

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: April 2, 2010;
Ruling #2010-2575; Agency: Department of State Police; Outcome: Agency Not In
Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2010-2575
April 2, 2010

The grievant has requested a ruling regarding the alleged noncompliance with the grievance procedure of the Department of State Police (the agency) in failing to produce requested documents. This ruling finds that the agency has failed to comply with the document discovery provisions of the grievance procedure.

FACTS

In her March 4, 2010 grievance, the grievant has challenged the agency's determinations in a competitive selection process. The grievant applied for the position in question, was interviewed, but not chosen as the best suited candidate. In this grievance, she has requested various documents from the agency. She seeks documents about the selection process;¹ the selected candidate's former position, #03043; any additional compensation received by the successful candidate in taking the position; and the Employee Work Profile (EWP) for the successful candidate in her new position. The grievant states that the agency has failed to produce many of these documents. For instance, with regard to the documents about the selection process, the agency has provided only documents pertaining to the grievant herself and no other candidates. The grievant, thus, seeks this compliance ruling.

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."² 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."³ For

¹ The grievant's first document request seeks "[a]ll relevant documentation to requesting, advertising, screening, interviewing, selecting and hiring for this position."

² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

³ *Grievance Procedure Manual* § 9.

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.⁴ 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.”⁵

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.

Selection Documents

The agency has asserted that some of the selection documents sought are protected from disclosure under DHRM Policy 2.10. This Department has repeatedly held that the restrictions on document disclosure in DHRM policies are overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.⁶ However, while policy protections do not automatically exempt document requests under the grievance procedure, this Department generally recognizes the importance of the policy embodied by such provisions in protecting the personal information of others from unnecessary disclosure, which can constitute “just cause” for refusing to produce documents in a grievance in an appropriate case.⁷

In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well established and applicable legal privilege,⁸ this Department will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party’s particular interests in obtaining the document, as well as the general presumption under the grievance statutes in favor of disclosure. Relevant documents must be provided unless the opposing party can demonstrate compelling reasons for nondisclosure that outweigh the general presumption of disclosure and any competing interests in favor of disclosure.

In this case, while the concerns of confidentiality of the other candidates’ personal information is understandable, the grievant’s interest in obtaining the selection documents is

⁴ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

⁶ E.g., EDR Ruling No. 2009-2087; EDR Ruling No. 2007-1437; EDR Ruling No. 2006-1199; EDR Ruling No. 2004-853. Indeed, the grievance statute specifically contemplates the production of documents related to nonparties. 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).

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

⁸ Certain well established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. See, e.g., EDR Ruling No. 2002-215 (discussing attorney-client privilege).

particularly high because of the relevance of these documents to her claims concerning the selection process. Documents related to the grievant's challenges to the selection process are clearly central pieces of evidence in this grievance. Further, it would appear that the confidentiality interests embodied in the DHRM Policy can still be sufficiently maintained by redacting non-relevant personal information from the selection documents (such as the candidate's name, social security number, telephone number, and address).⁹ Because the balance of interests weighs in favor of disclosure, the agency is ordered to produce the requested documents sought with respect to the successful candidate and documents related to the grievant's challenges to the selection process generally.¹⁰ However, the materials of other unsuccessful applicants would not appear to be particularly relevant to her grievance, thus those documents need not be produced.¹¹

Employee Work Profile

The grievant seeks a copy of the EWP, i.e., the explicit job duties, of the successful candidate in her new position. The agency did not provide this document because it was reportedly not yet complete. The agency indicated that management had 30 days to review the new EWP with the successful candidate. The grievant asserts that this document is relevant to her arguments about the duties of the position in relation to those actually assessed during the selection. As such, it appears that the new EWP is relevant¹² to this grievance and must be produced. The agency is directed to produce a copy of the new EWP as soon as the document is complete.¹³

Documentation regarding Position #03043

The grievant seeks all documentation related to Position #03043. However, this request appears to be overly broad and to be seeking nonrelevant information.¹⁴ The grievant states that

⁹ It is also important to note that DHRM Policy 2.10 merely states that an applicant does not have access to information related to the selection process that "identifies" other applicants. Therefore, by redacting non-relevant personal information (such as the applicant's name, social security number, telephone number, and address), the documents would no longer identify a particular applicant.

¹⁰ For example, the grievant should be able to review documents regarding the request for approval to fill the position, the advertising, screening, and ultimate evaluation and hiring decisions for the position.

¹¹ If the grievant presents an additional showing later that would explain why other candidates' materials are relevant, those documents may need to be provided as well.

¹² Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citations omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citations omitted)).

¹³ If this case is eventually qualified for hearing, a hearing officer could take an applicable adverse inference against the agency if this EWP is not completed in an effort to avoid discovery, or is completed but not provided to the grievant.

¹⁴ Whether requested documents are relevant to the grievance is inherent in this Department's consideration of a compliance ruling concerning documents. EDR must address relevance before it can be determined whether the agency has been noncompliant in refusing to produce the requested documents.

Position #03043 is the position the successful candidate held previously and was set to expire in December 2010, which was the reason the agency sought to put the successful candidate into a protected position. The grievant seeks information about the position to show that preselection, political affiliation, or other factors may have been considered in selecting the successful candidate.

These issues appear to be at least potentially relevant considerations. As such, the agency must produce documents reflecting the status and duties of Position #03043 as a position that was set to expire and not be filled (to the extent such documents exist and to the extent the agency has not already done so).¹⁵ However, as to the breadth of this request, the agency need not produce “all documentation” related to the position; the agency must only produce documents sufficient to show the relevant information sought for purposes of the grievant’s challenges. If there are additional questions about what specific information the grievant is seeking about Position #03043, the parties should communicate directly to clarify those concerns.

Salary Information

The grievant seeks information about whether the successful candidate received any kind of increase or additional compensation as a result of taking over the new position. The grievant states that she is requesting this information to show, for instance, that if the successful candidate was entitled to receive no additional compensation, such a factor could have played a role in the selection. At this early stage, this Department cannot find that this argument is entirely irrelevant.

In response to the grievant’s request, the agency produced a portion of its Salary Administration Plan. The agency’s production misses the mark and does not provide the information requested by the grievant. Therefore, the agency is ordered to produce documentation, to the extent it exists,¹⁶ showing whether and to what extent the successful candidate was awarded any additional compensation as a result of taking on the new position. It is notable that the grievant states she does not wish to receive the actual salary of the successful candidate. Indeed, the grievant only seeks, and the agency need only provide, existing documentation showing the amount of any additional compensation, such as a percentage increase, if that was the case.¹⁷

¹⁵ For instance, according to the grievant, the agency has provided an older EWP for Position #03043. The grievant also received a copy of an applicable Executive Order.

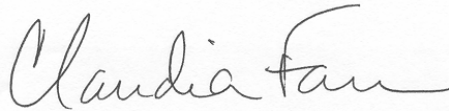
¹⁶ See *Grievance Procedure Manual* § 8.2 (“A party shall not be required to create a document if the document does not exist.”)

¹⁷ 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 or state policy, which, for example, allows disclosure of certain state employees’ salary information (*see* Va. Code § 2.2-3705.8; DHRM Policy 6.05), is not a question for this Department.

CONCLUSION

For the reasons set forth above, this Department finds that the agency has not complied with the grievance procedure by failing to provide the grievant with relevant documents which the agency is required to produce under the provisions of the grievance statute and procedure.¹⁸ The agency is ordered to produce the requested documents as identified above **within 10 workdays of its receipt of this ruling**. When providing copies of documents related to non-parties, however, any non-relevant personal information may be redacted, which could include, for example, names, social security numbers, telephone numbers, or home addresses.¹⁹

This Department's rulings on matters of compliance are final and nonappealable.²⁰

A handwritten signature in cursive script that reads "Claudia Farr". The signature is written in black ink on a light-colored background.

Claudia T. Farr
Director

¹⁸ See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹⁹ See *id.*

²⁰ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).