

Issue: Compliance – Grievance Procedure (Documents); Ruling Date:
November 3, 2008; Ruling #2009-2140; Agency: Department of Social
Services; Outcome: Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2009-2140
November 3, 2008

The grievant has requested a compliance ruling regarding her August 15, 2008 grievance with the Department of Social Services (the agency). The grievant claims that the agency has not provided all requested documents.

FACTS

This grievance involves the grievant's arguments about the classification of her position. The grievant is a Program Support Technician (PST). In 2007, the agency conducted a study that led to certain changes in classification and compensation. The grievant initiated her grievance on August 15, 2008 to challenge her classification. In conjunction with her grievance, she also requested certain documents: "a written copy of the assessment of my position along with a copy of the assessment of other positions that were [PST] Senior and moved to pay band 4;" and "a copy of the written assessment of my co-workers that [are] now classified as [PSTs]." The grievant was additionally seeking to see "justification for the determination on the classification on my position." The grievant reiterated her document request following the first step of the grievance process as seeking "the audit of the study used for the Classification of my position, my co-worker's position, and the other [PST] Seniors that were promoted." Although the agency has provided certain documents to the grievant, she asserts that she has not been provided other documents. As such, the grievant has asked for this compliance ruling.

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 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.² If the opposing party

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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 the delay in conforming to EDR's order.³

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.”⁴ 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. “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”⁵ For purposes of document production, examples of “just cause” include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.⁶ 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.”⁷

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 her notice of noncompliance to the agency head, the grievant identified the category of documents she had yet to receive from the agency: “the audit study used for the Classification of my position, my co-workers [sic] position, and the other [PST]

³ 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.

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

⁵ *Grievance Procedure Manual* § 9.

⁶ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁷ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

Seniors that were promoted.”⁸ The agency has indicated that the 2007 study contains no information regarding PSTs in the grievant’s division because the division’s director did not submit data; however, the consultants determined that the grievant’s position should be rated consistently with assessments of other PSTs in other divisions. Subsequently, the grievant appears to have clarified the documents she is specifically seeking in an e-mail to the agency and this Department on October 1, 2008. In that e-mail, she acknowledges that her position “was assigned to the same level as the evaluations that were done for [PSTs]” in other divisions. Therefore, she is now seeking “audit reports” that would show how those positions were classified.

The agency has stated that there are no such “audit reports” that the grievant has not already been provided. However, it appears the grievant has not received “audit reports,” or their equivalent, related to the evaluations of PSTs in other divisions. The agency claims that the grievant did not request those. However, based on a fair reading of the grievant’s document requests, the grievant is ultimately seeking documents that show “the justification for the determination on the classification of my position.” Therefore, the evaluations of the other PST positions in other divisions during and after the study that determined the classification of those positions and, thus, the grievant’s as well, are clearly within the category of documents the grievant has sought, irrespective of whether they are specifically called “audit reports.” The agency’s failure to provide the requested documents appears to be based on a difference in nomenclature, rather than on the plain meaning of the document request itself which, fairly read, asks for documents showing the justification for the classification of the grievant’s position. Thus, the agency is ordered to provide the grievant documents related to the evaluation and classification of the other PST positions in other divisions in relation to the 2007 study on which the classification of the grievant’s position was based.

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

Claudia T. Farr
Director

⁸ The grievant argues that she was a PST Senior at the time of the study and demoted to a PST. Therefore, the grievant was seeking documents regarding other PST Seniors who she believes were promoted. However, the agency has provided documentation indicating that the grievant was a PST not a PST Senior at the time of the study. Consequently, even if there were PST Seniors who were promoted, documents related to those PST Seniors would not be relevant to this grievance because the grievant was not a PST Senior.

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