

Issue: Compliance – Grievance Procedure (Documents); Ruling Date:
September 10, 2009; Ruling #2009-2348, 2009-2357; Agency: Department of
Criminal Justice Services; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Criminal Justice Services
Ruling Numbers 2009-2348 and 2009-2357¹
September 10, 2009

The grievant has requested a ruling on whether her August 7, 2008 grievance with the Department of Criminal Justice Services (DCJS or Agency) qualifies for a hearing. In addition, the grievant claims that the agency has failed to comply with the grievance process by refusing to provide her with documents relative to her August 7th grievance. Because there is an issue of compliance with the document procedures of the grievance process, this ruling will address only the compliance issues and a forthcoming ruling will address the qualification issue.²

FACTS

The grievant is employed as a Policy and Planning Specialist II with DCJS. On or about June 17, 2008, the grievant applied for a General Administration Manager III position within the agency ("Position #00308"). On July 10, 2008, the grievant learned that she had not been selected for an interview for Position #00308. The grievant subsequently challenged her failure to be selected for an interview by initiating a grievance on August 7, 2008. In her grievance, the grievant asserts that the agency's failure to interview her for Position #00308 was a misapplication of policy and discriminatory. In addition, the grievant alleges that she has been harassed by a member of senior management based on her race, sex and age.

As part of the grievance process, on June 12, 2009, the grievant requested certain documents pertaining to other applicants. When the agency failed to respond to the grievant's request, she sent a notice of noncompliance to the agency head on June 19,

¹ This Department originally issued Ruling Numbers 2009-2348 and 2009-2357 on August 27, 2009. The agency has since requested that this Department revise our earlier decision in order to protect the identity of nonparties and due to the sensitive nature of the documents to be produced, incorporate language restricting the use of the documents for purposes of the grievance procedure only. In recognition of the agency's legitimate requests, and in order to protect the identity of individuals not personally involved in this grievance, this Department has slightly modified the original version of this ruling to achieve these valid concerns.

² See, e.g., EDR Ruling No. 2008-1988 and 2008-1989; EDR Ruling No. 2007-1472; EDR Ruling No. 2007-1515.

2009. The agency provided the grievant with some, but not all, documents responsive to her request on June 26, 2009. The grievant, dissatisfied with the agency's response, now seeks a compliance ruling from this Department with regard to those documents not provided and requested on June 12, 2009.

Also in July 2008, the grievant and other employees were involved in the inadvertent release of confidential personnel information in responding to a Freedom of Information Act (FOIA) request. In mid-July 2008, the grievant and an agency manager were verbally counseled for their involvement in this incident. The grievant was further formally counseled via a counseling memorandum dated October 7, 2008 for her actions in the release of confidential personnel information. On May 27, 2009, the grievant requested copies of any counseling memoranda or written notices issued to the manager and any other employees involved in the July 2008 FOIA infraction. The grievant asserts that counseling memorandum she received in October 2008 is further evidence of harassment and intimidation. The agency denied the grievant's document request on June 4, 2009 and as a result, the grievant now seeks a compliance ruling from this Department.

DISCUSSION

Documents

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ 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.⁴ 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 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.⁵

³ *Grievance Procedure Manual* § 6.3.

⁴ *Id.*

⁵ 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. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

The grievance statute provides 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.”⁶ 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.

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. Where a party fails to comply with the grievance procedure, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its non-compliance. However, rendering such a decision is reserved for the most egregious of circumstances.

Furthermore, the grievance statute 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.”⁷ While a party is not required to create a document if the document does not exist,⁸ 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.

In this case, the grievant asserts that the agency has failed to provide her with (1) applications, resumes and cover letters of other applicants for Position # 00308; and (2) documentary evidence of any disciplinary action taken against other employees involved in the wrongful dissemination of personnel information in July 2008 and for which the grievant received a counseling memorandum.

Documents pertaining to other applicants

On June 12, 2009, the grievant requested the following documents:

[a] copy of the screening sheet and application package (including state application, resume, cover letter and any additional information submitted) for [Applicant A, Applicant B, Applicant C] and the woman who was interview [sic] by telephone and the woman who withdrew. Please make

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁷ *Id.*

⁸ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

certain to provide name and the race of each candidate on their information, as this grievance is about racial discrimination.

In response, the agency provided the grievant with copies of screening sheets for each of the candidates selected for an interview for Position # 00308. In addition, the agency told the grievant that three of the candidates interviewed were White, one was Black and one failed to disclose her race. The candidates' names were redacted from the screening sheets and the race of each candidate was not noted on the individual screening sheets. The agency has denied the grievant's request for applications, resumes and cover letters of those selected for an interview and claims that these documents are exempt from disclosure under the FOIA.⁹ The agency did not dispute the relevance of the requested information; rather, it objected to disclosure solely on the basis that providing the information would be a violation of the FOIA.

As we have stated in prior rulings and have noted in the *Frequently Asked Questions* section of our website, because of a July 1, 2000 statutory change, document requests are no longer associated with the FOIA and that Act alone cannot be used as the reason for refusing to produce documents.¹⁰ Likewise, this Department has held that the Department of Human Resource Management (DHRM) Policy 6.05 personnel document disclosure provision is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.¹¹

Thus, notwithstanding the FOIA personnel documents exemption, the agency must provide all requested relevant grievance documents to the employee, upon request, unless the agency can show just cause for not disclosing them. The agency has not offered any just cause for not producing the documents, only the FOIA objection, which, we note, does not prohibit the agency from disclosing personnel information, but simply grants the custodian of personnel records the discretion to disclose or withhold such documents in response to a request under the Act.¹² Thus, because documents containing the information requested by the grievant would appear to be relevant to a grievance

⁹ More specifically, that agency asserts that such documents are personnel records containing information of identifiable individuals and thus, exempt from disclosure under Va. Code § 2.2-3705.1(1).

¹⁰ See EDR Ruling Nos. 2004-629 and 2004-634; see also <http://www.edr.virginia.gov/faqs.htm>.

¹¹ See EDR Ruling Nos. 2006-1199, and 2004-853; Cf. EDR Ruling No. 2004-683 (an agency may not deny a grievant access to otherwise relevant documents relating to a selection process on the ground that such disclosure is prohibited by DHRM Policy No. 2.10, Hiring).

¹² See, Virginia Freedom of Information Advisory Council Opinion AO-28-01, dated May 31, 2001 which explains that:

[T]he section setting forth exemptions to FOIA including the personnel records exemption, states that [t]he following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where disclosure is prohibited by law. The Code does not prohibit the dissemination of personnel records to third parties. As such, the custodian of the personnel records may decide to release some or all of the information that it may otherwise properly withhold. (Emphasis in original.)

asserting discrimination based on race,¹³ and because the agency has provided no just cause for withholding such documents, we find that the agency failed to comply with the grievance procedure by withholding the requested documents.

The agency is therefore ordered to produce the requested information to the grievant within **10 workdays** of its receipt of this ruling. The agency shall redact any personally identifying information (such as names, social security numbers, telephone numbers, and addresses), provided that information relevant to the grievance is not redacted. The agency must identify the race of the applicant with each document produced.¹⁴ Due to the sensitive nature of these documents, the grievant must make every reasonable effort to preserve the confidentiality of these documents. Moreover, because this ruling only resolves the issue of document production under the grievance procedure rules, the grievant is permitted to use the documents solely for purposes of her August 7, 2008 grievance.¹⁵ The agency may charge the grievant its actual cost to retrieve and reproduce documents.

Disciplinary action taken against others

The grievant also seeks copies of any counseling memoranda or written notices issued to a male agency manager and any other staff members for their involvement in the July 2008 FOIA violation for which the grievant received a counseling memorandum in October 2008. In response to the grievant's request, the agency "neither confirm[ed] nor deni[ed]" the existence of such documents, and stated that even if such documents existed, they too would be exempt from disclosure under the FOIA because they are personnel records of identifiable individuals. Again, the agency did not dispute the relevance of the requested information; rather, it objected to disclosure solely on the basis that providing the information would be a violation of the FOIA. As outlined above, the exemptions provisions of the FOIA alone do not constitute just cause for failure to provide relevant documents.

In this case, the grievant asserts that she has been harassed on the basis of race, sex and age. Counseling memoranda and/or written notices issued to others involved in

¹³ Evidence is considered relevant when it would tend to prove or disprove a fact in issue. *See Owens-Corning Fiberglass 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, 464 (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)).

¹⁴ As noted above, the grievant asserts workplace harassment based on race, sex and age. However, because the grievant has already been told that all 5 applicants selected for an interview were female and because the grievant was not 40 years of age or older at the time of the events at issue in this grievance, when responding to the grievant's document request, the agency need not identify the sex and age of the individual applicants. *See* 29 U.S.C. 621 et seq. (ADEA). The ADEA's protections extend only to those who are at least forty years old.

¹⁵ Nothing in this ruling is intended to preclude the grievant from requesting, obtaining, and using these and/or other similar documents pursuant to some other provision of law.

the July 2008 FOIA infraction, and in particular, the male manager, could demonstrate that the grievant was treated differently and thus, such documents are potentially relevant to her August 7, 2008 grievance.¹⁶ The agency is therefore ordered to produce the requested information to the grievant within **10 workdays** of its receipt of this ruling. The agency shall redact any personally identifying information (such as names, social security numbers, telephone numbers, and addresses), provided that information relevant to the grievance is not redacted. The agency must identify the race and sex of the individual with each document produced.¹⁷ Again, due to the sensitive nature of these documents, the grievant must make every reasonable effort to preserve the confidentiality of these documents and is only permitted to use the documents for purposes of her August 7, 2008 grievance.¹⁸ The agency may charge the grievant its actual cost to retrieve and reproduce documents.

Qualification

This Department will stay its ruling on the grievant's qualification request until resolution of the compliance matter. However, within 10 workdays of receipt of the documents at issue, the grievant must either renew her request for qualification of her August 7, 2008 grievance to this Department or conclude her grievance and return it to the human resources office.

This Department's rulings on matters of compliance are final and nonappealable.¹⁹

Claudia Farr
Director

¹⁶ It should be noted that the grievant also asserts that the counseling memorandum she received in October 2008 was issued in retaliation for her filing her August 7, 2008 grievance and as such, any disciplinary action taken against others involved in the July 2008 FOIA infraction could be relevant to her claim that the counseling memorandum was retaliatory. However, while the grievant has included many facts surrounding the July 2008 FOIA infraction in her August 7, 2008 grievance, it does not appear that the grievant has filed a grievance challenging the October 2008 counseling memorandum. Accordingly, while the October 2008 counseling memorandum and discipline taken against others may be relevant to her claim of workplace harassment, she cannot be granted relief regarding that October 2008 counseling memorandum because she did not challenge it through the grievance process and it cannot be added to her August 7, 2008 grievance as a basis for relief. *Grievance Procedure Manual* § 2.4. See also EDR Ruling #2009-2227 ("While documents generated after the grievance initiation date could certainly be irrelevant, such documents could also be relevant if they would tend to prove or disprove a fact in issue. Accordingly, the relevancy of any such documents must be determined on a case-by-case basis.")

¹⁷ As noted above, the age of these individuals is irrelevant as the grievant, a person under the age of 40, is not in the class of individuals protected by the age discrimination laws and thus, could not prevail on a claim of harassment and/or discrimination based on age.

¹⁸ As noted above, nothing in this ruling is intended to preclude the grievant from requesting, obtaining, and using these and/or other similar documents pursuant to some other provision of law.

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