

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: April 29, 2009;  
Ruling #2009-2269; Agency: 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 No. 2009-2269  
April 29, 2009

The grievant has raised concerns and made certain requests to this Department in e-mails, dated March 28, April 6, and April 10, 2009, regarding the agency's alleged noncompliance with the grievance procedure in not providing requested documents.

FACTS

In his requests, the grievant argues that the agency continues to fail to produce requested documents. In EDR Ruling No. 2009-2239, this Department ordered the agency to produce the budget reduction proposals as developed at the program level and the communicating e-mails associated with these documents. The agency responded to the grievant by indicating that such documents had not been kept due to the agency's practice of only retaining the final version of documents that are viewed by the agency as Governor's Working Papers. Upon investigation by this Department, the agency stated that the requested electronic files had been deleted. It appears that the Division Business Manager, the Program Manager, and a Program supervisor deleted these e-mails in or around September 2008 through routine purging to preserve electronic storage space. The grievant argues that deleting these documents was against the law.

The grievant has also requested that this Department conduct an investigation of the agency, including interviews, to search for unreleased, relevant grievance documents. The grievant has additionally expressed concerns about the agency determining what documents are relevant in this case.

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 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 party fails to correct the alleged noncompliance, the complaining party may request a

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<sup>1</sup> See *Grievance Procedure Manual* § 6.

<sup>2</sup> *Grievance Procedure Manual* § 6.3.

ruling from this Department.<sup>3</sup> The *Grievance Procedure Manual* also requires that the party must provide the opposing side a copy of such a ruling request.<sup>4</sup>

The grievant's initial e-mail containing the ruling request received by this Department did not reflect that it had been copied to the agency. Both parties are advised that in any future ruling requests, the opposing party must be copied on any such requests. However, for purposes of expediency, EDR will address the grievant's ruling request.

### *Budget Reduction Strategy Documents*

Although we understand the grievant's frustration, whether the agency was required to keep the program-level budget reduction documents by law or policy is not relevant at this stage. This ruling must only determine whether the agency has been noncompliant with the grievance procedure. It appears that these documents were deleted prior to the initiation of this grievance.<sup>5</sup> As such, the agency's failure to produce them is not a failure to comply with the grievance procedure because they did not exist when the request was made. Further, this Department cannot find that the agency's deletion of these materials was an attempt to avoid the requirements of the grievance procedure. The agency appeared to be operating under a standard practice of not keeping prior versions of documents that were treated as Governor's Working Papers and, therefore, deleted them to preserve electronic storage space. As such, this Department cannot conclude that the agency's failure to produce these documents was 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 ruling does not address whether the agency was required to keep the program-level budget reduction proposals under law or policy. As stated in a prior ruling in this matter, the grievance procedure permits 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."<sup>6</sup> This is akin to the missing evidence inference (also known as the spoliation inference) recognized by state and federal courts in Virginia.<sup>7</sup> Thus, the grievant would not be precluded from arguing at hearing or in court (should the grievance

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The grievant has again cited to the agency's November 13, 2008 letter, in which it referred to "approximately twenty pages" of budget reduction strategies submitted by the program. Although this Department was not clear that such documents had been produced in EDR Ruling No. 2009-2239, it has been clarified by the agency that the "approximately twenty pages" of documents referenced in the November 13, 2008 letter were the documents that were provided to the grievant already under the agency's letter dated February 27, 2009. Therefore, the reference to the documents in the November 13, 2008 letter does not indicate that the program-level budget reduction proposal documents existed after September 2008. Further, the second step response, also cited by the grievant on this point, only describes the process of developing the budget reduction strategies, and does not indicate that the documents currently existed.

<sup>6</sup> *Rules for Conducting Grievance Hearings* V(B).

<sup>7</sup> *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 [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).

proceed to one of those venues), that an adverse inference on the factual merits of the grievance should be drawn against the agency based on the destruction of the program-level budget reduction proposals and associated e-mails. The Virginia Public Records Act and/or DHRM Policy may or may not be relevant to such a claim.

### *Relevancy Determinations*

The grievant has expressed a concern that the agency should not be permitted to make determinations of what documents are relevant because it has been noncompliant with the grievance process in this case. When a document request is made, the agency is initially responsible for determining what documents in its possession are within the scope of the document request. These initial determinations are unavoidable. Moreover, to the extent an agency were to refuse to provide documents due to issues of relevancy, this Department will determine whether the documents are potentially relevant and, if so, order the agency to produce the documents. Indeed, this Department has made such determinations of relevancy when necessary in this case as well.<sup>8</sup> There is no basis to change the limited discovery framework afforded by the grievance statutes solely for this case.

### *Investigation Request*

Due to the agency's alleged failure to provide relevant documents, the grievant has also requested that this Department conduct an investigation of the agency by interviewing officials and reviewing records in the agency's possession. EDR does not have the authority to conduct an investigation with such a scope. Although this Department will request information from the agency for purposes of a ruling, such requests are generally limited and targeted to the issues raised by the ruling request. This Department does not have the ability to undertake such a broad investigation into the agency's records based on the grievant's request. The grievant's request for such an investigation is denied.

## CONCLUSION

For the above reasons, we cannot conclude that the agency failed to comply with the grievance procedure by not producing the program-level budget reduction documents that appear to no longer exist and to have been destroyed before the grievance was filed. Therefore, an 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.<sup>9</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> *E.g.*, EDR Ruling No. 2009-2258; EDR Ruling No. 2009-2173.

<sup>9</sup> *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).