

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: February 24, 2010; Ruling #2010-2497, 2010-2498; Agency: Department of Social Services; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Nos. 2010-2497, 2010-2498
February 24, 2010

The grievants have requested a ruling regarding the agency's alleged noncompliance with the grievance procedure in not providing requested documents.

FACTS

In conjunction with efforts by the Department of Social Services (the agency) to reduce its budget, the grievants' former division was identified for reorganization. In effect, that division was eliminated and the grievants were subject to layoff. The grievants challenged their layoffs through the grievance process on various grounds, including retaliation, discrimination, and misapplications of policy. For purposes of their grievances, the grievants have sought various documents related to the agency's budget reduction strategies, the elimination of their former division, and their resulting layoffs. The agency has searched its files and produced certain documents to the grievants. The grievants have requested this ruling because they claim the agency has not produced all relevant documents in its possession.

DISCUSSION

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."¹ 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."² 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.³ The statute further states that

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

² *Grievance Procedure Manual* § 9.

³ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

“[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.”⁴

In the grievants’ ruling request, they have identified a number of issues and types of documents they feel they should have received. This ruling addresses the grievants’ arguments based on the general issues raised and some with regard to the specific items identified.

Budget Reduction Strategies

In claiming that the agency has not produced all documents pursuant to their requests, the grievants assert that they have not received documents regarding the rest of the agency’s budget reduction items across all divisions and levels. Such documents appear to be beyond the purview of what is relevant in this grievance as those budget reduction strategies address other agency expenditures unrelated to the grievants’ layoffs and do not pertain specifically to the budget reductions related to the grievants’ layoffs. For this reason, the agency need only provide documents related to the agency’s identification of the grievants’ positions for elimination (to include the elimination/break-up of their former division), the grievants’ subsequent layoffs, and the processes for those decisions.

To the extent such information appears within other documents, the nonrelevant information may be redacted.⁵ The grievants are entitled to review agency documents related to the rationale, basis, process, and determination of their layoffs. Their document requests under the grievance procedure do not entitle them to audit the entirety of the agency’s budget reduction process. In this regard, it appears that the agency’s determination of relevant documents was based appropriately on this distinction.

Layoff Process Documents

Generally speaking, the grievants requested all documents related to the elimination of their former division and their layoffs.⁶ The grievants have essentially asserted, by pointing to certain questions raised by the document productions, that there should be further documents pertaining to their layoffs and the related decisions that they have not received.

This Department sought information from the agency about its document collection procedure in this case. It appears that the agency devised a set of search terms, which were then utilized to locate relevant electronic documents across the computers and e-mails of sixteen agency employees. In addition, paper documents were reviewed. Based on the information

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

⁵ It should be noted that this ruling only addresses the document production requirements of the grievance procedure. Whether the agency may be under a duty to provide additional or fuller documentation under the Virginia Freedom of Information Act, for example, is not a question for this forum.

⁶ One of the grievants’ specific requests seeks all documents “established/generated between May 15, 2009 and October 16, 2009 related to the analyses, options, decisions and conclusions which resulted in the layoffs ... and the agency’s recently announced changes in organizational structure.”

reviewed, the agency's collection process seems reasonable.⁷ However, as with many search term-based approaches, there is the possibility that relevant documents could go unfound if they did not include any of the specific search terms. One such clearly relevant document, which is dated August 7, 2009 and also referenced below, that was apparently not discovered, documents the agency's decision to eliminate/break-up the grievants' former division. Because this document did not include one of the search terms selected, it was not collected to be provided to the grievants.

Given that the agency's process failed to collect this important document, it raises questions about whether the search terms selected were comprehensive enough to satisfy the requirements of the grievance procedure in locating all relevant documents. Indeed, additional questions are raised about what the agency's document production did not allegedly include. For instance, the grievants state they received no documents from the Chief Financial Officer (CFO). According to the grievants, the lack of such documents seems suspect because the CFO would have or should have been involved in these budgetary/financial decisions. The agency's document production also apparently included no documents explaining how or why the Budget Team's recommended budget reductions did not eliminate the grievants' former division, but the package submitted by agency management to the Department of Planning and Budget (DPB) did. If such documents exist, they would appear to be extremely relevant.

Upon reviewing the agency's list of search terms, it appears that some words that might be helpful to utilize were not included. In addition, some of the search terms or phrases could be viewed as too specific to appear verbatim in documents. As such, this Department has concerns that the agency has not adequately searched its files to collect all relevant documents sought by the grievants.

The agency is ordered to perform the searches again, using the same processes, computers, servers, files, and accounts of those employees identified as before, using additional search terms. As the agency did in the first collection, if nonrelevant documents are identified using these search terms, they need not be provided. The parties are encouraged to work together to develop an appropriate list of additional search terms. To the extent the agency has not already, it is also ordered to search shared drives for relevant files, not just individual computer hard drives and e-mails.

Settlement Agreement

The grievants allege that the agency has recently settled a lawsuit filed by a former agency employee against the agency. The grievants state that the allegations made by this former employee involved claims similar to those at issue in these grievances, e.g., failure to follow the layoff policy. The grievants argue that the settlement agreement is relevant to show

⁷ The grievants also asserted a lack of confidence in the individual chosen to perform the electronic searches for documents. However, based on information gathered from both parties, it does not appear that the individual actually selected to collect the relevant documents was one of those employees identified by the grievants as someone about whom they expressed concerns.

that the agency has engaged in similar conduct in the past. While evidence of such past conduct might be loosely relevant, it is not clear that a settlement agreement would demonstrate such facts. Indeed, a settlement agreement is not an admission of past misconduct, but rather simply a resolution to a lawsuit. Therefore, because it does not appear this settlement agreement would demonstrate any relevant or material information to the claims of these grievances, there is no reason for the agency to produce it under the grievance procedure.

August 7, 2009 Memo

Also referenced above, the grievants point to a memo reportedly drafted on August 7, 2009 recommending the dismantling of the grievants' former division. The agency has since found that document and provided a copy to this Department "for forwarding to the grievants." While it is commendable that the agency seeks to rectify this oversight, it is not this Department's role to serve as the conduit for document productions. Consequently, if the agency has not already done so, it is ordered to produce this August 7, 2009 memo to the grievants **within five workdays of its receipt of this ruling.**

2008 APA Audit Letter

The grievants have requested the agency's statement to the APA for 2008, which, allegedly, does not list certain items of "fraud" the grievants state it should have. The grievants assert that the agency's failure to list these items indicates the agency's intent to hide fraud and anyone who discovers it. Although the agency continues to state that the document is not "germane," the agency also states that it believes the former Commissioner sent the grievants a copy of this document. Consequently, the agency provided this Department a copy of the letter "for forwarding to the grievants." As stated above, this Department does not serve as the conduit for document productions. Because the agency's actions appear consistent with an intent to acquiesce to the production of this document, the agency must provide the 2008 APA letter directly to the grievants **within five workdays of its receipt of this ruling.**

Merger Documents

The grievants assert that they received no documents regarding a proposed, but aborted, merger of their former division and a similar division of another agency. However, documents about this merger, to the extent they exist, do not appear to be material to the claims at issue in this grievance. Such documents need not be produced under the grievance procedure.

Communications between the agency and DHRM

The grievants assert that the agency's human resources office communicated with the Department of Human Resource Management (DHRM) concerning the layoffs. While such communications by the agency would be understandable, documents reflecting the communications would also appear to be relevant to these grievances as they would by definition relate to the grievants' challenges to their layoffs. However, the agency states that it has

produced all such communications. Indeed, based on information collected from the agency, it appears that no other written communications with DHRM occurred on the topic of the grievants' layoffs other than those about which the grievants are apparently already aware. The grievants have not produced any evidence suggesting that any other documents exist on this topic. As such, it appears that the agency has produced all relevant documents regarding such communications, subject to any additional documents that are found in subsequent searches.

Documents regarding the agency's adoption of policy exceptions or deviations from policy

The grievants posit that the agency adopted at some point certain exceptions to and/or deviations from the Layoff Policy. The grievants state they requested information about the agency's adoption of these exceptions and/or related deviations. Certainly, the applicable policy language controlling the grievants' layoffs would clearly be relevant. As such, to the extent such documents exist and if the agency has not already, it is ordered to produce to the grievants documents regarding the agency's adoption of any exceptions to or deviations from the Layoff Policy and documents regarding policy language in effect for the agency regarding layoffs during the relevant time periods **within five workdays of its receipt of this ruling.**

Excessive Redactions

The grievants argue that some of the documents the agency produced were redacted excessively. For instance, the grievants point to documents regarding the agency's budget reductions that redacted all items except those specifically addressing the reductions related to the grievants' former division and resulting layoffs. Such redactions are consistent with the limitations discussed above. While the grievants are entitled to receive documents related to their layoffs, they are not entitled to audit the entirety of the budget reduction process. As such, the nonrelevant portions of the agency's budget reductions (those not related to the grievants' layoffs) need not be produced and, therefore, can be redacted as appropriate.⁸

The grievants have also stated that the agency redacted the names of other employees who were subject to layoff. Based on the limitations already discussed above, it would be appropriate to redact these individuals' names. Further, such redactions are consistent with the requirement of the grievance statute 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."⁹ However, while the identities of these individuals should be redacted, the grievants would still be entitled to review some information, for example, about certain employees in their former division (with names redacted) to be able to assess whether the provisions of the Layoff Policy were applied appropriately, such as the layoff sequence.

⁸ This limitation would similarly apply to the agency's redaction of information unrelated to the grievants from weekly reports.

⁹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

There has been no evidence presented to this Department that any of the agency's redactions have been inconsistent with the limitations described in this ruling. As such, there is no basis to find that the agency's redactions failed to comply with the requirements of the grievance procedure.

CONCLUSION

In summary, the agency is ordered to provide the grievants with documents related to the agency's decision to eliminate the grievants' former division, as well as their subsequent layoffs, as discussed above. The agency must perform again the electronic searches using additional search terms as directed above. Further, to the extent it has not already done so, the agency must provide a copy of 1) the August 7, 2009 memo, 2) the 2008 APA letter, and 3) documents regarding the agency's adoption of any exceptions to or deviations from the Layoff Policy and documents regarding policy language in effect for the agency regarding layoffs during the relevant time periods.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

¹⁰ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).