

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: March 12, 2010; Ruling #2010-2566; Agency: Virginia Department of Transportation; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Numbers 2010-2566
March 12, 2010

The grievant has requested a ruling regarding the agency's failure to provide him with certain requested documents.

FACTS

In his November 20, 2009 grievance, the grievant challenges multiple Written Notices with termination, which he received in conjunction with a particular project, referenced herein as the "HBT Project." After filing this grievance, the grievant requested various documents from the agency. The agency has provided many materials but has refused to provide any documents in response to the grievant's Request No. 43, which requested "[a]ll counseling memoranda or other written disciplinary notices issued to [one of the grievant's superiors who was allegedly involved in the HBT project] from December 1, 2007 to present." The agency responded by stating that "[t]he Department object [sic] to this request as it seeks personnel records from an employee who is not a party to this grievance, and such records are not subject to release pursuant to § 2.2-3705.1(1) of the Code of Virginia (1950), as amended."

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

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

² *Grievance Procedure Manual* § 9.

protected by a legal privilege.³ 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.”⁴

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. 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.

Requested Documentation Relates to a Non-Party

The agency objected to the grievant’s request because the requested documents are a personnel record of a non-party. The agency should be aware that this objection is without merit as the grievance statute specifically contemplates the production of documents related to non-parties.⁵ Thus, the fact that a document relates to a non-party is no basis for refusing to produce a document.

The Freedom of Information Act

The agency has cited to § 3705.1(1) of the Code of Virginia (the Virginia Freedom of Information Act “FOIA”) as grounds for not producing the documents in question. 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 FOIA, and FOIA exemptions alone cannot be used as the reason for refusing to produce documents.⁶

Relevance, Scope of the Request, and Just Cause

While the agency has made no relevancy objection regarding Request No. 43, we have recognized that “[w]hether requested documents are relevant to the grievance is inherent in this Department’s consideration of a compliance ruling concerning documents.”⁷ Accordingly, we now address the relevance of the requested documents.

In this case, the grievant has requested documents which he believes would establish that he was treated more harshly than another employee, a superior who was

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

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

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

⁶ See e.g., EDR Ruling No. 2006-1312; see also <http://www.edr.virginia.gov/faqs.htm>.

⁷ EDR Ruling No. 2009-2272, 2009-2289, note 9.

allegedly involved with the HBT Project. We agree that such documents would appear to be relevant. Under the grievance procedure, a hearing officer may mitigate a disciplinary action where a grievant is able to establish that he or she was disciplined in a manner inconsistent with the manner in which the agency disciplined (or failed to discipline) similarly-situated employees.⁸ The requested information would therefore be crucial to the grievant's ability to establish mitigating circumstances at his grievance hearing.

The scope of the request, however, appears potentially overly broad. The grievant seeks "all counseling memoranda or other written disciplinary notices issued to [the grievant's superior] from December 1, 2007 to present." The request for "all" counseling memoranda or other written disciplinary notices could potentially include irrelevant disciplinary documents because only documents that relate to similar misconduct are typically relevant. As we noted in a recent ruling:

The key is that the misconduct be of the same character. Thus, for example, in a case such as this where the grievant was issued a Written Notice for failing to follow his supervisor's instruction, only documents that are associated with any alleged failure by comparators to follow their supervisor's instructions are relevant. Documents pertaining to agency responses to other dissimilar alleged incidents of misconduct, such as disruptive behavior or tardiness, are generally irrelevant.⁹

Thus, in this case, the agency need only provide documents relating to comparable offenses committed by the superior from December 1, 2007 to present.¹⁰

As discussed above, because the agency has not asserted just cause as a basis for its decision (or established that any just cause basis exists), the agency is therefore ordered to produce the requested documents to the grievant within **ten workdays of its receipt of this ruling.**¹¹

CONCLUSION

⁸ See *Rules for Conducting Grievance Hearings* at § VI.B. (noting that "mitigating circumstances" include the "[i]nconsistent [a]pplication" of discipline among similarly-situated employees). See also EDR Rulings 2009-2136, 2006-1386, 2004-853, 2004-634, 2003-419 2003-107, 2002-241, 2002-215 (documents containing information about the discipline of similarly situated employees (e.g., Written Notices with personally identifiable information redacted) were relevant to grievances challenging discipline for similar misconduct (e.g., Internet abuse)).

⁹ EDR Ruling No. 2010-2376, note 19.

¹⁰ In this case, we believe that any discipline issued to the superior in conjunction with the HBT Project is presumptively relevant, therefore must be produced.

¹¹ The grievant may renew his request for "all" disciplinary documents if he can establish that "all" such documents would be relevant in this particular case. If the grievant so requests, the agency may refuse to provide any documents that it believes are irrelevant (except documents relating to similar misconduct which must be produced). The grievant is free to request a second compliance ruling regarding any disputed documents.

For the reasons set forth, the agency is ordered to produce the requested documents as identified above. When providing copies of such documents, however, any non-relevant personal information may be redacted, which could include, for example, social security numbers, telephone numbers, or home addresses.¹²

This Department's rulings on matters of compliance are final and nonappealable.¹³

Claudia T. Farr
Director

¹² See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹³ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).