

Issues: Compliance – Grievance Procedure (Documents and Resolution Steps);  
Ruling Date: November 20, 2009; Ruling #2010-2440, 2010-2447, 2010-2452;  
Agency: Department of Corrections; 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 Corrections  
Ruling Numbers 2010-2440, 2010-2447, 2010-2452  
November 20, 2009

The grievant has requested compliance rulings regarding his four grievances with the Department of Corrections (the agency). The grievant claims that the agency has failed to address the issues raised by his grievances and has not provided requested documents.

FACTS

The grievant's four grievances concern the agency's initial charges and eventual disciplinary actions issued to the grievant, with termination, for allegedly being a gang member (Group III) and failing to provide a written report (Group II). The grievant has raised numerous issues in his grievances, including discrimination based on race, stereotyping based on his appearance, and harassment. The grievant has also included various questions in his grievances that he claims the agency has not answered at the first steps of the grievances.<sup>1</sup>

Except for the response to the fourth grievance, the agency's first step responses have been brief. For instance, the first step response in the first grievance, dated September 1, 2009, responded only to the grievant's allegation that he had been involuntarily separated. The first step-respondent clarified that the grievant had been placed on pre-disciplinary leave and not separated.

The grievant also alleges that the agency has been noncompliant in not providing requested documents. In general, the grievant appears to be seeking evidence related to the allegations and disciplinary actions taken against him by the agency.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</sup> 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

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<sup>1</sup> All four grievances are currently pending at the second resolution step following separate responses by the first step-respondent in each grievance.

<sup>2</sup> *Grievance Procedure Manual* § 6.3.

noncompliance.<sup>3</sup> 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.<sup>4</sup>

### *Adequacy of Responses*

Under the grievance procedure, the first step-respondent 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.<sup>5</sup> 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.

In the first step responses, the agency has not addressed some of the basic issues raised by the grievances. The agency has not addressed the grievant's claims of harassment, discrimination, stereotyping, and possibly retaliation. In addition, although the agency has explained to the grievant the basis for its allegation that he is a member of a gang, it has not explained or addressed the grievant's questions about why he was initially accused of being a member of certain specific gangs and why the charges allegedly changed and evolved.<sup>6</sup>

While the first step-respondent need not respond to every point or factual assertion by the grievant, it does appear that the grievant has raised issues and questions that were not addressed at the first step. Therefore, because the grievant has properly asserted issues regarding his employment to which the agency has provided no response, the agency has failed to comply with the grievance procedure.<sup>7</sup> The grievance must be returned to the first step-respondent so that he can properly address the issues raised by the grievant. The first step-respondent must respond to the grievant's claims of harassment, discrimination, stereotyping, and retaliation. In addition, the grievant's questions about the initial accusations of being a member of different gangs, and the allegedly evolving nature of those charges, must be addressed.

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<sup>3</sup> *Id.*

<sup>4</sup> 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.

<sup>5</sup> *Grievance Procedure Manual* § 3.1.

<sup>6</sup> The grievant's questions about the agency's allegations that he is a member of particular gangs are not merely minor points or factual assertions. Rather, the basis for and manner in which the agency's charges were initially made and how they changed are central issues in the grievance and could impact the grievant's other claims of stereotyping, harassment, and discrimination.

<sup>7</sup> See, e.g., EDR Ruling No. 2008-1786; EDR Ruling No. 2004-851.

The grievant has also asserted that the agency has failed to respond to other questions he has asked in his grievances. Many of the questions strongly resemble interrogatories.<sup>8</sup> The grievance procedure does not require that a party answer interrogatories of this sort.<sup>9</sup> The limited discovery provided by the grievance procedure does not permit interrogatories. However, it appears that most, if not all, of these “interrogatories” could be considered document requests,<sup>10</sup> because they appear to ask, in various ways, for the agency’s evidence used to support its allegations. For example, the “interrogatories” ask for the evidence to support the agency’s accusations that the grievant was a member of particular gangs, evidence to support the charges contained in the Group III Written Notice, explanation for why he was given a Group II Written Notice for not writing a statement, and the grounds for his termination. By producing such documentary evidence in response to the grievant’s coextensive document requests, the agency will have effectively produced documents responsive to the grievant’s “interrogatories.”<sup>11</sup> Consequently, these “interrogatories” are not specific questions to which the first step-respondent must provide written or verbal answers.

### *Documents*

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.”<sup>12</sup> 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.<sup>13</sup> 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.”<sup>14</sup>

During the pendency of these ruling requests, the agency has provided responses to the grievant’s document requests. The grievant asserts that the agency took longer than the specified period in the grievance procedure to respond to his requests.<sup>15</sup> However, because the agency has now come into compliance by producing requested documents, there is no basis to grant relief as to any alleged minor delays at this time.

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<sup>8</sup> Interrogatories are “[a] pretrial discovery device consisting of written questions about the case submitted by one party to the other party or witness.” Black’s Law Dictionary 819 (6<sup>th</sup> ed. 1990).

<sup>9</sup> See *Grievance Procedure Manual* § 8.2; *Rules for Conduction Grievance Hearings III (E)*.

<sup>10</sup> Although a party should clearly identify a request for documents, because the agency has already responded, in effect, to the documents targeted in these “interrogatories,” this point need not be addressed any further.

<sup>11</sup> The grievant could also discuss these questions with the second step-respondent during the second step meeting.

<sup>12</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>13</sup> *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.

<sup>14</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>15</sup> See *Grievance Procedure Manual* § 8.2.

The grievant also asserts that the agency has not provided all of the documents he requested. First, the grievant claims that the agency has failed to provide a “ledger” of documents it has produced. Because creating such a “ledger” is not a requirement of the grievance procedure,<sup>16</sup> the agency could not have violated any portion of the grievance procedure by not producing any such document not already in existence. Nevertheless, the agency has provided a listing of the documents it has recently produced. The grievance procedure requires nothing more of the agency as to this request.

The grievant also asserts that he has been given a poor copy of a photograph that is a central piece of evidence in this case. The agency states it has provided him as good a copy as it can provide. The agency is not in possession of the original photograph, so a copy of its copy is the best evidence it can provide. Further, the agency has indicated that the grievant may come to its location to view its version of the photograph. The agency’s response to this document request is sufficient.

The grievant has also requested all the documents related to the disciplinary actions, including evidence concerning the Inspector General’s (IG’s) office reports and investigations. Both the IG’s office and the facility have now produced documents in response to the grievant’s requests. However, there are certain documents noted in the IG report that do not appear to have been provided.

It appears the agency provided the grievant with a report of an interview with Inmate A, but there are at least two other interviews with this same inmate noted in the IG report. The grievant states he has not received a summary or notes about these other interviews. One of these interviews is identified as included at “Exhibit A” to the IG report. The agency must produce or make available to the grievant the summary and/or notes of these additional interviews, to the extent such documents exist.

The IG report also discusses information gathered from Sergeant G on August 31, 2009. The grievant states he has not received any summary or notes about the “interview” with Sergeant G. The agency must produce or make available the summary and/or notes of the information gathered from Sergeant G, to the extent such documents exist.

Beyond these specific items, there is no evidence that the agency has failed to produce any other documents.<sup>17</sup> While the grievant may argue that there should be other documents responsive to his request, this Department has found no indication of any other documents that must be produced at this time.

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<sup>16</sup> *Id.* (“A party shall not be required to create a document if the document does not exist.”).

<sup>17</sup> The grievant also asserted that he did not receive certain documents from the IG’s office. However, the initial report of the Special Agent has now been provided by the facility. In addition, the IG’s office states that it is not involved in the disciplinary process. As such, the fact that the grievant did not receive from the IG’s office documents regarding the Written Notices and the facility’s actions related thereto does not indicate a failure to produce requested documents under the grievance procedure.

*Names of Investigators*

The agency has redacted many names from the IG report it produced. It would appear that the agency is understandably producing the materials consistent with the grievance procedure's requirement that "[d]ocuments pertaining to non-parties 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."<sup>18</sup> However, the grievant asserts that the agency has redacted the names of some of the IG investigators who conducted the investigation. He asserts that such individuals are personally involved in the grievance, and, therefore, the names should be provided so he will be able to call the investigators as witnesses, if necessary.

While this Department understands the grievant's argument, the agency's decision to redact the names of the investigators from the produced report appears to be for the intended purpose of preserving the privacy of non-parties. This is not a situation in which the agency is refusing to provide this information. Rather, the agency has stated that the grievant may review an unredacted copy of the report in its offices. The agency's position is that the grievant may obtain full disclosure of the identities of the investigators, but that an unredacted copy of the report will not be provided to prevent any possible further dissemination of the names of the non-parties in an official document. Therefore, the agency has complied with the grievance procedure because the information redacted can otherwise be made available to the grievant.

*Second Step Meeting*

An additional issue was noted to this Department during its investigation for this ruling about the agency's attempts to schedule the second step meeting. As the agency is aware, a compliance ruling request to EDR normally stops the grievance process.<sup>19</sup> Therefore, the second step meeting should not have been scheduled while the grievant's compliance ruling requests were pending with this Department. The grievant was entitled to refuse to participate in the scheduled second step meeting.

CONCLUSION

Based on the foregoing, **within five workdays of receipt of this ruling**, the first step-respondent must respond to the issues raised by the grievances as discussed above. Further, **within five workdays of receipt of this ruling**, the agency must produce the information described above in response to the grievant's document requests, to the extent it exists. This Department's rulings on matters of compliance are final and nonappealable.<sup>20</sup>

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Claudia T. Farr  
Director

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<sup>18</sup> *Grievance Procedure Manual* § 8.2.

<sup>19</sup> *Grievance Procedure Manual* § 6.1.

<sup>20</sup> Va. Code §§ 2.2-1001(5), 2.2-3003(G).