

Issues: Compliance – Grievance Procedure (Documents and Resolution Steps);
Ruling Date: July 24, 2008; Ruling #2008-2033; Agency: Virginia Community
College System; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Community College System
Ruling No. 2008-2033
July 24, 2008

The grievant has requested a compliance ruling regarding his March 6, 2008 grievance with a college within the Virginia Community College System (VCCS or the agency). The grievant asserts that the agency is attempting to require him to meet at the second step of his grievance with someone other than the designated second step respondent. He also asserts that he has not been provided with all documents requested pursuant to his grievance.

FACTS

The grievant initiated his grievance on March 6, 2008, in which he challenged the agency's issuance of two disciplinary written notices. The grievant asserts that he was disciplined in retaliation for calling the state's Fraud, Waste, and Abuse (FWA) Hotline.

In conjunction with his grievance, the grievant requested five groups of documents. Two groups of documents requested were for all correspondence between the grievant's supervisor and two other VCCS faculty members. The third group of documents sought consisted of all correspondence between the grievant's supervisor and the agency's Human Resource Director. The fourth group included "[a]ny email to the Business and Social Sciences Faculty referencing retaliation towards [grievant]." The last request was for "[a]ny relevant information or documentation regarding the grievances of [grievant's supervisor]."

In response to this document request, the agency provided the grievant with several e-mails between the grievant's supervisor and the agency's Human Resource Director. The agency stated that "[t]o honor your request for any additional records, you will need to provide to me more specific details as to the nature of the email and correspondence you are requesting."

The grievant also asserts that in attempting to advance his grievance to the second step, he tried to present his grievance to the Vice President of the college where he works. The agency responded by informing him that he must present his grievance to the Administrative Council member in his supervisory chain.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first communicate with each

¹ See *Grievance Procedure Manual* § 6.3.

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. In this case, the grievant has notified the agency head of the agency's asserted noncompliance.

Second Step Respondent

The grievant and agency dispute the identity of the second step respondent. 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.² 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.

When a community college is involved in a grievance, the agency is VCCS.³ In the present case, the VCCS has designated the Vice-President at each community college to serve as the second step respondent for their respective colleges.⁴ Accordingly, the Administrative Council member in the grievant's supervisory chain is not the designated respondent. The agency therefore shall have the Vice-President arrange a second step meeting with the grievant within 5-workdays of receipt of this ruling. If in the future the agency wishes formally to change its list of step respondents, a request must be provided to EDR for approval.

² Va. Code § 2.2-3003(D).

³ EDR Ruling No. 2008-2009.

⁴ See Step Respondent Confirmation Letter from EDR Director to VCCS Chancellor dated August 5, 2004. The President of each college is the third step respondent. The Chancellor, as agency head, makes qualification determinations. See EDR Ruling No. 2008-2009.

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.”⁵ 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.

In response to the grievant’s request for documents, the agency provided several but stated that it needed “more specific details as to the nature of the email and correspondence you are requesting” before it could honor the grievant’s request for additional documents. Each group of requested documents will be addressed below.

1. Correspondence Between Faculty and the Grievant’s Supervisor

The grievant has requested all correspondence between the grievant’s supervisor and two other VCCS faculty members. The grievant seeks these documents because he believes that they may help to prove the alleged fraud, waste, and abuse that prompted his call to the FWA Hotline.

The agency need not provide all correspondence between the grievant’s supervisor and the two VCCS faculty members because this grievance challenges alleged retaliation for calling the FWA Hotline, not the alleged underlying fraud, waste, or abuse. In other words, to establish a retaliation claim, there is no need to show that the grievant’s FWA complaint was valid—simply calling the FWA Hotline in good faith is a protected activity.⁶ (To establish his retaliation claim the grievant must present evidence that (1) he engaged in a protected activity;⁷ (2) the employee suffered a materially adverse action;⁸ and (3) a causal link exists between the

⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

⁶ Protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct. *Sumner v. United States Postal Service*, 899 F.2d. 203, 209 (2nd Cir. 1990) (“[t]o establish that his activity is protected under Title VII, a plaintiff need not prove the merit of his underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed.”) *See also* 42 U.S.C. § 2000e-3(a).

⁷ *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: “participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, *reporting an incidence of fraud, abuse or gross mismanagement*, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b)(emphasis added).

⁸ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); *see also, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. A formal written disciplinary notice satisfies this requirement.

materially adverse action and the protected activity.) Whether or not his FWA complaint is ultimately established as valid is, in and of itself, irrelevant.⁹

2. All Correspondence Between the Grievant's Supervisor and the Agency's Human Resource Director Regarding the Grievant

According to the grievant, in response to his request for all correspondence between his supervisor and the agency's Human Resource Director from September 1, 2007 to the present, the agency provided two emails, both dated January 17, 2008. The Human Resources Director asserts that she believes that all such documents have been provided.

Upon receipt of such a request, a party shall have a duty to conduct a reasonable search of its records to ensure that, absent just cause, all such relevant documents are provided. If the agency has not conducted a reasonable search of its records to ensure that all relevant documents are provided, it must do so and provide any documents responsive to this request within 5 workdays of receipt of this ruling.

3. Any Email to the Business and Social Sciences Faculty Referencing Retaliation Towards Grievant

The grievant has asked for "[a]ny email to the Business and Social Sciences Faculty referencing retaliation towards [g]rievant." Apparently, no documents have been provided in response to this request.

The grievant's request is reasonably specific as to the nature of what is sought. Thus, within 5 workdays of receipt of this ruling, the agency shall (1) inform the grievant that no such documents exist, or (2) provide any such correspondences to the grievant. If it is not possible to provide the requested documents within the 5 workday period, the agency must, within 5 workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than 10 work days from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or "just cause," the agency must provide the grievant with a written explanation of each claim, no later than 10 workdays from the receipt of the document request.¹⁰

4. Any Relevant Information or Documentation Regarding the Grievance of Grievant's Supervisor

Finally, the grievant made a broad catch-all request for "[a]ny relevant information or documentation regarding the grievances of [grievant's supervisor]."

When the grievant was asked during the course of the investigation for this ruling how any grievances by his supervisor relate to his grievance, he explained that he intended to request all relevant information or documentation regarding the actions of his supervisor against him. In other words, he is seeking relevant information or documentation regarding his own grievance

⁹ Of course if a correspondence is somehow otherwise relevant, it must be provided.

¹⁰ *Grievance Procedure Manual* § 8.2. We note that such a request cannot be viewed as a request for irrelevant documents. The grievance centers on retaliation, thus any document referencing retaliation is relevant.

challenging the discipline issued by his supervisor. Accordingly, the grievant must renew his request to make it clear that he is seeking all documents relevant to *his* grievance challenge to the written notices. Upon receipt of such a request, the agency shall have a duty to search its records to ensure that, absent just cause, all such relevant documents are provided. Again, all such documents must be provided within 5 workdays of receipt of the request.¹¹

Finally, we note that such a request cannot, by definition, be viewed as a request for irrelevant documents. Nor is such a request overly broad. The grievant is challenging a disciplinary action taken against him as an act of retaliation. Accordingly, while not intended to be an all inclusive list, any documents that discuss (1) directives given to grievant regarding the reporting of suspected fraud, waste, or abuse, (2) actions taken by the grievant that led to his discipline, and (3) discussions regarding how the agency intended to respond to the grievant, would all appear relevant. Furthermore, because the grievant does not know the full extent of what documents might exist, he cannot specifically identify all documents that may be relevant. Thus, this sort of catch-all request is not inappropriate.

This Department's rulings on matters of compliance are final and nonappealable.¹²

Claudia T. Farr
Director

¹¹ If it is not possible to provide the requested documents within the 5 workday period, the agency must, within 5 workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than 10 work days from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or "just cause," the agency must provide the grievant with a written explanation of each claim, no later than 10 workdays from the receipt of the document request.

¹² Va. Code § 2.2-1001(5).