

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: September 21, 2009; Ruling #2009-2320, 2009-2332; Agency: George Mason University; Outcome: Agency In Compliance (in part), Agency Not In Compliance (in part).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of George Mason University
Ruling Number 2009-2320, 2009-2332
September 21, 2009

In EDR Ruling Number 2008-1870, this Department ordered George Mason University (the University) to produce threat assessment documents requested by the grievant without redactions. That order was modified in EDR Ruling Number 2008-2030, in response to the University's request for reconsideration, to require again that the University produce the requested documents, but allowing for the redaction of names and other personal information such as a social security number or home address. The grievant has since requested rulings on the University's noncompliance with EDR Ruling 2008-2030, the University's alleged failure to produce other requested documents, and the proper designation of the second step-respondent. The University in turn seeks reconsideration of EDR Ruling Number 2008-2030. These matters are addressed in this combined compliance ruling.

FACTS

The factual background provided in EDR Ruling Nos. 2008-1870 and 2008-2030 is incorporated by reference.

In seeking a second reconsideration, the University asked this Department to receive evidence from various current and former employees who were interviewed as part of the threat assessment ("Affected Employees") or otherwise knowledgeable about the facts. A limited number of "Affected Employees" were interviewed by this Department, as well as members of the University's human resources staff, in order that they could express their concerns about the disclosure of the redacted threat assessment documents and the safety-related basis for their concerns. No facts about these interviews are included in this ruling because they were not material to the determinations made herein.

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.² “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”³ 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.⁴ The grievance statutes further state 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.”⁵

In determining whether “just cause” exists under the grievance procedure for nondisclosure of a generally relevant document, and in the absence of a well established and applicable legal privilege,⁶ 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.

I. University’s Request for Reconsideration

After carefully reconsidering this matter and the University’s arguments asserted in its second reconsideration request, we now alter our prior holding in this case and conclude that just cause exists for the nondisclosure, in their entirety, of certain of the threat assessment documents. In EDR Ruling Numbers 2008-1870 and 2008-2030, this Department determined that the requested documents “related to” the actions grieved, in other words, were generally relevant to the grievance. While that determination has not changed, a closer look at the relative *materiality*⁷ of certain of these documents to the specific complaints in the grievance compels a re-balancing of the interests discussed in EDR Ruling No. 2008-2030, in an effort to determine whether “just cause” exists for their nondisclosure.

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

² *E.g.*, EDR Ruling No. 2007-1420; EDR Ruling No. 2001-047. 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. *E.g.*, EDR Ruling No. 2007-1468; EDR Ruling No. 2001-047. 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. Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

³ *Grievance Procedure Manual* § 9.

⁴ *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁶ 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).

⁷ “‘Materiality’ of evidence refers to pertinency of the offered evidence to the issue in dispute.” *Black’s Law Dictionary* 976 (6th ed. 1990).

Safety Concerns

As discussed in EDR Ruling No. 2008-2030, the primary argument the University raises is a concern regarding the safety of its employees. However, even taking into account the additional information provided by the University and the Affected Employees interviewed for this Ruling, there is insufficient evidence to enable this Department to conclude that the grievant's behavior ever compromised, or ever would compromise, his own safety, or the safety of others inside or outside the workplace. There is no basis for altering EDR Ruling No. 2008-2030 on safety grounds.⁸

Preservation of Non-Party Privacy

Through its submissions in this case, the University has indicated that the threat assessment documents consist of a computer generated report ("report") as well as notes of interviews with Affected Employees ("interview notes/statements").⁹ The University asserts that even in a redacted format, the grievant would likely be able to deduce the identity of the Affected Employees by reading the redacted interview notes/statements. Based on the University's recent written offer to provide the grievant with a copy of the final threat assessment report, the report itself apparently does not contain such identifying information. Accordingly, the final report must be provided, because it is "related to" the grievance and apparently does not contain identifying information. The interview notes/statements of the Affected Employees, however, require further analysis in light of University's interests in preserving non-party privacy.

As indicated above, the grievance statutes recognize the general interest in preserving the privacy of nonparties.¹⁰ Significantly in this case, the nature of the issues addressed in the threat assessment – specific claims of perceived threats and/or potential workplace violence -- lend considerable weight to the University's interest in protecting a complainant's identity.¹¹ Given the great weight of this interest here, and the likelihood that the specific content of the interview notes/statements (dates, times, locations, actions, etc.) could lead to the identification of the

⁸ In response to the University's proposal to provide additional information from witnesses to support its assertions about safety concerns, the grievant provided a list of witnesses to counter the University's witnesses. Because the grievant's witnesses were to be presented on the safety issue and this Department is not disturbing its prior safety determination, there was no reason to contact the grievant's witnesses.

⁹ In its June 12, 2008 Request for Reconsideration, the University further stated that the "Report is a document generated with the assistance of the threat assessment computer program that summarizes the concerns expressed about the grievant. The Report itself does not contain the names of those who complained about the grievant's behavior. However, the Notes include the names of the complainants, and even if those names were to be redacted, the Notes include sufficient factual information that a reasonable person could still identify each complaining employee."

¹⁰ Va. Code § 2.2-3003(E).

¹¹ The fact that these interview notes/statements of the Affected Employees contain reports of alleged threatening behavior and/or similar matters is what differentiates this case from simple complaints involving employee performance, such as the documents that were the subject of EDR Ruling No. 2008-1884.

Affected Employees, this Department will require the disclosure of these documents only if the grievant's interests in obtaining them for his grievance are greater than the University's interests in protecting the privacy of the Affected Employees. Based on this Department's reconsideration of the grievance record and information gathered from the grievant, we conclude that he does not have such an interest. The interview notes/statements -- while "related to" and generally relevant to the grievance -- are ultimately immaterial to the determination of the merits of the grievant's specific complaints against the University.

The grievance record indicates that the primary reason the grievant is seeking the interview notes/statements is to challenge the threat assessment itself and show upper University management that the grounds for conducting the threat assessment (the complaints against him) were spurious.¹² The grievance record also reflects the grievant's apparent theory that he did not obtain a desired position with the University because certain University employees pushed for the threat assessment in an effort to prevent him from being considered for the position.¹³ We can certainly understand the grievant's stated intent to show that statements made about him were unfounded and that an improper motive existed for making at least some of the complaints. However, upon further review, it does not appear that this is a particularly compelling reason for obtaining these specific documents: notwithstanding the complaints, the University's threat assessment report ultimately determined that the grievant was not an imminent threat.¹⁴ Nor would the interview notes/statements of the Affected Employees be of any consequence to the consideration of the grievant's candidacy for the desired position: he was found by the University not to be a threat well before the selection decision for the position was made. Indeed, the critical propositions to his theory are that a threat assessment was initiated and that an improper motivation prompted it, not the actual content of the Affected Employees' interview statements. The interview statements would do nothing to advance or resolve the specific issues grieved. Accordingly, this Department concludes that under the grievance procedure, the University's interest in preserving the privacy of the Affected Employees outweighs the grievant's interest in obtaining the interview notes/statements.¹⁵ The University may withhold the interview notes/statements in their entirety from the grievant.

This has been a difficult issue to determine, as reflected by the amount of time and deliberation used in analyzing the facts and related law, weighing the competing interests, and reaching these conclusions. This Department has had to strike a multifaceted balance between the public policy concerns for nonparty privacy, workplace safety and a grievant's need for documents under the grievance procedure's broad statutory mandate. Further, many of the issues raised in these rulings have been questions of first impression given the distinct factual framework of this case. This second reconsideration allowed this Department to revisit and

¹² EDR Ruling No. 2008-1870.

¹³ See EDR Ruling No. 2008-1870.

¹⁴ See *id.*

¹⁵ This Department notes the University's recent assertion that the grievant's purpose for obtaining these documents is simply to confront the Affected Employees. While we do not make such a finding, we note that such a purpose would not be supported by the grievance procedure, which is meant to be used to resolve disputes between state employees with access and their state employers (as opposed to conflict or disputes between state employees with access and their co-workers). See Va. Code § 2.2-3000(A).

reassess the weighing analysis in light of the materiality of the requested documents to the specific complaints raised in the grievance.

In the end, the grievant will receive a copy of the final threat assessment report.¹⁶ Moreover, the University has offered to allow the grievant to converse with the officers who prepared that report. It would appear the grievant could use the information gained from these sources to engage suitably in discussions with management about the threat assessment. However, it is this Department's final determination that while the interview notes/statements relate generally to the issues presented by the grievance, they bear little or no materiality to the specific management actions alleged in this grievance, and need not be disclosed by the University.¹⁷

II. Grievant's Other Compliance Ruling Requests

Other Documents

In EDR Ruling No. 2008-1870, the University was ordered to provide the grievant with a copy of any existing policy/procedure that states the subject of a threat assessment will not be interviewed. Such a document, if it exists, would appear to be "related to" the grievance and thus subject to production absent just cause. According to the grievant, the University has not provided such a policy or otherwise responded to this order. If there is an existing University policy/procedure that states that the subject of the threat assessment will not be interviewed, the University is ordered to provide the grievant with a copy of any such policy/procedure within 10 workdays of its receipt of this ruling unless just cause exists for not disclosing any such policy/procedure.

The grievant has further asserted that he has requested all documents relevant to the issues in his grievance.¹⁸ While it is unclear whether the University has responded in full to this request, it is such a broad request that a response is not required until further clarification is made by the grievant. This grievance identifies certain specific issues, but also includes a lengthy timeline of events. To deduce what documents might be relevant to all the issues that are potentially raised by the entirety of the grievance attachments is much too onerous without clarification by the grievant. As such, if the grievant wishes to pursue his document request for all relevant documents, he must clarify the request with the University before further response is necessary.

¹⁶ To the extent the final report may contain information that would personally identify an Affected Employee (similar to the information contained and being withheld in the interview notes/statements), such information could be redacted. However, any such redaction should be drawn narrowly so as to allow disclosure of information related to the grievance without subjecting any of the Affected Employees to identification.

¹⁷ The compliance issue raised by the grievant concerning the University's failure to disclose the threat assessment documents as ordered in EDR Ruling No. 2008-2030 is now moot given the reconsidered determinations provided above in this Ruling. It should be noted, however, that this Ruling only determines whether under the grievance statutes these documents must be produced. This ruling does not address whether there is some other legal right or process available to the grievant that would enable him to obtain the documents.

¹⁸ The grievant states he is seeking "all documents pertaining to my grievance, i.e. all relevant emails, reports, and other documents about the circumstances and issues relevant to my grievance."

Step-Respondents

In EDR Ruling No. 2008-1870, this Department found that the University's designation of the Associate/Assistant VP as the second step-respondent (from the non-academic side) in the grievant's case was appropriate. Further, the designated second step-respondent from the academic division was to be the individual selected by the Associate/Assistant VP to accompany him/her to the meeting. The grievant indicates that the Associate/Assistant VP has retired and the second step-respondent from the academic division is no longer with the University. To the extent the grievant is arguing that further questions arise about who the appropriate second step-respondent would be, it is this Department's view that whoever has taken on the role of the Associate/Assistant VP will serve as the designated second step-respondent. If that individual is not available, whoever has taken over the role of the second step-respondent from the academic division could serve instead. The parties could also agree on a substitute second step-respondent.

CONCLUSION

After careful reconsideration, this Department modifies its earlier determinations in EDR Ruling Numbers 2008-1780 and 2008-2030 to protect from disclosure, in their entirety, the interview notes/statements of the Affected Employees. The University is ordered to produce, consistent with this Ruling, the final threat assessment report it offered to provide and the provisions of the policy, if it exists, indicating that the subject of a threat assessment is not interviewed, within **ten workdays of its receipt of this ruling**. This Department's rulings on matters of compliance are final and nonappealable.¹⁹

Claudia T. Farr
Director

¹⁹ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).