

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: August 21, 2009; Ruling #2010-2381; Agency: Department of Minority Business Enterprise; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Minority Business Enterprise
Ruling Number 2010-2381
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

In his July 1, 2009 grievance, the grievant raises issues concerning harassment and discrimination based on race. The grievant provided an attachment of specific examples of statements or practices by the Senior Manager the grievant believes indicate harassing or discriminatory conduct. Pursuant to his grievance, the grievant requested "all emails or related documents to my grievance" from a specific set of agency employees. The agency denied the grievant's request for documents because "[s]ome of the issues in [the] grievance are so broadly stated that is [sic] would be difficult, if not impossible, to determine what information is related to your grievance." The grievant has appealed that denial and now requests a compliance ruling from this Department.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ 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.² 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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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.³

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.”⁴ 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.⁵ “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”⁶ 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.⁷ 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.”⁸

While the grievant’s document request does appear to be rather broad, it cannot be fairly said that the agency could not respond at all to what appears to be a general request for e-mails from a specific set of agency employees related to the issues raised in his grievance (at least with regard to some of the grievant’s allegations). The grievant has cited to specific examples he alleges indicate harassing and/or discriminatory conduct. For instance, the grievant lists at least three allegations that directly concern e-mails sent by or involving the Senior Manager. The grievant has raised issues concerning his title change (and related e-mails), the Senior Manager’s 30 minute e-mail response time requirements and replies by the Senior Manager to those employees who do not meet such response times, and e-mail statements by the Senior Manager about the agency’s treatment of outside agencies and colleges. These allegations do not appear to be so broadly stated such that the agency could not respond to the document request.⁹ As such, it was premature for the agency to deny the grievant’s request without either conducting a reasonable search for at least some documents and/or communicating with the grievant for

³ 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.

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

⁵ *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.

⁶ *Grievance Procedure Manual* § 9.

⁷ *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

⁹ For instance, with regard to the final of the three identified examples, the agency could search for and produce the alleged e-mail statements by the Senior Manager concerning the agency’s treatment of outside agencies and colleges as described in the grievant’s allegation.

further clarification. The agency has failed to satisfy its duty to conduct a reasonable search to determine whether the requested documentation is available.

Therefore, the agency is ordered to conduct a search of its records to determine what documents are available to respond to the document request concerning at least the allegations identified above. The agency must also revisit the grievant's document request generally to determine what, if any, documents may be responsive. To the extent the agency is unable to determine what else the grievant is seeking, the agency should ask the grievant to clarify what he is seeking. There may not be e-mails related to all the grievant's allegations, but it does not appear that the allegations themselves are too broad for the agency to comprehend. However, to assure a common understanding, the grievant must provide additional detail to the agency to clarify the documents he wants the agency to produce.

As an additional point, both the grievant and the agency have characterized the grievant's document request as a request under the Freedom of Information Act (FOIA). Pursuant to the *Grievance Procedure Manual*, all documents requests related to a grievance "shall also be treated by the agency as a request for documents under the grievance procedure."¹⁰ To prevent any future compliance issues, the parties are also instructed that, consistent with EDR's prior rulings and as noted in the *Frequently Asked Questions* section of our website, because of a July 1, 2000 statutory change, document requests under the grievance statutes are no longer associated with FOIA, and FOIA alone cannot be used as the reason for refusing to produce documents.¹¹

CONCLUSION

Within five work days of the date of this ruling, the agency is ordered to revisit the grievant's document request and respond appropriately consistent with the *Grievance Procedure Manual* as described above. Further, the grievant is ordered to provide the agency additional detail to clarify the documents he is seeking. This Department's rulings on matters of compliance are final and nonappealable.¹²

Claudia T. Farr
Director

¹⁰ *Grievance Procedure Manual* § 8.2.

¹¹ See e.g., EDR Ruling No. 2006-1312; see also <http://www.edr.virginia.gov/faqs.htm>.

¹² See Va. Code §§ 2.2-1001(5), 2.2-3003(G).