

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: August 21, 2009; Ruling #2010-2372; Agency: Department of Correctional Education; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Correctional Education
Ruling Number 2010-2372
August 21, 2009

The grievant has requested a ruling regarding the agency's alleged noncompliance with the grievance procedure in not providing requested documents.

FACTS

The grievant initiated her May 14, 2009 grievance to challenge the four Group II Written Notices she received on or around April 15, 2009. The Written Notices charged the grievant with having engaged in certain discriminatory, retaliatory, and harassing acts toward a subordinate employee. The disciplinary actions were based entirely upon findings by a hearing officer in a grievance filed by the subordinate employee.

In conjunction with her May 14, 2009 grievance, the grievant requested various documents from the agency, some related to the subordinate employee's grievance and hearing. The grievant initially claimed that the agency failed to produce five sets of documents. The agency has recently located certain of these documents and provided them to the grievant. The remaining documents that have not been produced are 1) a work order concerning a computer, 2) certain staff meeting minutes, and 3) the recording of the hearing in the subordinate employee's grievance ("hearing recording"). The agency states that the work order does not exist and that it has provided all meeting minutes in its possession. The agency has refused to provide the hearing recording due to issues of confidentiality. The grievant now seeks a compliance ruling.

DISCUSSION

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."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

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

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 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.”⁵

Work Order

The agency states that the work order requested by the grievant does not exist. It appears that the agency has conducted a reasonable search to attempt to locate this purported record. The grievant has provided no other persuasive evidence that this work order currently exists. Consequently, this Department cannot find that the agency has failed to comply with the grievance procedure in not providing a document that apparently does not exist.

Meeting Minutes

The agency states that it has provided the grievant copies of all records of the meeting minutes in its possession. The grievant, however, claims that the agency has not provided all of the requested minutes. The grievant states that the chairs and/or vice-chairs of the committee in question have large binders of meeting minutes in their classrooms. It appears the agency has contacted these individuals (Mr. B and Mrs. H), but has “yet to hear back from them.”

This Department does not know whether the alleged binders of minutes exist as described by the grievant, but the agency’s excuse that it has “yet to hear back” from the alleged custodians of the binders is confusing. Even though the agency has “yet to hear back” from these individuals, the agency could follow up with their supervisor(s), direct another agency employee to conduct a search of their classrooms, or take many other reasonable approaches to discover the binders. It does not appear that the agency has upheld its duty under the grievance procedure to conduct a reasonable search to determine whether the requested documentation is available.⁶ Consequently, the agency is ordered to locate these binders of meeting minutes, if they exist, and provide the

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

grievant with the minutes for the requested date range **within five workdays of receipt of this ruling.**

Hearing Recording

There can be no question that the evidence presented at the subordinate employee's grievance hearing is highly relevant to the grievant's May 14, 2009 grievance. The agency is also correct in that documentation concerning the grievances of another employee should generally be kept confidential. Indeed, the need to preserve the confidentiality of sensitive personnel information constitutes just cause to protect a grievance hearing recording from disclosure in most cases. However, this case presents a unique situation that requires disclosure for the parties to fully and fairly address the charges and supporting evidence, as discussed below.

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,⁷ 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.

The confidentiality of a hearing recording in another employee's grievance must be recognized and respected in all but the most compelling circumstances, such as when disclosure is ordered in a court or administrative proceeding. Here, the disciplinary actions issued to the grievant were entirely based on the findings of the hearing officer in the subordinate employee's grievance. As such, the evidence presented at that hearing, upon which the hearing officer based his determinations, is information that is highly relevant to the grievant's challenge to the four Written Notices. Because the hearing officer's findings, and by definition the supporting evidence thereto, are so central to this case, this Department concludes that the grievant's interests in obtaining the hearing recording outweigh the interests of confidentiality. Indeed, the grievant has already been given some documents from this hearing and was present for a portion of the hearing during her testimony, thus part of any veil of confidentiality has been lifted already. The agency must provide the grievant with a copy of the hearing recording.

CONCLUSION

In summary, the agency must locate the binders identified by the grievant as containing the requested meeting minutes, if they exist, and produce the documents **within five workdays of receipt of this ruling.** The agency is also ordered to provide

⁷ 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).

the grievant with a copy of the hearing recording **within five workdays of receipt of this ruling**. The grievant is only permitted to use the recording for purposes of her grievance. Due to the sensitive nature of this recording, the grievant must make every reasonable effort to preserve the confidentiality of the recording. Further, the grievant is directed to return all copies of the recording to the agency after her May 14, 2009 grievance is concluded. This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁸ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).