

Issues: Compliance – Grievance Procedure (5-Day Rule and Documents); Ruling Date: December 23, 2008; Ruling #2009-2150, 2009-2178; Agency: Department of Corrections; Outcome: 5-Day Rule – No Ruling (moot); Documents – Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Nos. 2009-2150, 2009-2178
December 23, 2008

The grievant has requested a ruling regarding the agency's alleged noncompliance with the grievance procedure.

FACTS

In his August 26, 2008 grievance, the grievant is challenging a Written Notice he received regarding issues with his attendance. In his ruling request, the grievant alleges that the agency failed to provide written responses to his grievance within the required five workday timeframe at both the second and third resolution steps. After advising the agency of this alleged noncompliance, the grievant now seeks a compliance ruling. The grievant additionally argues that the agency has not provided documents he has requested under the grievance procedure.

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 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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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.³

Timeliness

In this case, the grievant asserts that he notified the agency head of the agency's failure to respond to his grievance in a timely fashion. However, based on the dates on the Grievance Form A, written responses were provided by the second step-respondent on September 2, 2008, and the third step-respondent on September 26, 2008. Even if the agency's responses were not timely, the issuance of the written responses has rendered moot any issue of noncompliance for failure to respond. Further, the minor delays in this case would not constitute substantial noncompliance with the grievance procedure and, as such, the grievant's request that this Department drop the Group I Written Notice will not be granted.

Documents

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 The grievant's requests are discussed separately below.

Disciplinary Actions

In an October 1, 2008 e-mail, the grievant requested the "names of all staff that have taken sick leave in excess of 120 hours or more, and if they received disciplinary action for unsatisfactory attendance." Though not specifically a request for documents, fairly read, this e-mail is seeking information about any staff who have taken over 120 hours of sick leave and whether they received disciplinary action. The agency initially denied the grievant's request.

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.

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.

However, in an October 20, 2008 e-mail, the agency provided information regarding the number of facility employees who have used at least 120 hours of sick leave. According to this response, none of those employees had received any disciplinary action. Thus, it appears that the agency has sufficiently responded to the grievant's request. The only information sought by the grievant in the above request not provided is the names of those other employees. However, this is not a case in which the names of these other individuals are relevant to the grievant's claim.⁸ While the disciplinary actions against other employees could be relevant to the issues of any alleged inconsistent treatment or lack of notice, the individual employees' names would not be material to such issues, only the evidence of the disciplinary actions (the Written Notices) and the surrounding circumstances.⁹ Consequently, this Department finds that the agency has sufficiently followed the grievance procedure in providing the generic information in response to the grievant's request without identifying employees.

The grievant additionally posed the following questions in his October 1, 2008 e-mail: "Has anyone received disciplinary action for a similar case like mine. Is there anyone that should of [sic] received group 1 [sic] for their attendance? that did not?" The agency stated in its October 20, 2008 e-mail that there were no other similar cases to the grievant's warranting disciplinary action. Further, during this Department's investigation for this ruling, the agency has stated that there are no other facility employees who have received disciplinary action for unsatisfactory attendance in the past three years. As such, it does not appear that there are any documents responsive to the grievant's questions. The agency has complied with the grievance procedure in responding to the grievant's October 1, 2008 e-mail.

In a later e-mail, the grievant has also requested information about all employees agency-wide who have received Group I Written Notices for unsatisfactory attendance and the surrounding circumstances of those actions. The facility denied the grievant's request by saying that the information was not available. While that may be true at the facility level, documents reflecting such information must exist somewhere at the agency if any such disciplinary actions have ever been taken.¹⁰ While some of these documents might be relevant,¹¹ relevancy becomes almost nonexistent, and the burden of production becomes excessive, if the scope of the review is too broad. In determining whether just cause exists for nondisclosure of relevant documents

⁸ See, e.g., EDR Ruling No. 2009-2087.

⁹ In certain cases, the status of a particular employee might also be relevant and should be provided depending on the grievant's claim. For example, an employee's rank and/or position could be relevant to establish the context of a particular disciplinary action. Similarly, an employee's race, gender, or other status could be relevant in a discrimination case.

¹⁰ For instance, during this Department's investigation, a member of the facility's human resources staff indicated that the facility did not have access to the records and they would have to be requested centrally.

¹¹ Evidence is generally 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.'" (citations 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." (citations omitted)).

under the grievance procedure, this Department will weigh the interests expressed by the party for nondisclosure against the general presumption under the grievance statutes in favor of disclosure and the requesting party's particular interests in obtaining the document. In most cases involving a claim of inconsistent treatment of employees, a grievant can obtain related documents addressing the treatment of employees in the grievant's reporting line, division/department, and/or at the same facility. In this case, there is no indication that an agency-wide request is needed. Further, an agency-wide search for and production of these types of documents, in an agency as large as the grievant's, would be unduly burdensome, especially compared to the relatively low value of the documents in this case. Therefore, although the agency has not provided information in response to the grievant's agency-wide request, the agency is not in noncompliance because such a request is too broad in this case without a further showing of need.

Leave Restriction

The grievant has also requested the number of employees on leave restriction at his facility, their names, and the number of leave hours they used. It does not appear that the agency has responded to this request for information. Questions about leave use, leave restriction, and consistent treatment of employees appear relevant to and raised in this grievance. As such, the agency is directed to provide a response to the grievant's request with relevant documents or a generic summary of the relevant information. As similarly discussed above, this is not a case in which the grievant would need to see the names of these employees. Therefore, names can and should be redacted from the relevant documents, as well as other non-relevant personal information.

CONCLUSION

Except a failure to respond to the grievant's request for information regarding leave restrictions, this Department does not find that the agency is in noncompliance. As stated above, the agency is ordered to respond to the grievant's request for information about other employees on leave restriction. The grievant's request for any further relief is denied.

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

Claudia T. Farr
Director

¹² See Va. Code §§ 2.2-1001(5), 2.2-3003(G).