

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: March 23, 2009; Ruling #2009-2239; Agency: Virginia Department of Agriculture and Consumer Services; Outcome: 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 No. 2009-2239
March 23, 2009

The grievant has requested a ruling regarding the agency's alleged noncompliance with the provisions of EDR Ruling No. 2009-2173 regarding the production of documents.

FACTS

As part of his grievance challenging his layoff, the grievant requested various documents. The agency's alleged noncompliance related to those document requests was addressed in EDR Ruling No. 2009-2173. In that ruling, this Department ordered that the agency provide documents "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," including (with the exception of Governor's Working Papers as discussed in that ruling) "documents related to the rationale, basis, process, and determination of the elimination of his position and his layoff."¹ Because the grievant's position was eliminated as one of the agency's budget reduction strategies, relevant documents included agency budget reduction proposals.² On February 27, 2009, in response to this Department's ruling, the agency mailed the grievant budget reduction strategy documentation in the form of one letter and approximately thirty-four (front and back) pages of budget reduction proposals for the Program in which the grievant was previously employed ("Program").

The grievant argues that the agency has not provided all relevant documents. He refers to a November 13, 2008 letter from the agency, which describes the amount of documents the agency had corresponding to certain of the grievant's document requests. In this letter, the agency stated it had approximately twenty pages of records of budget reduction strategies submitted by the Program, sixty pages of records of budget reduction strategies submitted by the grievant's former Division ("Division") to the agency Budget Director, and approximately twenty-six pages of records related to budget reduction scenarios submitted by the agency to the Department of Planning and Budget (DPB). The grievant states that because there are 106 pages of records cited in this letter, the documents he received were incomplete. Based on information from the agency, when the budget reduction strategies were developed, each program within the grievant's former Division was directed to develop its proposed budget reduction strategies. The Division Business Manager then compiled the various programs' proposals into the Division's

¹ EDR Ruling No. 2009-2173.

² *See id.*

proposals to be submitted to the agency Budget Director. It appears that all these documents were developed and communicated electronically in spreadsheets.

The grievant also asserts that the copy of the EWP of the Division Business Manager provided by the agency was not the version applicable at the times involved in this matter, because the Division Business Manager did not sign the EWP until late October 2008. Based on the agency documents, it appears the budget reduction proposals, of which the grievant's layoff was one, were developed in September 2008. Therefore, it appears the pertinent facts relating to the Division Business Manager's role in the layoff of the grievant occurred on or after September 1, 2008. Though not signed until afterwards, the EWP provided is dated September 1, 2008. The agency's Salary Administration Plan indicates that the evaluation period begins on that date as well.

Finally, the grievant raises an issue with the agency's attempt to schedule a meeting with the third step-respondent on February 27, 2009, the same date it was to mail the documents. The grievant asserts that in doing so, the agency failed to comply with the grievance procedure and EDR Ruling No. 2009-2173.

DISCUSSION

Third Step Meeting

The grievant asserts that the agency was noncompliant in its attempt to hold the meeting with the third step-respondent on the same date it was planning to mail the documents provided in response to EDR Ruling No. 2009-2173. The grievant had previously requested that the grievance process be put on hold until the document production issues were resolved. Pursuant to *Grievance Procedure Manual* § 8.2, such a request stops the grievance process. Therefore, until the requested documents are produced or the document request is otherwise resolved, resolution step meetings should not take place.

It is understandable if the agency believed that by sending the documents to the grievant on February 27, 2009, the document issues would be resolved and the grievance process could proceed. In the e-mail communication at issue, though the agency encouraged the grievant to schedule the meeting for February 27th, it also allowed the grievant to take more time if he wanted to review the documents prior to the meeting. Reading the entire e-mail, it does not appear that the agency was insisting that the third step meeting occur on February 27, 2009.³ It appears the agency was attempting to move the grievance forward following resolution of

³ If the agency had insisted on holding the third step meeting on February 27th, that would not have been appropriate. It is reasonable to assume that both parties would want to review the documents before coming to the meeting, and insisting on holding the meeting on the day the documents were placed in the mail would not allow the grievant to do so. Further, the grievance process would not have resumed until the documents were actually provided. Therefore, to the extent the agency believed it was under a five workday deadline to hold the meeting, that time period would not have even started to run until after the documents were produced.

compliance issues. The grievant did indeed choose to review the documents, notified the agency of that desire, demanded that the grievance process halt because of outstanding document request issues, and no third step meeting has been scheduled.⁴ In light of the above, we conclude that the agency has not been noncompliant with the grievance procedure in this regard.

Following the resumption of the grievance process after the document production issues are resolved, voluntarily by the parties or by an EDR compliance ruling, the agency must contact the grievant to schedule the third step meeting. Both parties must make reasonable efforts to schedule the meeting once the documents are provided and compliance rulings are no longer outstanding.

Layoff Documents (Budget Reduction Strategies)

The grievant asserts that the agency has not provided all documents “related to the rationale, basis, process, and determination of the elimination of [the grievant’s] position and his layoff.”⁵ First, regarding any discrepancy involving the approximately sixty pages of strategies referenced in the agency’s letter as being submitted to the Budget Director by the grievant’s former Division, all such documents for the entire Division need not be provided unless they related to the grievant’s layoff.⁶ It appears the agency has provided the reduction strategies submitted by the Division to the agency Budget Director as they related to the grievant’s former Program only, which complies with EDR Ruling No. 2009-2173. Indeed, this Department only ordered the agency to provide the budget reduction strategies that related to the elimination of the grievant’s position and layoff, thus nonrelated Program strategy documents need not have been provided.

Second, as to the documents referenced in the agency’s letter as “approximately twenty pages” of budget reduction strategies submitted by the Program, it is not clear whether all such documents have been produced. While it appears the agency provided copies of the final proposal spreadsheets submitted by the Division to the Budget Director, it does not appear that the agency provided the strategies that the grievant’s Program submitted to the Division Business Manager. An electronic or hard copy of the proposals submitted by the Program to the Division Business Manager presumably should exist in one form or another. The agency is ordered to provide copies of these documents.⁷ Further, the agency is directed to produce copies of any e-mails that communicated these relevant budget reduction proposals to the various levels within

⁴ Further, the grievance process was effectively stopped because of the grievant’s request for reconsideration of EDR Ruling No. 2009-2173 made in the interim, *see infra*, and for purposes of this compliance ruling.

⁵ EDR Ruling No. 2009-2173.

⁶ *See* EDR Ruling No. 2009-2173. For example, budget reduction strategies related solely to other programs within the Division would not need to be provided.

⁷ If the strategies developed by the Program do not exist, the agency must provide a written explanation to the grievant. Again, this Department reiterates that the agency must provide all versions of the budget reduction strategies that relate to the grievant’s position and layoff that exist at each level of the process in the agency, except those strategies provided to the Office of the Governor. *See* EDR Ruling No. 2009-2173.

the agency to provide clarity as to the versions of the documents. If communicating e-mails and/or earlier versions of the budget reduction spreadsheets do not exist, the agency must provide an explanation to the grievant.

Finally, while this Department does not disagree that the documents the agency produced do not provide much information about the rationale, basis, process, and determination of the elimination of the grievant's position and his layoff, the agency is not obligated to create documents that do not already exist.⁸ This Department has questioned the agency about other documentation that might exist, such as e-mails between the relevant individuals, but this Department has no evidence that there are additional relevant documents. Based on the agency's statements, it appears that these budget reduction strategies were developed electronically and there are no other supporting working papers or other documents related to the rationale, basis, process, and determination of the elimination of the grievant's position and his layoff that have not been provided or identified. Therefore, other than those documents specifically identified herein, the agency need not provide additional documents. However, to the extent the grievant later produces evidence that records relevant to his layoff document requests do exist and have not been provided, for example, e-mails related to his layoff, such facts would be relevant to determining whether the agency failed to comply with the document production requirements of the grievance procedure in good faith.

Employee Work Profile

The grievant also argues that the Division Business Manager's EWP provided by the agency did not apply during at least part of the pertinent time period. The EWP is dated September 1, 2008, and, as such, appears to cover the applicable time period, even though it was not signed until well into October 2008. The facts reflect that this version of the EWP was applicable to the evaluation period beginning September 1, 2008. The agency's Salary Administration Plan indicates that the performance cycle begins on that date. It also appears that the EWP was signed and approved in accordance with the agency's practice under that plan. In sum, because it appears this version of the EWP would have applied during the pertinent period, even if it was not officially signed until later, the agency has complied with the provisions of EDR Ruling No. 2009-2173.

Timeliness of Response

The grievant also appears to dispute the timeliness of the agency's response to EDR Ruling No. 2009-2173. While EDR Ruling No. 2009-2173 did not provide a deadline by which the agency must provide the documents at issue,⁹ in the absence of a set time period within a

⁸ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁹ Though this Department's document compliance rulings may include specific deadlines for response, *e.g.*, EDR Ruling No. 2006-1312, other such compliance rulings do not always include similar deadlines. *E.g.*, EDR Ruling No. 2009-2140.

ruling, the pertinent time frames provided in the *Grievance Procedure Manual* apply. Section 6.1 of the *Grievance Procedure Manual* provides that a compliance ruling request stops the grievance process temporarily. The process resumes once EDR issues the applicable ruling.¹⁰ Therefore, once EDR Ruling No. 2009-2173 was issued, the process resumed and the agency had five workdays from receipt of the ruling to respond to the order for production of documents, just as it would have five workdays to respond to a new document request.¹¹

In this case, it appears the agency mailed the documents to the grievant six workdays following the issuance of EDR Ruling No. 2009-2173. However, on February 25, 2009, the fourth workday following the issuance of EDR Ruling No. 2009-2173, the grievant requested that EDR reconsider Ruling No. 2009-2173. When the grievant made that request, the process effectively stopped again,¹² which extended the agency's deadline under the grievance procedure for providing the documents ordered produced in EDR Ruling No. 2009-2173. Therefore, there is no basis to find that the agency's response was untimely or noncompliant. Moreover, the agency has already responded to EDR Ruling No. 2009-2173, thus the timeliness issue is moot.

CONCLUSION

The agency is ordered, as specifically discussed above, 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 layoff.

Although it appears that the agency has not completely complied with EDR Ruling No. 2009-2173, it made an attempt to do so. Indeed, it appears in some regards the agency provided more documents than required by that ruling, though also leaving others out. Based on the available evidence, this Department cannot find that the agency has willfully attempted to avoid the requirements of the grievance procedure. As such, no award on the merits is warranted. Nevertheless, the agency is cautioned to ensure it has provided all relevant, nonprivileged documents concerning the grievant's layoff.

This Department's rulings on matters of compliance are final and nonappealable.¹³

Claudia T. Farr
Director

¹⁰ *Grievance Procedure Manual* § 6.1.

¹¹ *See Grievance Procedure Manual* § 8.2.

¹² *See Grievance Procedure Manual* § 6.1.

¹³ *See Va. Code* §§ 2.2-1001(5), 2.2-3003(G).