

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: May 15, 2009; Ruling #2009-2272, 2009-2289; Agency: Department of Corrections; Outcome: Agency in Compliance/Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Numbers 2009-2272, 2009-2289
May 15, 2009

The grievant has requested rulings regarding the agency's alleged noncompliance with the grievance procedure. This ruling finds that the agency has complied in some aspects with the document discovery provisions of the grievance procedure, and has not complied with respect to others.

FACTS

In her January 2, 2009 grievance, the grievant challenges her Group III Written Notice with termination, which she received on or around December 5, 2008. The grievant allegedly violated safety rules by allowing two offenders to move out of the District in which she worked ("District") and by failing to notify the districts to which the offenders moved in a timely manner.

After filing this grievance, the grievant requested various documents from the agency. The agency has provided some materials, but has refused to provide any documents in response to most of the grievant's requests. The agency claims that some of the documents sought are not relevant or are otherwise protected from disclosure by policy. The grievant now requests a compliance ruling in this matter, alleging that the agency has failed to comply with the grievance procedure.

In addition, on January 2, 2009, the grievant requested that the agency place a litigation hold on all relevant documents because the matter "may result in litigation." The litigation hold was sought so that the agency would alter normal document destruction protocols to preserve all documents relevant to the grievant's claims. On April 23, 2009, the grievant sent a letter to this Department claiming that the agency had failed to respond to this request and had not produced documents the grievant requested concerning the agency's implementation of the litigation hold. The grievant seeks a compliance ruling on these issues as well.

DISCUSSION

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be

made available upon request from a party to the grievance, by the opposing party.”¹ This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided. “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”² For purposes of document production, examples of “just cause” include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.³ The statute further states that “[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.”⁴

This Department has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner.

Personnel Information

The agency has asserted as to certain of the grievant’s document requests that the particular documents sought contain personnel information, which, it argues, is protected from disclosure under DHRM Policy 6.05. This claim was the only basis for not producing documents in response to the grievant’s Request Numbers 6, 7, and 18. This Department has repeatedly held that the restrictions on personnel document disclosure in DHRM Policy 6.05 are overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.⁵ Indeed, EDR has specifically instructed this particular agency no fewer than three times in prior rulings on this issue.⁶

The agency is cautioned that claiming this policy to resist producing documents in future cases may result in a finding of substantial noncompliance.⁷ The agency has been

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

² *Grievance Procedure Manual* § 9.

³ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁵ E.g., EDR Ruling No. 2009-2087; EDR Ruling No. 2007-1437; EDR Ruling No. 2006-1199; EDR Ruling No. 2004-853.

⁶ EDR Ruling No. 2009-2087; EDR Ruling No. 2007-1402; EDR Ruling No. 2004-853; see also EDR Ruling No. 2006-1386 (holding similar objection under FOIA inapplicable).

⁷ Although the grievant has requested an automatic ruling on the merits due to the agency’s alleged substantial noncompliance, this case does not rise to that level. If a party engages in substantial noncompliance without just cause, this Department has the authority to render a decision against the noncompliant party on any qualifiable issue. See Va. Code § 2.2-3003(G). However, this Department will generally only make such an extreme order on the merits of a grievance when a party’s noncompliance appears driven by bad faith or a gross disregard of the grievance procedure.

instructed that DHRM Policy 6.05 is not a proper basis for withholding relevant grievance documents on multiple occasions. The agency should be aware that its argument is meritless. Indeed, the grievance statute specifically contemplates the production of documents related to non-parties.⁸ As such, the agency is ordered to produce the documents in response to Request Number 18. However, because the relevance of Request Numbers 6 and 7 must be addressed, these requests are discussed further below.⁹

Relevance and Just Cause

The agency has asserted that many of the grievant's document requests seek documents that are not related to the actions grieved or are otherwise protected by an agency policy. An assessment of the agency's relevance¹⁰ and policy arguments as to each document request is made individually below.

Request 1: *Monthly workload distribution list for each Parole Officer in [the District] for 2005, 2006 and 2007.*

The grievant has requested these documents to demonstrate the extent of the grievant's workload, especially compared to other employees. The agency argues that such documents are not relevant to the grievance. However, this evidence could be relevant on mitigation to show that the grievant had a substantial workload that could have impacted the completion of her job duties. Therefore, at this early stage, this Department cannot find that the requested materials are not related to the grievance, as asserted by the agency.

However, the scope of this request appears to be too broad. The request should be limited to 2007 only. The grievant appears to have been charged with alleged misconduct that occurred in the latter half of 2007. Consequently, the level of the grievant's and her co-workers' workloads would not appear to be relevant into 2005 or 2006. The documents from these prior years appear to be too far removed from the time

⁸ Va. Code § 2.2-3003(E) ("Documents pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance."); *Grievance Procedure Manual* § 8.2 (same).

⁹ Whether requested documents are relevant to the grievance is inherent in this Department's consideration of a compliance ruling concerning documents. EDR must address relevance before it can be determined whether the agency has been noncompliant in refusing to produce the requested documents. Relevance questions exist as to Request Numbers 6 and 7 and are addressed below. However, the documents sought in Request Number 18 are clearly relevant and do not require further discussion.

¹⁰ Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citations omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citations omitted)).

of the grievant's alleged misconduct to provide probative evidence. The agency is only required to produce the requested distribution lists for 2007.

Request 2: *Record of volunteers/interns who worked in [the District] in 2005, 2006 and 2007.*

Request 3: *Record of background investigations conducted on volunteers and interns who worked in [the District] in 2005, 2006 and 2007.*

Request 4: *Record of hostage forms completed on volunteers and interns who worked in [the District] in 2005, 2006 and 2007.*

The grievant seeks these documents to demonstrate alleged failures on the part of District employees in conducting background investigations on and completing hostage forms for volunteers and interns, employees who were allegedly not disciplined. The agency argues that such documents are not relevant to the grievance. At this early stage, this Department cannot determine that such matters are wholly irrelevant to this grievance. How or whether the agency disciplined these alleged violations of policy could be potentially relevant to the issue of consistency of discipline. However, some limitations must be made.

The grievant is seeking these documents to show that for some volunteers or interns, there is no record of a background investigation being done or a hostage form being completed by a District employee. Therefore, the documents themselves are not necessarily what is relevant, but rather the absence of certain information within the documents (background investigation or hostage forms) is the relevant issue to which the requested sets of documents relate. Therefore, in producing this information, the agency need only provide documents sufficient to show records of volunteers and interns and whether a background check and hostage form was completed by the responsible District employee as to each. The full files on such volunteers and interns need not be provided; only sufficient documentation to show the relevant information.¹¹

Request 5: *PB 15 log of [the District] for 2005, 2006 and 2007.*

The grievant has requested the PB 15 log to demonstrate that some District employees have not been disciplined for failing to notify the court of taking offenders into custody in a timely manner. As this early stage, this Department cannot determine that such matters are wholly irrelevant to this grievance. How or whether the agency disciplined these alleged violations of policy could be potentially relevant to the issue of consistency of discipline. Therefore, the agency is ordered to produce the requested PB 15 log for the listed periods of time.

¹¹ As already discussed above, the agency's claim that DHRM Policy 6.05 protects certain documents sought in Request Numbers 3 and 4 is without merit.

Request 6: *All Written Notices issued on [District] employees during 2005, 2006 and 2007.*

The reason the grievant is seeking all Written Notices of all District employees is to show the absence of disciplinary actions against other employees for policy violations. While these documents can be relevant to show inconsistencies in discipline, the scope of this request is too broad. There are many types of misconduct that could occur in the workplace that would not be relevant to this grievance. For instance, documents reflecting the agency's disciplinary practices of employee attendance would have no bearing on this matter as they are not sufficiently related to the grievant's alleged misconduct, violations of safety rules. The grievant is not entitled to audit the entirety of the District's disciplinary practices. However, the grievant should be permitted to obtain documents relevant to the issue of whether she was treated the same as other similarly situated District employees. Therefore, this request must be limited to Written Notices issued to other employees for violations of safety rules and other policy violations similar to the charges against the grievant (e.g., missing deadlines, failing to satisfy policy requirements, failure to complete assigned tasks, etc.). The agency is ordered to produce such responsive documents.

Request 7: *All performance evaluations issued for all employees in [the District], other than the Grievant, during 2005, 2006 and 2007.*

The grievant is similarly seeking these documents to show that the agency did not provide negative commentary on the performance evaluations of certain employees who may have allegedly violated policy and to show positive feedback for other employees, which the grievant allegedly did not receive for the same or greater work. While the requested documents might show what the grievant alleges, it is not clear how this evidence is relevant here. The grievant's performance evaluation is not at issue. Discrepancies that might appear between other employees' performance evaluations do not appear to be relevant at this time. Therefore, the agency need not provide the requested performance evaluations.

Request 8: *All documents relating to Probation & Parole absconders during 2005, 2006 and 2007 who were under the supervision of [the District] Parole Officers.*

The grievant states that she is seeking these documents to demonstrate that other employees were not disciplined for having offenders abscond from their supervision. However, it is not clear that such an occurrence is itself a violation of policy warranting discipline against a District employee. These documents do not appear to be relevant to the issue of consistency of discipline.

The grievant also states that she will use these documents to demonstrate the quality of her work performance in comparison to her co-workers. She alleges that she has not had an offender abscond, which she argues is indicative of the attention she pays

to building a trustful relationship with offenders. It is presumed the grievant will argue that the fact her co-workers may have had offenders abscond demonstrates the better quality of her work performance. While it cannot be said that the grievant's allegedly good work performance is not relevant to a mitigation argument, it is not clear that the allegedly comparably less satisfactory work performance of her co-workers, even if it could be demonstrated by the absconder documents, would be relevant at all. The grievant might be able to argue that her work performance should mitigate the disciplinary actions at issue in this case. However, whether her co-workers may have performed more or less admirably is not relevant. As such, the agency need not produce any of the documents sought in Request Number 8.

Request 9: *Audit of [the District] conducted during or about April 2007.*

The grievant has asserted various policy violations by the agency, some of which, it is presumed, could be listed in the audit. An audit of the District's activities, especially with regard to any such policy violations, would be relevant to the grievance. Simply because the audit was performed for a period prior to the grievant's disciplinary action is not persuasive. If the agency has failed to discipline policy violations in the past, such facts are relevant to the grievant's concerns of consistency of discipline. The agency is ordered to produce a copy of the audit report.

Request 10: *Log of presentence reports prepared by each [District] Parole Officer during 2005, 2006 and 2007; or, if a log does not exist, then a copy of all presentence reports prepared by each [District] Parole Officer during 2005, 2006 and 2007.*

The grievant has requested the presentence reports to demonstrate that some District employees have not been disciplined for failing to file such reports timely. At this early stage, this Department cannot determine that such matters are wholly irrelevant to this grievance. How or whether the agency disciplined these alleged violations of policy could be potentially relevant to the issue of consistency of discipline.¹² Although the agency has stipulated that the grievant was never late with presentence reports, the documents are still relevant to show whether and/or how other District employees were disciplined. Therefore, the agency is ordered to produce the relevant information about the requested presentence reports.

Request 11: *Log of transfer investigations which were completed by each [District] Parole Officer during 2005, 2006 and 2007; or, if a log does not exist, then a copy of all transfer investigations completed by each [District] Parole Officer during 2005, 2006 and 2007.*

¹² Although similar to Request Numbers 2 – 4 above, only records sufficient to show whether and how timely such reports were filed would be relevant. The entire report is not relevant; only the timeliness of or failure to submit the report.

The agency has stated that no such log exists and that it would be unduly burdensome to access the many files to create such a log. The agency is correct that it is not required to create a document that does not exist.¹³ As such, the log that does not exist need not be created. However, the grievant has requested that, if there is no such log, copies of all the transfer investigations completed during 2005 – 2007 be produced instead. At this early stage, this Department cannot determine that the timeliness of District employees performing transfer investigations is wholly irrelevant to this grievance. How or whether the agency disciplined an employee's failure to perform such an investigation in a timely manner could be potentially relevant to the issue of consistency of discipline.¹⁴ However, it is not clear that the agency has responded to this portion of the document request. Therefore, the agency is ordered to respond to the portion of Request Number 11 that seeks a copy of all transfer investigations.

Request 12: *All case log notes prepared by the Grievant ... during 2005, 2006 and 2007.*

The agency has responded to this request by stating that these documents are part of the case files of offenders and protected from disclosure by agency policy. Generally speaking, an agency's policy will not override the statutory document disclosure requirements of the grievance statutes.¹⁵ However, when the reasons for nondisclosure underlying the agency policy are of substantial concern, there may be just cause for withholding the documents.

In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well established and applicable legal privilege,¹⁶ this Department will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party's particular interests in obtaining the document, as well as the general presumption under the grievance statutes in favor of disclosure. Relevant documents must be provided unless the opposing party can demonstrate compelling reasons for nondisclosure that outweigh the general presumption of disclosure and any competing interests in favor of disclosure.

In this case, documents maintained by the agency about offenders, including information that might be contained within the grievant's case notes, could be understandably sensitive as they relate to individuals' criminal history. The nature of these documents presents a potentially compelling interest for nondisclosure. More

¹³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹⁴ Although similar to Request Numbers 2 – 4 above, only records sufficient to show whether and when such transfer investigations were performed would be relevant. The entire transfer investigation is not relevant; only the timeliness of or failure to perform the investigation.

¹⁵ See, e.g., EDR Ruling No. 2006-1199 (holding same with regard to DHRM policies).

¹⁶ Certain well established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. See, e.g., EDR Ruling No. 2002-215 (discussing attorney-client privilege).

importantly, the grievant's need for these documents appears to be minimal by comparison.

The grievant primarily seeks these documents to show the extent of her workload. While it cannot be said that such an argument is entirely irrelevant, the grievant's own testimony will likely be important evidence about her workload. Moreover, other documents requested provide further documentary evidence on this point. These case notes do not appear to be so important to the grievant's case to warrant the broad disclosure of information about various offenders, most of which would not be particularly probative.

In sum, the grievant's need for these case notes is not significant. Therefore, the compelling interest in protecting from unnecessary disclosure information about offenders presents just cause for not providing the documents. The agency need not produce the grievant's case notes in response to Request Number 12.

Request 13: *Monthly VACCIS list for all [District] Parole Officers during 2005, 2006 and 2007.*

The grievant has requested these lists to demonstrate the extent of the grievant's workload, especially compared to other employees. Such evidence could be relevant on mitigation to show that the grievant had a substantial workload that could have impacted the completion of her job duties. Therefore, at this early stage, this Department cannot find that the requested materials are not related to the grievance. However, the scope of this request appears to be too broad. The request should be limited to 2007 only. The grievant appears to have been charged with alleged misconduct that occurred in the latter half of 2007. Consequently, the level of the grievant's and her co-workers' workloads would not appear to be relevant into 2005 or 2006. The documents from these prior years appear to be too far removed from the time of the grievant's alleged misconduct to provide probative evidence. The agency is only required to produce the requested lists for 2007.

Request 14: *All Parole Officer case log notes regarding [Offender Name Deleted].*

Request 15: *All Parole Officer case log notes regarding [Offender Name Deleted].*

The grievant has requested these notes to show that serious violations of policy occurred and the relevant employee was not disciplined. The agency argues that such documents are not relevant to the grievance. However, the allegations of inconsistent discipline would be relevant to this case. Therefore, the agency is ordered to produce these case log notes.

Request 16: *All documents relating to [Offender Name Deleted].*

Request 17: *All documents relating to [Offender Name Deleted].*

The grievant has requested these documents because they concern the offenders listed on the Written Notice received by the grievant. Because the grievant has been charged with misconduct in handling these offenders, these documents would appear to be directly relevant to this grievance. Although the policy cited by the agency in refusing to provide these documents will not override the statutory document disclosure requirements of the grievance procedure, similar to the analysis discussed under Request Number 12, the policy rationale in withholding potentially sensitive documents about offenders must be weighed against the general presumption of disclosure and the grievant's interests in disclosure.

As already discussed, documents maintained by the agency about offenders could be understandably sensitive as they relate to individuals' criminal history. The nature of these documents presents a potentially compelling interest for nondisclosure. However, the grievant's need for these documents is much more compelling than under Request Number 12. These documents directly relate to the grievant's alleged misconduct. Therefore, given that personal information in these documents can be redacted,¹⁷ the interests weigh in favor of disclosure. The agency is ordered to produce the requested documents.

Litigation Hold

The grievant has also raised various arguments regarding her January 2, 2009 request that the agency place a litigation hold on the destruction of documents because the dispute between the grievant and the agency "may result in litigation." First, the grievant asserts that the agency has been noncompliant with the grievance procedure because the agency has not responded to this request. Although failure to retain and produce, when requested, relevant documents during a grievance could raise issues of noncompliance, there is no provision in the grievance procedure that allows for a party to request a litigation hold. Indeed, by its terms, the litigation hold is not a part of the grievance, but related to potential court litigation. Therefore, any alleged failure by the agency to respond formally to the grievant's request for a litigation hold is not a compliance matter under the grievance procedure.

The grievant also alleges that the agency has failed to produce documents she has requested in relation to any litigation hold implemented by the agency. While such documents might be relevant to court-based litigation, they are not relevant to the grievance. The litigation hold is not a grievance matter and such documents need not be produced. Therefore, the agency has not failed to comply with the grievance procedure by not producing documents or responding to the grievant's request for the litigation hold records.

¹⁷ See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2; see also *infra*.

The grievant also infers that because the agency has failed to respond to these requests, the agency has destroyed relevant documents and a spoliation inference must be made. While an agency's destruction of relevant documents could give rise to a spoliation inference at a grievance hearing,¹⁸ there is no basis to do so here. The grievant's assumption that the agency has destroyed documents is unsupported. As such, the grievant's requests for relief in the April 23, 2009 letter on issues related to the litigation hold are denied.

CONCLUSION

For the reasons set forth, the agency is ordered to produce the requested documents as identified above. In addition, a substantial portion of the documents requested by the grievant in this case relate to non-parties. When providing copies of such documents, however, any non-relevant personal information may be redacted, which could include, for example, names, social security numbers, telephone numbers, or home addresses.¹⁹ Further, the parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents.²⁰ The parties are also reminded of the provision of the *Grievance Procedure Manual* stating that in producing the documents, the "party requesting the documents may be charged the actual cost to retrieve and duplicate the documents."²¹

Finally, this Department cannot find that substantial noncompliance with the grievance procedure has occurred warranting an award on the merits. The grievant's request for such an award is denied.

This Department's rulings on matters of compliance are final and nonappealable.²²

Claudia T. Farr
Director

¹⁸ *Cf. Rules for Conducting Grievance Hearings* V(B) (permitting 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.").

¹⁹ *See* Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

²⁰ *E.g.*, EDR Ruling No. 2006-1312.

²¹ *Grievance Procedure Manual* § 8.2.

²² *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).