

Issue: Compliance – Grievance Procedure (Documents, Resolution Steps, 5-Day Rule); Ruling Date: November 3, 2008; Ruling #2008-1988, 2008-1989; Agency: Department of Corrections: Outcome: Agency Not in Compliance regarding Documents, Agency In Compliance regarding Resolution Steps and 5-Day Rule.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2008-1988 and 2008-1989
November 3, 2008

The grievant has requested a ruling on whether her January 24, 2008 grievance with the Department of Corrections (DOC or Agency) qualifies for a hearing. In addition, the grievant claims that the agency has failed to comply with the grievance process (1) by refusing to provide her with documents relative to her January 24th grievance; (2) by failing to address her claims of discrimination and retaliation in the management resolution steps; and (3) because the agency head did not render his qualification decision within the mandated 5 workdays. Because there is an issue of compliance with the document procedures of the grievance process, this ruling will address only the compliance issues and a forthcoming ruling will address the qualification issue.¹

FACTS

On November 30, 2007, the grievant interviewed for a Psychology Associate II position with DOC. There were three interviewers present for the group interview for the Psychology Associate II position. The grievant's Applicant Evaluation Forms reveal that two of the three interviewers, Mr. K. and Mr. D., found the grievant to be well qualified for the Psychology Associate II position and recommended her highly for the job. The third interviewer, however, who was also the appointing authority in this case, Dr. B., found her skills to be either good or adequate and did not recommend her for the position.

After the interview process for the Psychology Associate II position was complete, the agency apparently determined that the recruitment and interview processes had failed to present a suitable candidate and as such, it decided to re-advertise the position on or about January 14, 2008. On January 24, 2008, the grievant initiated a grievance challenging her nonselection as arbitrary and capricious and a misapplication and/or unfair application of policy. In addition, sometime on or around February 5, 2008, the grievant attached an addendum to her January 24th grievance which alleges that her

¹ See, e.g., EDR Ruling No. 2007-1472; EDR Ruling No. 2007-1515.

nonselection was discriminatory and/or retaliatory. During this Department's investigation, the grievant indicated that Dr. B. failed to select her for the position because she is a female.

In the relief section of her grievance, the grievant seeks "copies of all information relevant to the consideration and deliberation of this selection/non-selection process including documents, emails, correspondence, memos, attachments, forms, notes, etc. as provided for under sec. 8.2 of the grievance process." In response to her request for documents, the agency provided the grievant with a copy of the Applicant Evaluation Forms completed by all three interviewers in response to the grievant's interview. Dissatisfied with the agency's response to her document request, the grievant sent a notice of noncompliance to the agency head on February 14, 2008. The agency has stated that the grievant is not entitled to any additional documents. As such, the grievant seeks a compliance ruling from this Department.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (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.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for its delay in conforming to EDR's order.⁴

In this case, the grievant claims that the agency has failed to comply with the grievance process (1) by refusing to provide her with documents relative to her January 24th grievance; (2) by failing to address her claims of discrimination and retaliation in the

² *Grievance Procedure Manual* § 6.3.

³ *Id.*

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

management resolution steps; and (3) because the agency head did not render his qualification decision within the mandated 5 workdays. The grievant's claims of noncompliance will be discussed in turn below.

Alleged Failure to Address Claims of Discrimination and Retaliation

On or about February 5, 2008, the grievant attached an addendum to her January 24, 2008 grievance. In this addendum, the grievant raises issues of discrimination and retaliation, specifically:

Additionally, the grievant alleges that the hiring and selection process for position #00281 (11/30/07) was arbitrary and capricious resulting in no selection being made in disregard of the applicants' stated and relative qualifications and the recommendations of the group interviewers (including the appointing authority). As such is [sic] the case and since no plausible explanation to the contrary has been given (as supported by requested documentation), it is reasonable to presume **that she has been subjected to discrimination for unknown reason(s)**. Further, in light of the highly sensitive nature of this action and the potential implications to the administrative/supervisory chain of command, the grievant is deeply concerned about possible **retaliation against her** either directly or indirectly.⁵

The agency has refused to address the grievant's claims of discrimination and retaliation because "they were not a part of [the grievant's] original grievance complaint."⁶

This Department has previously held that so long as the management action being grieved (e.g., nonselection) is expressly stated on the Form A and the addition of alternative theories will not prejudice the agency, the grievant is permitted, during the management resolution steps, to allege alternative theories as to *why* that management action being challenged was improper.⁷ Accordingly, the agency's determination that the grievant could not allege that her nonselection for the Psychology Associate II position was discriminatory and/or retaliatory is erroneous. This Department further concludes, however, that the agency's failure to address these issues during the management resolution steps did not violate the grievance process as alleged by the grievant. That is, as stated above, the grievant is challenging her nonselection for the position of Psychology Associate II and the agency has provided a reason as to why the grievant was not selected for the Psychology Associate II position (i.e., "she did not demonstrate in the interview a strong enough set of skills for this position"). Accordingly, this Department concludes that the agency has adequately addressed the grievant's claim that her nonselection was improper and did not violate the grievance procedure by failing to

⁵ Emphasis in original.

⁶ See Agency Head's Determination of Qualification for a Hearing, Feb. 25, 2008.

⁷ See, EDR Ruling Nos. 2007-1561 and 2007-1587; EDR Ruling No.2007-1444.

specifically name and respond to each of the grievant's theories as to why the nonselection was improper.⁸

Alleged Failure to Comply with the 5 Workday Rule

The grievant further claims that the agency head violated the grievance procedure because he failed to issue his qualification determination within 5 workdays.⁹ A ruling on the issue of whether the agency head responded within the mandated 5 workdays is premature because it does not appear that the grievant has notified the agency in writing of the alleged procedural violation, as required by the grievance procedure.¹⁰ Moreover, the agency has corrected any noncompliance by providing the grievant with a qualification decision on February 25, 2008, thus rendering the issue of any purported noncompliance moot.

Documents

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.”¹¹ 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.

Furthermore, the grievance statute 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.”¹² Documents, as defined by the Rules of the Supreme Court of Virginia, include “writings,

⁸ Cf. EDR Ruling No. 2004-851 (determining that the second step-respondent was out of compliance with the grievance process when he addressed in his second step response only one of the two distinct actions taken by management and challenged by the grievant in his grievance.)

⁹ See *Grievance Procedure Manual* § 4.2.

¹⁰ See *Grievance Procedure Manual* § 6.3.

¹¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹² *Id.*

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.”¹³ While a party is not required to create a document if the document does not exist,¹⁴ 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.

In this case, the grievant seeks “copies of all information relevant to the consideration and deliberation of this selection/non-selection process including documents, emails, correspondence, memos, attachments, forms, notes, etc. as provided for under sec. 8.2 of the grievance process.” As stated above, the agency has provided the grievant with copies of the Applicant Evaluation Forms completed based on her interview as well as with information relating to DOC’s selection policy. The agency contends that the grievant has been given “all pertinent documents relating to [her] request.” The grievant, however, believes that she has been improperly denied (1) e-mail correspondence between the appointing authority, Dr. B., and his supervisor, Dr. H.; (2) any notes taken by Dr. B. about or during the interview process; (3) a document detailing what skill set she did not demonstrate for the position; and (4) applicant evaluation forms of all other applicants.

With regard to the agency’s failure to provide the grievant with e-mail correspondence and a document detailing what skill set the grievant lacks, the agency has indicated that no such documents exist. Additionally, any notes taken by Dr. B about or during the interview process were apparently disposed of shortly after the interviews and as such, no longer exist. Furthermore, as stated above, an agency is not required to create a document that would provide the grievant with further information regarding the specific skills she lacked for the Psychology Associate II position.

Finally, with regard to the grievant’s request for the applicant evaluation forms of all other applicants, this Department concludes that such documents are potentially relevant¹⁵ to the grievant’s claims in this case¹⁶ and thus, the agency must provide the

¹³ Va. Sup. Ct. R. 4:9(a).

¹⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹⁵ Evidence is considered relevant when it would tend to prove or disprove a fact in issue. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) (“We have recently defined as relevant every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.” (internal question omitted)); *Morris v. Commonwealth* 14 Va. App. 283, 286, 416 S.E. 2d 462, 463 (1992) (“Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue.” (internal question omitted)).

¹⁶ In this case, while it is possible that the applicant evaluation forms of other applicants will not assist the grievant in proving her claims, it is also possible that the requested information could potentially reflect the appointing authority’s motivation as it relates to the propriety of his hiring decision under state policy and related discrimination laws.

grievant with such documents absent some “just cause”¹⁷ reason for not producing the documents. The agency argues that the grievant is “not entitled to information about the other applicant’s interview evaluations as there was not a selection made from amongst the pool.” The agency’s failure to select a candidate for the Psychology Associate II position does not constitute “just cause” for not providing the grievant with the applicant evaluation forms of the other candidates in this case. 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 the candidate’s name, social security number, telephone number, and address), provided that information relevant to the grievance is not redacted. Because redaction of the names will make the determination of gender difficult, if not impossible, the agency must identify the gender of the employee with each document produced. The agency may charge the grievant its actual cost to retrieve and reproduce documents.

This Department will stay its ruling on the grievant’s qualification request until resolution of the compliance matter. However, within 10 workdays of receipt of the documents at issue, the grievant must either renew her request for qualification of her January 24th grievance to this Department or conclude her grievance and return it to the human resources office.

This Department’s rulings on matters of compliance are final and nonappealable.¹⁸

Claudia T. Farr
Director

¹⁷ “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9.

¹⁸ Va. Code § 2.2-1001(5).