

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 30, 2009; Ruling #2010-2398; Agency: Department of Social Services; Outcome: Agency in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2010-2398
September 30, 2009

The grievant has requested a ruling regarding the alleged noncompliance of the Department of Social Services (the agency) in not providing requested documents.

FACTS

The grievant initiated his July 10, 2009 grievance to challenge, among other issues, threatening behavior and intimidation by his supervisor. In conjunction with that grievance, the grievant requested "all documents pertaining to me and my memorandum dated May 7, 2009." The grievant sought "all emails, documents and relevant documentation" between particular individuals. The agency has provided the grievant with certain documents in response to the request. However, the grievant asserts that the agency has not provided all the documents he requested. He cites to various e-mails indicating that meetings had taken place or that subjects had been discussed, including the subject of his May 7, 2009 memorandum, and seeks notes and/or communications about those events. The grievant also has indicated that his supervisor drafted a response to his May 7, 2009 memorandum, which had not been originally produced, but was later provided to the grievant during the investigation for this ruling. In addition, the grievant seeks an alleged August 17, 2009 letter sent by an agency employee to a former agency employee that discussed the grievant.

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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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.³

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

The grievant asserts that there are additional e-mails and meetings notes that have not been provided. The grievant's assertions, however, appear to be more in the way of suggestions about what documents might or should exist. The agency has stated that it conducted an exhaustive search of multiple computers and files for responsive documents. Further, it appears the agency has provided additional documents to the grievant following the additional searches. There is no evidence that the agency is withholding any responsive documents. There is also no evidence that any other responsive documents existed at one time and have been destroyed. In light of this lack of evidence, this Department cannot conclude that the agency has failed to comply with the grievance procedure. The grievant's request for relief is denied.

In addition, with regard to the alleged August 17, 2009 letter, there is insufficient evidence for this Department to find that the agency has or had a copy of this purported document.⁸ Although this Department has been provided a copy of the alleged August 17, 2009 letter and reviewed the original letter, it is not clear that the document was created and/or held in agency files. Indeed, both the appearance of the letter and the date it was purportedly created

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 *Grievance Procedure Manual* § 9.

⁶ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁷ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁸ While the grievant has a purported copy of this letter, it was not received from the agency as a result of the document production provisions of the grievance procedure. The agency states the letter was not found during its searches of various employees' computers.

could suggest it was created by the alleged author at home, while on leave. There is insufficient evidence to suggest that the alleged August 17, 2009 letter was created and/or held within the custody or control of the agency that might subject it to disclosure under the grievance procedure.

It is *not* this Department's determination that this document does not exist, or, in the alternative, that the document was manufactured in some way.⁹ This ruling only finds that there is insufficient evidence to conclude that the agency has or had this document within its possession, custody, or control.¹⁰ As such, there is no basis for this Department to find that the agency has failed to comply with the grievance procedure.

This Department's rulings on matters of compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

⁹ Having reviewed the original version of the document, it appears that the document could be authentic given its appearance, though there are also questions raised by the layout of the document.

¹⁰ Further, this ruling in no way limits the grievant's ability to offer a copy of the letter as evidence at hearing. Indeed, if the document is authentic, it would be particularly relevant to the grievant's case and a cause for extreme concern.

¹¹ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).