

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: April 1, 2009;
Ruling #2009-2249; Agency: Virginia Department of Agriculture and Consumer
Services; Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

SECOND RECONSIDERED COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Agriculture and Consumer Services
Ruling No. 2009-2249
April 1, 2009

The grievant has requested that this Department reconsider, again, EDR Ruling No. 2009-2173 concerning the agency's alleged noncompliance with the grievance procedure by 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.¹

FACTS

The issue in these rulings concerns a file about the grievant previously in the possession of a program supervisor.² In EDR Ruling No. 2009-2173 and again in EDR's first Reconsidered Ruling No. 2009-2238, this Department addressed the grievant's claim regarding the file, the agency's failure to produce the file, and the allegation of inappropriate disposition of the file. As part of its investigation for this Ruling, and at the request of the grievant, Employee T was interviewed concerning his knowledge about the supervisory file. The information Employee T provided was consistent with information previously provided by the grievant and Employee L.

The grievant's knowledge about the file flows from a conversation the program supervisor had with Employee L in which the program supervisor stated that he had the file. The program supervisor also allegedly told Employee L that he was keeping the file in case he needed to use it against the grievant. Employee L informed Employee T of his conversation with the program manager. Following a request for production of the file, the program supervisor had a conversation with Employee L and Employee T in which he stated that he no longer had the file. The program supervisor told this Department that he destroyed the file shortly after taking over his current position two years ago. The program supervisor stated that he wanted to start with a "clean slate" and form his own opinion about the grievant.

¹ It should be noted that a second reconsideration of a "final and nonappealable" compliance ruling is an extremely rare occurrence. Nevertheless, given the additional factual questions raised by the grievant's e-mail request, dated March 12, 2009, this Department is proceeding with this review. However, additional information was sought from the grievant and other witnesses to ensure that all relevant evidence has been gathered and reviewed for finality of this issue. Unless compelling newly discovered evidence that would alter the result of this ruling is presented in the future, this Department will not reconsider its compliance ruling on this matter again.

² A former supervisor had apparently compiled this file. The program supervisor inherited the file because he took over the former supervisor's office and the file was left there.

As part of his second reconsideration ruling request, the grievant also provided a copy of a letter received from the agency in response to his Freedom of Information Act (FOIA) request for “a file in the hands of [the program supervisor] concerning supposed transgressions by [the grievant] and [Employee T].” The agency responded stating that “no such file exists,” and that the program supervisor “stated that he does not have a file or ever had a file with any information about unethical actions performed by [the grievant] or [Employee T].” The grievant asserts that these statements contradict the program supervisor’s statements to this Department about the file.

DISCUSSION

The material and determinative issue concerning the supervisory file is not whether it existed, but when it was destroyed. The evidence of the program supervisor’s statements to Employee L about the file indicated a present tense possession, including the apparent statement to Employee L that the program supervisor was keeping the file in case it needed to be used. Having been relayed this information, it is understandable why the grievant would take the position that the file was destroyed immediately after the request for the file because the program supervisor shortly thereafter told Employee T and Employee L that the file no longer existed. However, the program supervisor has stated to this Department that he destroyed the file over two years ago. As stated in EDR Ruling No. 2009-2238, this apparent conflict in the evidence required this Department to weigh the facts. Because the program supervisor’s statement to this Department is a first hand description of how and when the file was destroyed, it was given more weight than the evidence provided by Employee T, Employee L, and the grievant as to the program supervisor’s statements to Employee L about the file.³ In this Department’s review of the evidence, it appears more likely than not that the file was destroyed more than two years ago, well before this grievance was initiated. The evidence gathered from Employee T for this ruling was consistent with evidence already reviewed by this Department and, therefore, does nothing to change the determinations made in previous rulings.⁴

The grievant also argues that the agency’s FOIA response is inconsistent with the statements of the program supervisor. First, the December 2008 FOIA response that no such file exists appears accurate under any review of the facts. Even under the grievant’s argument, the supervisory file had been destroyed at that point. Further, the statement that the program supervisor “does not have ... or ever had a file *with any information about unethical actions performed by [the grievant]*” does not contradict the statements by the program supervisor to this Department. The program supervisor did not state to this Department that he had a file about “unethical” actions by the grievant. The only file that existed was a supervisory file.

³ It appears the only direct statements to Employee T by the program supervisor concerning the file occurred after the FOIA request was made and involved the program supervisor’s statements that the file did not exist anymore.

⁴ This Department is also not persuaded by the grievant’s assertion that because the program supervisor was not the grievant’s supervisor, the program supervisor’s statement that he wanted to start with a “clean slate” was not credible. Indeed, the fact that there was no supervisory relationship may have additionally explained why the program supervisor did not need the file. Further, even in the absence of a supervisory relationship, it is understandable why a newly promoted supervisor might wish to develop his own opinion about other employees rather than relying on issues gathered by and involving someone else.

Consequently, the program supervisor's apparent statement that he has never had a file about the grievant's alleged "unethical" actions is consistent with evidence gathered by this Department. The program supervisor had a file previously kept on the grievant at one time, not a file on "unethical" actions.⁵ Based on a discussion with the agency for this ruling, this distinction was the position of the agency in the FOIA response. The FOIA response does not appear to present a conflict with the program supervisor's statements.

CONCLUSION

The grievant has not presented sufficient grounds for this Department to alter its determinations in EDR Ruling No. 2009-2173 and EDR Ruling No. 2009-2238. For the reasons stated in prior rulings, this Department 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. Automatic award of relief on the merits is not warranted at this time.

This Department's rulings on matters of compliance with the grievance procedure are final and nonappealable.⁶

Claudia T. Farr
Director

⁵ It should also be noted that a member of the agency's human resources department has indicated to this Department that she has never heard anyone indicate that the grievant was "unethical."

⁶ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).