

Issue: Compliance – Grievance Procedure (documents); Ruling Date: March 10, 2009; Ruling #2009-2238; Agency: Virginia Department of Agriculture and Consumer Services; Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

RECONSIDERED COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Agriculture and Consumer Services
Ruling No. 2009-2238
March 10, 2009

The grievant has requested that this Department reconsider EDR Ruling No. 2009-2173 concerning the agency's alleged noncompliance with the grievance procedure in not providing requested documents. This Department concludes that there is no basis to change the determinations made in that Ruling and the original decision will stand.

FACTS

In his October 9, 2008 grievance, the grievant challenged his layoff as retaliatory and a misapplication of policy. In his ruling request that gave rise to EDR Ruling No. 2009-2173, the grievant alleged the agency had failed to provide various documents he had requested.¹ The requested documents included a file allegedly kept by a supervisor about the grievant's alleged "unethical" conduct. In EDR Ruling No. 2009-2173, this Department addressed that claim, finding as follows:

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

¹ EDR Ruling No. 2009-2173.

procedure regarding this file of documents regarding alleged “unethical” conduct by the grievant.²

The grievant disputes these determinations. In his February 25, 2009 e-mail, the grievant raises issues regarding the Virginia Public Records Act and Department of Human Resource Management (DHRM) Policy 6.10. Further, the grievant disputes this Department’s factual conclusions concerning the investigating consultant’s interview with an agency employee (Employee L) who was allegedly told by the program supervisor about the “unethical” file. Another agency employee (Employee T) was apparently listening to the investigating consultant’s interview with Employee L as the Employee L’s phone was apparently on speaker. In support of his arguments, the grievant refers to documents already provided to this Department related to this issue. The grievant requests reconsideration on these grounds.

DISCUSSION

Factual Basis of Ruling

In challenging this Department’s determinations concerning his request for files or records about his alleged “unethical” conduct, reportedly kept by a program supervisor, the grievant relies on Employee T’s statement that Employee L told him (Employee T) that the program supervisor had told Employee L that he (the program supervisor) had this “unethical file.”

During the investigation for EDR Ruling No. 2009-2173, the investigating consultant spoke with the program supervisor and Employee L. As stated in the Ruling, neither of these individuals recalled all of the exact specifics and contexts of the conversations at issue.³ However, Employee L indicated to the investigating consultant that the program supervisor had stated that he had such a file. When the program supervisor was interviewed, as indicated in EDR Ruling No. 2009-2173, he stated that he did possess such a file when he took over as a supervisor approximately two years ago, but had destroyed the file around the time he began his supervisory duties to start with a “clean slate.”

The evidence gathered potentially conflicts. On the one hand, Employee L states he was told by the program supervisor that he “has” the file, indicating present tense possession at the time. On the other hand, the program supervisor states that he “had” such a file, but destroyed it about two years ago. Because the descriptions by Employee L of what the program supervisor told him are second-hand, this Department relied on the first-hand description by the program

² *Id.*

³ For example, Employee L indicated that he did not remember how the file came up in his conversation with the program supervisor. As Employee T’s notes of the conversation he overheard with the investigating consultant indicate, Employee L also stated that he could not recall the program supervisor’s exact words in a follow-up conversation. Similarly, the program supervisor indicated that he could not recall the specifics of his conversation with Employee L.

supervisor as to whether the file currently exists. This is consistent with a hearing officer's weighing hearsay as less probative.⁴

While the grievant disputes this Department's findings as to why the file no longer exists, this Department had already reviewed all the information the grievant now references and provides again. The notes of Employee T provided by the grievant about Employee L's interview with the investigating consultant for EDR Ruling No. 2009-2173 are consistent with what this Department reviewed and considered for that ruling. Consequently, the grievant has presented no basis for this Department to alter its findings.

Alleged Violations of Law and Policy

The grievant also raises issues regarding the Virginia Public Records Act (the Act) and DHRM Policy 6.10. He asserts that the agency destroyed this "unethical" file contrary to the provisions of the Act and DHRM Policy. Destroying documents in violation of law or policy could be relevant in assessing whether an agency's noncompliance with the grievance procedure was "substantial." Specifically, if a party engages in "substantial" noncompliance without just cause, this Department has the authority to render automatically a decision against the noncompliant party on any qualifiable issue, without the need for a hearing.⁵ Generally, this Department will only issue such an extreme order when a party's noncompliance is driven by bad faith or a gross disregard of the grievance procedure.⁶

Based on this Department's investigation, the "unethical" file appears to have been destroyed about two years ago, well before the grievant initiated this grievance. Thus, we cannot conclude that the agency's failure to produce the file was, with respect to the instant grievance, a violation of the grievance procedure, much less a substantial violation motivated by bad faith or a gross disregard of the grievance procedure. Consequently, this Department cannot find that substantial noncompliance with the grievance procedure had occurred in this case warranting an automatic award on the merits.

To the extent the program supervisor's apparent destruction of the "unethical" file two years ago violated the Virginia Public Records Act or DHRM Policy, this Department has no authority to grant relief for any such claim. The grievance procedure does, however, permit a hearing officer "to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents . . . as the hearing officer or the EDR Director had ordered."⁷ This is akin to the missing evidence inference (also known as the spoliation inference) recognized by state and federal courts in Virginia.⁸ Thus, the grievant would not be

⁴ See, e.g., EDR Ruling No. 2009-2058 n.21.

⁵ See Va. Code § 2.2-3003(G).

⁶ For an example of the type of noncompliant conduct that would be required before such an order is made, see EDR Ruling No. 2007-1470.

⁷ *Rules for Conducting Grievance Hearings* V(B).

⁸ See, e.g., *Wolfe v. Virginia Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 580-81, 580 S.E.2d 467, 475 (2003) ("[W]here one party has within his control material evidence and does not offer it, there is

precluded from arguing at hearing or in court (should the grievance proceed to one of those venues), that a factual adverse inference on the merits of the grievance should be drawn against the agency based on the apparent destruction of the “unethical” file. The Virginia Public Records Act or DHRM Policy may or may not be relevant to such a claim.

CONCLUSION

The grievant has not presented sufficient grounds for this Department to alter its determinations in EDR Ruling No. 2009-2173. This Department’s rulings on matters of compliance with the grievance procedure are final and nonappealable.⁹

Claudia T. Farr
Director

[an inference] that the evidence, if it had been offered, would have been unfavorable to that party. ... A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.”) (internal quotation omitted) (alteration in original).

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