

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: August 31, 2009; Ruling #2010-2385; Agency: Department of Alcoholic Beverage Control; 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 Department of Alcoholic Beverage Control
Ruling Number 2010-2385
August 31, 2009

The grievant has requested a compliance ruling regarding her May 21, 2009 grievance with the Department of Alcoholic Beverage Control (the agency). The grievant claims that the agency has failed to address the issues raised by her grievance and has not provided requested documents.

FACTS

In her May 21, 2009 grievance, the grievant raises two general claims: misapplication of policy and discrimination on the basis of age. The grievance challenges various agency actions, including her transfer to a new work location, denial of transfer to a particular store, and a selection process. On June 19, 2009, the second step-respondent provided a response that addressed the grievant's general claims. The third step response was simply: "I find that policy was correctly applied. I cannot grant the requested relief." Following her receipt of the third step response, the grievant forwarded the grievance package to the agency head for a qualification determination, but also noted the alleged noncompliance by all step-respondents in not responding to the issues raised in her grievance.

The grievant also alleges that the agency has been noncompliant with regard to requests for documents she has made. During and after the second step meeting, the grievant requested "complete interview notes" for the selection in which she competed. The grievant has also requested 1) information about stores acquiring new positions and 2) "a list of all classified store management positions filled ... and where the successful candidate came from." The grievant first notified the agency on July 13, 2009 that she had not received the documents. The agency responded with a document production on July 31, 2009. The agency has provided the grievant with the interview notes concerning her interview, but not the interview notes for any other candidates because the candidates have not consented to the disclosure. The agency provided substantial information concerning 1) stores acquiring new positions by sales criteria and 2) a listing of various store management positions filled. The grievant asserts that she has not received information regarding positions filled through "non-competitive" means, i.e., internal transfers, allegedly similar to her denied transfer request. The grievant now seeks a compliance ruling regarding these issues.

DISCUSSION

Adequacy of Management Step Responses

Under the grievance procedure, step-respondents must provide a written response within five workdays of receipt of the employee's grievance absent an agreement between the parties to extend the deadline. The written response must address the issues and relief requested and should notify the employee of his or her procedural options.¹ While the step-respondent is not required to respond to each and every point or factual assertion raised by the employee, the respondent must address each issue raised and the requested relief.

The grievant asserts that all the step-respondents have failed to respond to the issues raised in her grievance. However, the grievant first raised this alleged noncompliance after the third step. Consequently, the grievant has waived any alleged noncompliance at the first and second steps by proceeding beyond those steps.² However, the grievant timely raised her noncompliance allegations regarding the third step. As such, this ruling will only address the adequacy of the third step response.

The Grievance Form A clearly asserts claims regarding misapplication of policy and discrimination based on age. However, the third step-respondent only directly addressed the misapplication of policy claim. Therefore, because the grievant has properly asserted a discrimination claim to which the step-respondent provided no response, the agency has failed to comply with the grievance procedure.³ The grievance must be returned to the third step-respondent so that he can properly address the discrimination issue. While a step-respondent need not respond to every point or factual assertion by the grievant, it does appear that the grievant has asserted a claim that was not addressed.⁴

Documents

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

¹ *E.g.*, *Grievance Procedure Manual* § 3.3.

² *Grievance Procedure Manual* § 6.3.

³ *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936; EDR Ruling No. 2008-1786; EDR Ruling No. 2004-851.

⁴ While the grievance procedure requires a step-respondent to “address the issues and relief requested,” a step-respondent is not prohibited from doing so by incorporating a previous response that expressly addressed all issues. The key is that both the review of the issues grieved and subsequent response be sufficient. EDR Ruling No. 2009-2347. However, the third step-respondent did not incorporate the more complete second step response in any way. It is quite possible that the third step-respondent reviewed all the issues, including the manner in which they were addressed at the second step. However, the brevity of the third step response prevents this Department from being able to determine that the third step-respondent has addressed the issue of discrimination.

made available, upon request from a party to the grievance, by the opposing party.”⁵ 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.⁶ “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”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

Interview Notes

While the agency has provided the grievant with documents pertaining to her interview, the agency has not produced the interview notes for the other candidates interviewed. The agency states it has not given the grievant access to the records because the other candidates have not consented to the disclosure. However, 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.⁹ Further, consistent with EDR’s prior rulings and as noted in the *Frequently Asked Questions* section of our website, due to a July 1, 2000 statutory change, document requests under the grievance statutes are no longer associated with the Freedom of Information Act (FOIA), and FOIA exemptions alone cannot be used as the reason for refusing to produce documents.¹⁰ Therefore, the lack of consent of the other candidates is an insufficient basis on which to withhold the documents, to the extent the agency is relying solely on DHRM Policy or FOIA. However, while FOIA exclusions and/or policy protections do not automatically justify the withholding of requested documents under the grievance procedure, this Department recognizes the importance of the public policy rationales underlying such provisions (protecting the privacy of personal information of others from unnecessary disclosure), rationales which can constitute “just cause” for refusing to produce documents in a grievance in an appropriate case.¹¹

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

⁶ *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.

⁷ *Grievance Procedure Manual* § 9.

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

⁹ *E.g.*, EDR Ruling No. 2009-2087; EDR Ruling No. 2007-1437; EDR Ruling No. 2006-1199; EDR Ruling No. 2004-853.

¹⁰ *See e.g.*, EDR Ruling No. 2006-1312; *see also* <http://www.edr.virginia.gov/faqs.htm>.

¹¹ *See* Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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,¹² 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, while the concerns of confidentiality of the other candidates' personal information is understandable, the grievant's interest in obtaining the interview notes is particularly high because of the relevance of the documents to her claims of misapplication of policy and discrimination concerning the selection process. Such documents would clearly be central pieces of evidence in this grievance. Further, it would appear that the confidentiality interests can still be maintained by redacting non-relevant personal information from the interview notes (such as the candidate's name, social security number, telephone number, and address). Because the balance of interests weighs in favor of disclosure, the agency is ordered to produce the interview notes for the other candidates. In so doing, the agency should be mindful of the instructions in the *Grievance Procedure Manual* and grievance statutes that "[d]ocuments pertaining to nonparties ... shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance."¹³

Information about Filling of Positions

The agency has provided the grievant with extensive information about the filling of various store management positions. However, the grievant seeks information about positions that were filled through "non-competitive" transfers. While this information could be encompassed by the grievant's request for "a list of all classified store management positions filled... and where the successful candidate came from," it was not so clearly requested such that this Department can find the agency noncompliant for failing to provide the information. Indeed, the inclusion of the terminology "successful candidate," could indicate competitive processes. Nevertheless, information about such "non-competitive" transfers could be relevant to this case. Thus, assuming the grievant still seeks these documents, she must clarify her document request for the agency, so the agency may make a proper response.

CONCLUSION

Based on the foregoing, the agency is ordered to produce the interview notes requested by the grievant consistent with this ruling. The grievant must further clarify

¹² 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).

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

her document request for information about positions filled by “non-competitive” transfers. The agency must respond to this clarified request consistent with the provisions of the *Grievance Procedure Manual*. Further, within five workdays of the resolution of all the document issues, the third step-respondent must respond to all the issues raised by the grievance not previously addressed, i.e., the grievant’s discrimination claim. This Department’s rulings on matters of compliance are final and nonappealable.¹⁴

Claudia T. Farr
Director

¹⁴ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).