

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: April 24, 2009; Ruling #20009-2117; Agency: Department of Criminal Justice Services; Outcome: Agency Not In Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of  
Criminal Justice Services  
Ruling Number 2009-2117  
April 24, 2009

By letter dated September 2, 2008, the grievant requests a compliance ruling from this Department. The grievant claims that the Department of Criminal Justice Services (DCJS or the agency) has failed to provide her with requested documents related to her August 7, 2008 grievance.

FACTS

The grievant is employed by the agency as a Policy and Planning Coordinator. On or about June 17, 2008, the grievant applied for the agency's position of Division Director of Strategic Planning and Development. The grievant was not selected to interview for this position; and on August 7, 2008, she initiated a grievance challenging her non-selection as well as what she describes as "workplace harassment" by her immediate supervisor. In particular, the grievant asserts that her supervisor "pre-selected the African-American candidate for the position per her [supervisor's] history of racial preference." In support of her claim that her supervisor "has shown a preference for hiring solely African Americans," the grievant alleges that her supervisor has on at least two occasions "required" the Planning and Policy Unit to consider African-American applicants, Ms. X and Mr. Y.

On August 13, 2008, pursuant to her grievance, the grievant made a written request to the agency for a number of documents, including copies of the interview questions and hiring panel's notes and recommendations regarding Ms. X and Mr. Y. She also asked for documentation showing the dates when Ms. X and Mr. Y submitted their applications, resumes or letters of interest. The agency denied the grievant's request for the materials regarding Ms. X and Mr. Y on the ground that the requested documents and information were not "relevant or material" to the August 7<sup>th</sup> grievance.

By a memorandum dated August 20, 2008, the grievant gave the agency head written notice of non-compliance with respect to the documents regarding Ms. X and Mr. Y. On August 28, 2008, the agency responded by letter to the grievant's claim of non-

compliance. The agency again advised the grievant that it would not provide the requested documents and information because the grievant has not shown that the requested materials were related to the issues being grieved. On September 2, 2008, the grievant requested a compliance ruling from this Department regarding the agency's failure to provide the requested materials.

### DISCUSSION

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>1</sup> 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 grievance 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.”<sup>2</sup> Documents, as defined by the Rules of the Supreme Court of Virginia, include “writings, 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.”<sup>3</sup> While a party is not required to create a document if the document does not exist,<sup>4</sup> 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.

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.

In this case, the grievant challenges the agency's failure to provide selection materials relating to Ms. X and Mr. Y. Although these documents relate to selection decisions other than the one being challenged in the grievant's August 7<sup>th</sup> grievance, they nevertheless relate to that grievance. The grievant asserts that she was denied the Division Director position because of her supervisor's alleged preference for hiring African-American candidates. Evidence of that preference, the grievant asserts, can be

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<sup>1</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>2</sup> *Id.*

<sup>3</sup> Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

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

found in the selection processes involving Ms. X and Mr. Y. Accordingly, the requested documents and information regarding Ms. X and Mr. Y would certainly appear to be relevant to this grievance.<sup>5</sup>

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 social security number, telephone number, and address), provided that information relevant to the grievance is not redacted. The agency may charge the grievant its actual cost to retrieve and reproduce documents.

This Department's rulings on matters of compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> Although the agency has not asserted that the requested documents are protected personnel materials, we note that, as this Department has previously explained with regard to DHRM Policy 2.10 (Hiring), to the extent materials otherwise protected by a DHRM policy are sought by a grievant in conjunction with the grievance process, DHRM policy is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents. *See* EDR Ruling No. 2004-683. It further appears that the grievant herself was involved the selection processes for Ms. X and Mr. Y, and therefore has already had access to any personnel information contained in the requested documents.

<sup>6</sup> See Va. Code § 2.2-1001(5); 2.2-3003(G).