

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: February 19, 2009; Ruling #2009-2173; Agency: Virginia Department of Agriculture and Consumer Services; Outcome: Agency In Compliance / Agency Not In Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Agriculture and Consumer Services  
Ruling Nos. 2009-2173  
February 19, 2009

The grievant has requested a ruling regarding the agency's alleged noncompliance with the grievance procedure in not providing requested documents.

FACTS

In his October 9, 2008 grievance, the grievant challenged his layoff as retaliatory and a misapplication of policy. According to the agency, the grievant's position was eliminated as a budget reduction strategy in conjunction with directives from the Governor to reduce General Fund expenditures – not for retaliatory purposes and not in a manner otherwise contrary to applicable policy. To support his case, the grievant has made various requests for documents, dated October 14, 28, and 29, 2008, to which the agency has provided certain responses, dated October 28, 2008 and November 3 and 13, 2008. However, the grievant claims that the agency has failed to comply with the grievance procedure by not providing some of the requested documents. The grievant now seeks this compliance ruling.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *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.<sup>3</sup>

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.”<sup>4</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. “Just cause” is defined as “a reason sufficiently compelling to excuse not taking a required action in the grievance process.”<sup>5</sup> 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.<sup>6</sup> 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.”<sup>7</sup>

#### Budget Reduction Documents

As indicated above, the grievant claims that the agency misapplied policy and retaliated against him by eliminating his position and subjecting him to layoff. To support those claims, the grievant requested division “plans for budget reductions submitted to the Commissioner's Office and Governor since June 1, 2008,” and in a later document request, other budget reduction documents at the levels of Program Manager, Division Business Manager, Division Director, and those sent to the Department of Planning and Budget (DPB). The agency has denied access to all these documents as “Governor's Working Papers.”

The Virginia Freedom of Information Act (FOIA) excludes “working papers and correspondence of the Office of the Governor” from mandatory disclosure.<sup>8</sup> While FOIA exclusions do not automatically protect a document from disclosure under the grievance statutes,<sup>9</sup> this Department recognizes the importance of the public policy embodied by the

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<sup>3</sup> 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.

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

<sup>5</sup> *Grievance Procedure Manual* § 9.

<sup>6</sup> *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

<sup>8</sup> Va. Code § 2.2-3705.7.

<sup>9</sup> *See* Virginia Code § 2.2-3003 (amended by 2000 General Assembly to remove language referencing FOIA); *see also* EDR Ruling No. 2007-1470; Grievance FAQs, No. 27, at <http://www.edr.virginia.gov/faqs.htm>.

“Governor’s Working Papers” exemption,<sup>10</sup> which can constitute “just cause” for refusing to produce documents in a grievance.<sup>11</sup>

FOIA’s “Governor’s Working Papers” exclusion, which must be narrowly construed,<sup>12</sup> defines “Office of the Governor” as “the Governor; his chief of staff, counsel, director of policy, Cabinet Secretaries, the Director of the Virginia Liaison Office; and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104” in the form of a written Executive Order.<sup>13</sup> “Working papers” are “those records prepared by or for [one of the above-named public officials] for his personal or deliberative use.”<sup>14</sup> If the record was not prepared by or for one of those named official’s personal or deliberative use, it appears the exemption cannot be invoked.<sup>15</sup> Further, “no record, which is otherwise open to inspection under [FOIA], shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.”<sup>16</sup> Finally, formal opinions by the Attorney General and the FOIA Advisory Council have concluded that the “Governor’s Working Papers” exemption no longer applies after a document has been disseminated beyond the Office of the Governor.<sup>17</sup>

In this case, any final budget reduction plans submitted by the agency to the Office of the Governor would appear to have been, at least initially, protected from disclosure as “Governor’s Working Papers.” However, the agency’s submitted plan has been accessible on the Department of Planning and Budget’s web site for some time,<sup>18</sup> thus the “Governor’s Working Papers” exemption would appear to no longer apply.<sup>19</sup> Moreover, the agency has already provided a copy of its final submitted budget reduction plan to the grievant. Therefore, the issue of whether those final plans continue to be protected from disclosure to the grievant is essentially moot.

On the other hand, the agency still has not provided documents reflecting the budget reduction strategies developed within the agency but not submitted to the Office of the Governor. Here, the agency started at the Program Manager level in developing its budget reduction strategies, which were then provided to the Division Business Manager, who, after review, provided such plans to the Division Director, and so on up the line to the Commissioner’s office. Documents developed by or for employees within the agency would not be subject to FOIA’s

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<sup>10</sup> See Va. FOIA Council Adv. Op., AO-17-04, Aug. 31, 2004 (citing the need for a zone of privacy within the decision-making process of the Office of the Governor, to protect creativity and encourage the free-flow of ideas).

<sup>11</sup> See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>12</sup> See Va. Code § 2.2-3700(B).

<sup>13</sup> Va. Code § 2.2-3705.7 and § 2.2-104.

<sup>14</sup> *Id.*

<sup>15</sup> See Va. FOIA Council Adv. Op., AO-17-04, Aug. 31, 2004.

<sup>16</sup> Va. Code § 2.2-3705.7.

<sup>17</sup> See FOIA Council Adv. Op., AO-17-04, Aug. 31, 2004 (citing 1982-83 Op. Atty. Gen. Va. 724).

<sup>18</sup> See <http://www.dpb.virginia.gov/budget/08-10/51015submissions102008.pdf> at 22-30.

<sup>19</sup> In addition, the 2008 Budget Bill provides that budget reduction proposals submitted by state agencies to the Governor or his staff, included but not limited to the Department of Planning and Budget, shall be forwarded to the “Chairmen of the House Appropriations and Senate Finance Committees” concurrently with the budget reduction plan approved by the Governor. 2008 Budget Bill § 4-1.02(d)(5)(b).

“Governor’s Working Papers” exemption because they were not prepared by or for any of the enumerated individuals listed in FOIA as constituting the Office of the Governor.

However, the analysis does not end here. The breadth and relevancy of these documents must also be considered. The grievant states that he requested *all* of the agency’s budget reduction documents to demonstrate how, at the agency level, his position was identified for layoff and where within the agency that decision originated.<sup>20</sup> As such, the grievant’s request for all budget reduction documents is too broad, because a majority of the budget reduction strategies addressed various other agency expenditures unrelated to the grievant’s position. For this reason, the only documents the agency must provide in response to these requests are those related to the agency’s identification of the grievant’s position for elimination, the grievant’s subsequent layoff, and the processes by which those decisions were developed. To the extent such information appears within other documents, the nonrelevant information may be redacted.

In sum, the grievant is entitled to review agency documents related to the rationale, basis, process, and determination of the elimination of his position and his layoff.<sup>21</sup> Indeed, such documents are particularly relevant because it appears the grievant may have been given different explanations about why and how his layoff occurred. While the agency has provided copies of his actual layoff notifications and a brief explanation of the agency’s rationale in the second step response, the agency has not satisfied its obligation under the grievance procedure to provide the requested layoff-related documents.

#### Employee Work Profile

One of the other documents requested was the Employee Work Profile (EWP) of an agency Division Business Manager. While the agency produced a copy of this EWP, the version provided was unsigned, and appears, at best, to be a draft, with no indication of when it was in effect. By providing an unsigned, undated EWP, the agency has not complied with this document request. The agency is ordered to provide a copy of the official, signed and dated version(s) of the EWP for this position during the relevant time periods.

#### Meeting Notes

The grievant has requested the Division Director’s notes regarding a meeting with an oil company in 2006. The agency states that no such documents exist. The grievant points to an e-mail the Division Director wrote indicating that he had notes from such a meeting. However, the agency head indicated in one of the responses to the grievant’s document requests that the

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<sup>20</sup> While it appears that the final decision on which budget reduction strategies would be implemented was made by the Governor’s Office, the relevant question for this grievance appears to be at what point and on what basis the agency developed as one of its budget reduction strategies the elimination of the grievant’s position.

<sup>21</sup> The grievant’s other multiple requests for documents regarding his layoff effectively seek any document related to the agency’s identification of the grievant’s position for layoff, including the criteria used to determine who would be subject to layoff, the factors guiding the agency in selecting employees for layoff, and the process employed.

Division Director's e-mail referred to notes he kept regarding oil company issues generally, but when those notes were consulted, no entry for the pertinent 2006 meeting existed. Consequently, because there are no such documents responsive to the grievant's request, the agency has complied with the grievance procedure.

#### "Unethical" File

The grievant also requested a copy of any files or records reportedly kept by a program supervisor about the grievant's alleged "unethical" conduct. The agency states that "[n]o such records exist." The grievant has provided information indicating that this program supervisor did have such a file in his possession, or had at least allegedly stated as much to another agency employee prior to the grievant's document request.

As part of this Department's investigation of this ruling, the relevant individuals were questioned. The program supervisor and the other agency employee could not recall the full extent and context of the alleged discussion between them. However, the program supervisor made a reference about a file that a prior supervisor kept of various documents regarding the grievant. The program supervisor states that shortly after he started in his current position about two years ago, after the former supervisor left the agency, he destroyed that file to start his role as a supervisor with a "clean slate." As such, it appears that the agency's statement that the documents do not exist is accurate. Further, it does not appear that the destruction of these documents was done with the intent of avoiding any obligations under the grievance procedure. Consequently, this Department cannot find that the agency has failed to comply with the grievance procedure regarding this file of documents regarding alleged "unethical" conduct by the grievant.

#### Leave Activity Reporting Form

The grievant requested a copy of an agency employee's leave activity reporting form to determine if she was in the office on a particular date. The agency provided a computer report reflecting that the agency employee was on leave during the pertinent time. The grievant has objected because he requested the actual leave reporting form submitted by the agency employee indicating her use of leave during a particular week. Although it appears the grievant would prefer to have received a document with the agency employee's signature, the document provided by the agency effectively conveys the same information as would be conveyed on the actual leave activity reporting form. The agency employee appears to have requested and taken leave during the pertinent period, which is confirmed by the produced document. It appears the agency has effectively satisfied this document request under the grievance procedure and this Department cannot find that the agency was noncompliant in supplying the document it did.

### Tracking Receipt

The grievant states that he has requested from the agency a copy of the tracking receipt for a letter reportedly dated October 20, 2008 from the agency head to the grievant advising him of the need for additional time to respond to one of his document requests. The agency states that it has provided the grievant a scanned copy of this receipt. However, it appears that the tracking receipt actually provided may have been for other, unrelated correspondence. It also appears that the grievant received a copy of the actual letter, with some handwritten modifications, in person, on October 23, 2008.

While it appears that the agency may not have provided the tracking receipt requested, if it exists, it is also difficult to understand the relevance of such a tracking receipt to this grievance. The October 20, 2008 letter at issue concerned the extension of the time period to respond to the grievant's document request. Whether the agency's response to the document request was timely under the provisions of the *Grievance Procedure Manual* has become moot now that the agency has actually responded. Consequently, this Department sees no relevance to the tracking receipt to the grievance and, therefore, it need not be provided.<sup>22</sup> Therefore, the agency is not in noncompliance for its apparent failure to provide this receipt.

### Backdating of Documents

The grievant has additionally alleged that the agency "backdated" the Grievance Form A, indicating that the agency dated the package as received by the second step-respondent when that individual was actually not in the office. It appears that the date marked on the Grievance Form A (October 14, 2008) may have been the date the form itself was received at the agency, even though the second step-respondent did not review the document until October 16<sup>th</sup>. Even if the Grievance Form A was "backdated" in such manner, it is unclear what, if any, detrimental impact this has had on the grievance process or the parties. The second step response has been issued, rendering moot any alleged noncompliance for failure to provide a timely response. As such, there does not appear to be any noncompliance warranting remedy at this time on this issue.<sup>23</sup>

## CONCLUSION

In summary, the agency is ordered to provide the grievant with documents related to the agency's decision to identify the grievant's position for elimination, as well as his subsequent

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<sup>22</sup> To the extent the agency is under an obligation to produce the tracking receipt pursuant to FOIA, this Department has no authority to enforce the provisions of that Act, and, as such, this ruling does not address any such rights the grievant might have pursuant to FOIA as to this tracking receipt or any other document requested under FOIA.

<sup>23</sup> The grievant has also stated during this Department's investigation for this ruling that the agency backdated certain documents related to his layoff and benefits. Whether such documents have been backdated is not an issue of compliance with the grievance procedure and, as such, will not be addressed as part of this ruling. The effect of any alleged backdated documents, however, may have substantive relevance to the issues raised in the grievance.

layoff, as discussed above. Further, the agency must provide a copy of the official, signed and dated version(s) of the EWP for the Division Business Manager in effect during the relevant time periods.

In addition, this Department finds no evidence of substantial noncompliance warranting an award of any further relief at this time. The grievant's remaining requests regarding any other allegations of noncompliance not specifically addressed above are denied.<sup>24</sup>

This Department's rulings on matters of compliance are final and nonappealable.<sup>25</sup>

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Claudia T. Farr  
Director

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<sup>24</sup> It must be noted, however, that the grievant also raised during this Department's investigation an issue with the agency's response to the grievant's request for budget information with line items for certain divisions. The grievant asserts he received general budget summary information, but without line items. However, it does not appear the grievant has raised this issue as a matter of noncompliance with the agency and thus it would be premature to address that argument at this time. Consequently, if this remains an outstanding issue of alleged noncompliance after being raised with the agency by the grievant, this Department will address that concern if raised in a new ruling request.

<sup>25</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).