

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: November 2, 2009; Ruling #2010-2453; Agency: Department of Alcoholic Beverage Control; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Alcoholic Beverage Control
Ruling Number 2010-2453
November 2, 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 not provided requested documents.

FACTS

The grievant's May 21, 2009 grievance challenges various agency actions, including a selection process.¹ Following this Department's prior ruling in this case,² the grievant clarified her document request to seek "a list of all positions filled through 'non-competitive' i.e. [sic] Internal transfers, including denied transfer requests, and all voluntary employee position exchange transfers, dating from January, 1981." In response, the agency has provided the grievant with a chart "depicting those positions identified back in November 2007 as being overstaffed and what has transpired since that time relative to these positions." The grievant asserts that the agency has not provided the information she seeks about all "non-competitive" transfers.

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."³ 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.⁴ "Just cause" is defined as "[a] reason

¹ See EDR Ruling No. 2010-2385.

² *Id.*

³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁴ *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

sufficiently compelling to excuse not taking a required action in the grievance process.”⁵ 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.”⁶

Beyond the information the agency has provided regarding the “overstaffing” and related transfers, it appears the agency has provided no response to the grievant’s request for information about all non-competitive transfers. If the agency has withheld this information for any just cause reason, that basis has not been expressed to the grievant. By failing to respond appropriately to this request, the agency has not complied with the grievance procedure.⁷

The agency asserts that this grievance concerns a selection and not the agency’s alleged failure to grant the grievant a non-competitive transfer. The agency is arguing that the grievance would be untimely to challenge such acts as they purportedly occurred more than 30 calendar days prior to the initiation of this grievance.⁸ However, this “untimeliness” argument need not be addressed here; such an argument has no bearing on the relevancy of the requested documents to the nonselection being grieved.

Specifically, in this case, part of the grievant’s challenge to the selection process appears to be an assertion that the agency may have pre-selected the successful candidate. Therefore, if the grievant were to show, for instance, that the agency normally grants non-competitive transfers when requested by a qualified employee, the agency’s denial of the grievant’s transfer request could be material to this case. A denial of the grievant’s request could be seen as the natural precursor to enable the pre-selection of the successful candidate in the later selection process, if that occurred.

Based on this reasoning, this Department cannot find that the non-competitive transfer information sought by the grievant is wholly irrelevant. Therefore, unless there is just cause as to why this information must not be produced, the documents reflecting this information are subject to disclosure and must be gathered and provided.⁹ However, the grievant’s request for information dating back to 1981 is too broad. The agency need only provide information for the five years preceding the grievance.¹⁰

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.

⁵ *Grievance Procedure Manual* § 9.

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁷ *See id.*

⁸ The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

⁹ The agency has indicated that some of the information may be held by the various regions. If that is the case, it does not obviate the agency of the requirement to provide the documents.

¹⁰ There may be good reason to further restrict or expand the relevant time period depending on the particular facts. However, based on the information provided so far, five years seems an appropriately relevant period.

CONCLUSION

Based on the foregoing, **within five workdays of receipt of this ruling**, the agency is ordered to provide the requested information as discussed above and/or respond with justification for nondisclosure of some or all of the information, if applicable.¹¹ This Department's rulings on matters of compliance are final and nonappealable.¹²

Claudia T. Farr
Director

¹¹ See *Grievance Procedure Manual* § 8.2.

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