

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: April 1, 2009;
Ruling #2009-2258; Agency: Virginia Department of Agriculture and Consumer
Services; Outcome: Agency 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. 2009-2258
April 1, 2009

By e-mail on March 16, 2009, the grievant has requested a ruling regarding the agency's alleged noncompliance with the grievance procedure in not providing requested documents.

FACTS

On October 14, 2008, the grievant requested various documents, including a "final budget with line items for FY 08 for [the Program] and the [Division]." On October 28, 2008, the agency provided a response to this request. It is not clear what documents were produced at that time. The grievant provided a notice of noncompliance to the agency, dated February 22, 2009, stating that the agency had failed to provide the final budget documents he sought. The agency responded to that notice on March 11, 2009, by providing a copy of the agency's final budget from the General Assembly, including the line items for the agency's various categories of expenditures. Because the grievant claims that the agency has failed to provide all the documents he is seeking, he now asks this Department to rule on the agency's alleged noncompliance.¹

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² 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.³ 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

¹ In his March 16, 2009 e-mail, the grievant asserts issues regarding the agency's alleged failure to produce other documents as well. However, those document requests and the agency's responses thereto are part of another EDR compliance ruling request. See EDR Ruling No. 2009-2239. As such, they will not be addressed as part of this ruling.

² *Grievance Procedure Manual* § 6.3.

³ *Id.*

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 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.⁴

The grievant alleges that the agency has failed to comply with the grievance procedure by not providing the final budget documents. However, the language of the grievant's request for "final budget with line items for FY 08 for [the Program] and the [Division]" can be subject to different interpretations. For instance, the documents the agency provided on March 11th would appear to be responsive to the general language of the request, in that the documents provide the final budget for fiscal year 2008 for the entire agency, with line items as enacted by the General Assembly. From the grievant's perspective, however, the agency has not provided the agency's final budget documents for the Program and the Division, including the line items within the Program and the Division.⁵ Read in this manner, the agency has not provided the documents the grievant is seeking.

Because of the ambiguity of the document request, this Department cannot find that the agency has failed to comply with the grievance procedure. It appears the agency made a good faith effort to respond to the grievant's document request. Though the agency did not provide the grievant the specific documents he is seeking, it provided documents that would appear to be responsive to the language of the request. Because there is no noncompliance in this instance, there is no basis for this Department to provide a final ruling on the merits as requested by the grievant. If a party engages in substantial noncompliance without just cause, this Department may issue a ruling against the noncompliant party on the merits of the grievance if a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure.⁶ The facts of this case do not support such a finding.

In the interests of expediency in addressing this document dispute, EDR will provide further guidance. It would appear the grievant is seeking internal agency documents/spreadsheets about the fiscal year 2008 budget for the Program and the Division. At this early stage, it cannot be said that such documents are not relevant to the grievance. Indeed, the documents would appear to be relevant and, as such, subject to disclosure. Therefore, **within five workdays of receipt this ruling**, the agency is ordered to provide such internal agency

⁴ 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.

⁵ Although the General Assembly budget includes line items, the line items do not appear to describe budget appropriations within the Program and Division specifically.

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.

documents/spreadsheets about the budget for the Program and the Division for fiscal year 2008. If there are just cause reasons for nondisclosure, the agency can alternatively assert such arguments at that time. Further, to the extent the grievant believes this ruling does not adequately describe the documents he was seeking through his request for the “final budget with line items for FY 08 for [the Program] and the [Division],” he should provide further clarification to the agency. Clarification of the document request for the agency might be helpful in this matter in general.

Further, this Department must also strongly encourage the parties to communicate with each other when there are discovery disputes. It appears that some of the disputes at issue in this case could be clarified through direct communication between the parties to address any differences in understanding what is being sought.

CONCLUSION

Within five workdays of receipt of this ruling, the agency is ordered to provide the grievant with documents described above or just cause reasons for why they should not be produced. This Department’s rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁷ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).