those points.

The agency is ordered to provide the grievant all notes concerning the interviews about the grievant's conduct referenced in the second step response. In addition, the grievance must be returned to the agency for the third step-respondent to respond to the grievant's discrimination claim. The third step-respondent must respond within five workdays of the grievance package being returned to the agency by the grievant, if it is not already with the agency. However, if the third step-respondent needs additional time to inquire about the grievant's discrimination claim and investigate, the parties may extend the time limit upon mutual agreement.[21] Such an agreement must be in writing.[22]

This Department's rulings on matters of compliance are final and nonappealable.[23]

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Director

[21] *Grievance Procedure Manual* § 8.4.
[22] *Id.*
[23] Va. Code §§ 2.2-1001(5), 2.2-3003(G).