

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: June 4, 2010;  
Ruling #2010-2628, 2010-2629; Agency: Department of Social Services; Outcome:  
Agency In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Social Services  
Ruling Nos. 2010-2628, 2010-2629  
June 4, 2010

The grievants have requested a ruling regarding the agency's alleged noncompliance with the grievance procedure involving requests for documents.

FACTS

The grievances at issue concern the grievants' challenge to their layoffs on various grounds, including retaliation, discrimination, and misapplications of policy.<sup>1</sup> The grievants have sought various documents related to the elimination of their former division and their resulting layoffs. The agency searched its files and produced certain documents to the grievants. However, this Department determined, in EDR Ruling Nos. 2010-2497, 2010-2498, that the agency's collection method had resulted in a failure to provide certain documents. In that ruling, in addition to ordering the agency to produce certain specific documents, it was determined that the agency must re-do its search for electronic documents, including e-mail and data files on network and local drives.<sup>2</sup> It was recommended that the parties work together to develop search terms and continue with the document collection and production process.<sup>3</sup>

The agency sought the grievants' input on search terms to be utilized in the new search. When requesting this input, the agency stated that it could provide the grievants with the documents within approximately three weeks of receiving their proposed search terms. On or about March 17, 2010, the grievants sent the agency an eight page document listing various types of documents, search criteria, and search terms for collecting the information they are seeking. The agency distilled this proposal into 72 search terms. In addition, although the grievants' original request had sought documents from the files of 16 agency employees, in the new proposal, 25 current and former agency employees were listed by the grievants.

The agency had an Information Technology (IT) Specialist review the extent of the document collection that was involved. The IT Specialist described using a two-step process to collect three general categories of electronic documents: e-mail, network files, and local hard drive files. The first step is collecting documents that are potentially relevant based on the date

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<sup>1</sup> See EDR Ruling Nos. 2010-2497, 2010-2498.

<sup>2</sup> *Id.*

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

of the document. The second step would then be to search within these collections for documents in which any of the 72 search terms appear. Once the documents found as a result of those searches were collected, the documents would have to be reviewed by administrative staff to determine whether the documents were indeed relevant to the grievances and potentially redact certain information.

Upon determining the extent of the work involved in conducting this collection and production of documents, the agency notified the grievants of the costs it would incur and for which the agency was charging the grievants. In a letter dated March 29, 2010, and apparently received by the grievants on or about March 31, 2010, the agency provided the grievants with its estimated costs, requesting a deposit of half of the amount before proceeding with the document collection process. The ultimate totals were \$5,514.02 if all 25 users' materials are searched and \$3,686.12 if the original 16 users' materials are searched. The majority of these costs represent estimates of the time it would take the IT Specialist to collect and search for the materials. Also included are costs for an administrative staff member to review and/or redact the documents based on the minimum salary of an employee in a position with the requisite skills to complete the task, and minimal copying charges per page.

The grievants have requested a ruling on whether these charges are appropriate. In addition, the grievants' ruling request alleges that the agency has failed to comply with the document production timeframes. The grievants have also noted a set of documents it believes the agency has failed to produce as a result of a recent document provided by the agency in response to EDR Ruling Nos. 2010-2497, 2010-2498 on the topic of exceptions to the layoff policy.

## DISCUSSION

### *Charges*<sup>4</sup>

The Grievance Procedure Manual provides that “[t]he party requesting the documents may be charged the actual cost to retrieve and duplicate the documents.”<sup>5</sup> This Department has had few occasions in past rulings to address this provision. Indeed, EDR was unable to find any ruling in its online searchable database that addressed whether the charges proposed by an agency were reasonable and consistent with this section. In interpreting this section, EDR will look to other analogous laws and regulations for guidance if needed. As such, principles and approaches arising under the Virginia Freedom of Information Act (FOIA) are an immediately relevant resource. For instance, under FOIA, an agency must notify a requester of documents if the agency will be charging for the search and production of materials sought and can further request payment of a deposit in advance before producing the documents in certain cases.<sup>6</sup> Such

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<sup>4</sup> As noted above, the agency estimated its costs for two different production options, depending on the number of users within the scope of the search (25 vs. 16). This ruling will use the figures for the 25-user search, but the determinations made in this ruling are equally applicable to the 16-user search, if that is the method the grievants opt for, with requisite adjustments to the figures.

<sup>5</sup> *Grievance Procedure Manual* § 8.2.

<sup>6</sup> Va. Code § 2.2-3704.

a practice would appear to be reasonably applicable and useable under the grievance process, as the agency has done in this case. However, this Department must also review whether the agency's proposed charges were reasonable under the facts of this case.

#### Actual Costs

At no time could the agency charge the grievants more than the actual time costs incurred based on the hourly rates quoted.<sup>7</sup> For example, the agency estimates approximately 45 minutes per user for the IT Specialist to collect e-mail for each of the users. If the IT Specialist took less overall time than the 18.75 hours proposed (45 minutes times 25 users), then lower costs would be incurred resulting in reduced charges to the grievants.

The agency can also only charge grievants for the actual time spent on the document collection and production effort.<sup>8</sup> Therefore, for instance, in conducting an electronic search, if the IT Specialist is able to perform other work while the search runs without any further input needed during the search, that search time could not be charged to the grievants. As such, the IT Specialist's time must be accurately documented consistent with the provisions of this ruling so that the grievants are not charged for any time in addition to the actual work done on the document collection.

#### Reasonableness of Charges<sup>9</sup>

The charges estimated by the agency are not unreasonable if the search process were to be executed in the manner proposed. However, the proposed process does not appear to be the best and/or most efficient means to accomplish this task. This may well have led to an inadvertent overestimate of charges for the search term step of the process, which must be reduced as follows.

The agency has proposed to run individual searches, using one search term each, within every user's PST file of e-mails. However, because the senders and recipients of e-mails are readily apparent (unlike, at times, document or data files), it is unnecessary to run separate searches per e-mail user. A more efficient approach would appear to be to compile all the e-mails collected in the first step based on relevant date and run the searches during the second step for all these e-mails in one large PST file rather than separate files for each user. Such a change should dramatically cut the time and cost estimates for this portion of the search.

The agency estimated that the e-mail searches would take approximately three minutes per search term. However, given that the new combined single PST file will be much larger than

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<sup>7</sup> See *Grievance Procedure Manual* § 8.2.

<sup>8</sup> See *id.*

<sup>9</sup> Unless otherwise indicated in this ruling, this Department has no basis to dispute the reasonableness of other portions of the agency's estimated charges. For instance, the estimated time to review and/or redact the materials by administrative staff at 2 hours per user searched appears reasonable, as long as the charges do not exceed the actual time expended, which must be tracked. Similarly, the estimates for the IT Specialist to collect the electronic files for searching purposes appear to be reasonable.

the individual files, it reasonably will take more time to administer the searches and handle the results. As such, a maximum reasonable average would appear to be between five and ten minutes per search,<sup>10</sup> unless the agency presents information showing that this estimate is unjustifiably insufficient. Therefore, the agency's cost estimates for the combined e-mail searches will be capped at 12 hours (10 minutes maximum times 72 search terms, divided by 60 minutes).

A similar approach could be taken with document and data files (hard drives), but we can also understand if the grievants would prefer to have the location of these files available if relevant. However, compiling all hard drive files in the potentially relevant series (again, based on date) and running the searches for all users at one time should also significantly reduce the amount of time spent by the IT Specialist. The agency currently estimates another 60 hours to search all 25 users' hard drives. If these files were consolidated together, the IT Specialist would only need to run one search for all the hard drive document and data files. A reasonable estimate of these searches would likely be five minutes per search term,<sup>11</sup> accounting for the additional files involved, unless the agency presents information showing that this estimate is unjustifiably insufficient. This would result in a cap of six hours for the combined hard drive search charges. The agency must confirm with the grievants if they are agreeable to the compiled search of the hard drive document and data files. If not, the original cost estimates are reasonable as stated for the separate searches. If the grievants do agree to a compiled search of these files, such a compiled search must be done by the agency.<sup>12</sup>

#### Search Process – Additional Points

While the agency invited the grievants to submit proposed search terms, it does not appear that the agency has ever shared with the grievants its list of 72 search terms. The agency appears to have taken the grievants' proposals and consolidated terms, which was an appropriate step because the terms proposed by the grievants included a large amount of unnecessary duplication. Even the list of 72 search terms appears to include items that could probably be eliminated as too broad. Consequently, the parties need to address this list together.

The grievants are asking the agency to undertake a substantial document collection and production in this case. They have proposed a large number of search terms to be used across a vast amount of e-mails and data files for 25 different users. To collect and sort through the quantity of documents sought will require a substantial time commitment and effort, which is reflected in the cost estimates. Notwithstanding the fact that these costs can be lowered as outlined in this ruling, there will still remain a substantial sum for document retrieval and

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<sup>10</sup> The agency was contacted about this search method. Its initial estimate of the time it would take to run searches across all the compiled e-mails was within this approximate range.

<sup>11</sup> The agency was also contacted about this search method. Its initial estimate of the time it would take to run the searches of compiled hard drive files was at this approximate level.

<sup>12</sup> It should be noted that the caps set forth in this section are based on using all 72 search terms. If the number of search terms is altered, it would obviously have an impact on these caps. However, the time estimates per search term would not change and could be applied to the new number of search terms to compute a new cap.

duplication that could be appropriately charged to the grievants before the document collection and production will proceed.

As a result of this Department's determinations above, the number of estimated hours chargeable to the grievants for the IT Specialist's time would appear to be reduced by 78 hours (for the 25-user search). That reduction equates to a decrease in the estimated cost by approximately \$2,000. We are hopeful that further discussions between the parties can result in even further honing of the document collection resulting in a more efficient process with lower costs to all involved.<sup>13</sup>

### Retaliation

Quite reasonably, when document productions are small, agencies may decide not to charge grievants at all. Indeed, the grievance process works better when parties are able to freely exchange information and documents without such charges.<sup>14</sup> However, even assuming as true the grievants' allegation that the agency has never charged past grievants for requested documents, this case can understandably be considered an extraordinary situation. When a document collection and production reaches the level of effort that is involved in this case, seeking to recoup the costs expended by the agency is reasonable. As such, a deviation from the agency's presumed practice of not charging, if that were actually the case, can readily be explained by the amount of work involved here. Therefore, having no other indication that the agency's proposal of charges to the grievants was based on an improper purpose, this Department can find no retaliation in the agency's decision in this matter.

### *Timeliness*

The grievants assert that the agency has failed to abide by its commitment to provide documents within three weeks after the grievants provided their proposed search terms. At this point, the additional searches have not taken place and no additional documents have been provided as a result of any updated searches. As such, the three-week "deadline" has come and gone. However, it is not the agency's action that has held up the document production. Rather, the agency notified the grievants, within the original three-week period, of the proposed costs for which the grievants would be responsible if the searches would be conducted and documents produced as planned. The grievants have understandably disputed these charges, but there is no basis to find that the agency has failed to comply with any applicable deadline in not providing the documents when the issue of cost has not been resolved. Any delay here is not the result of noncompliance with the grievance procedure.

### *Policy Exception Documents*

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<sup>13</sup> To that end, if the parties are able to reach an agreement on other ways to gather and produce the documents sought, they are free to do so. Absent an agreement, the approach as proposed and modified in this ruling is the default.

<sup>14</sup> Cf. Va. FOIA Council Adv. Op., AO-06-09, June 9, 2009.

The grievants assert that they have not received sufficient documents about the agency's "policy exceptions." However, in making this argument, it appears that what the grievants actually seek are documents relating to alleged misapplications of policy by the agency during the layoff process, not the requested "policy exceptions" to the layoff policy granted by the Department of Human Resource Management (DHRM), which were addressed by this Department in EDR Ruling Nos. 2010-2497, 2010-2498. The documents produced by the agency appear to represent such DHRM-granted exceptions to policy, which would be consistent with that Ruling and the grievants' original request. As such, there is no basis for an additional finding of noncompliance on these grounds.

Any documents about the agency's alleged misapplications of policy, for which the grievants offer examples in their current ruling request, are clearly relevant to their grievances, and as such, must be produced, if they exist, in conjunction with the broader document production. Although the grievants assert that there must have been higher-level management approval of these "deviations," such documents would obviously not exist if the agency viewed its handling of the layoff process in these and other alleged actions as consistent with policy.

#### *Document Preservation Issues*

The grievants have raised issues about the agency's alleged destruction of files and/or lack of "destruction hold." Although failure to retain and produce relevant documents requested during a grievance could raise issues of noncompliance, there is no provision in the grievance procedure that allows for a party to request a "destruction hold." Therefore, any alleged failure by the agency to respond to the grievants' request for such a hold, or to provide related information about the hold, is not a compliance matter under the grievance procedure.<sup>15</sup> While an agency's destruction of relevant documents could give rise to a spoliation inference at a grievance hearing<sup>16</sup> or another finding of noncompliance,<sup>17</sup> this Department has no credible basis to find that any improper document destruction has taken place.

The grievants have also asked about searching back-up drives. According to the agency, such back-up drives will not be searched in this document collection. This Department finds no basis to require the agency to do so given the lack of any credible concerns of electronic documents being deleted that would or even could be remedied by accessing back-up drives. Requiring the agency to access back-up drives would create unnecessary and unreasonable delays, expense, and expended effort for likely no additional relevant or material documents.

### CONCLUSION

In summary, the agency is ordered to provide the grievants with an updated cost estimate consistent with the provisions of this ruling. The grievants must notify the agency if they are

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<sup>15</sup> See EDR Ruling Nos. 2009-2272, 2009-2289.

<sup>16</sup> Cf. *Rules for Conducting Grievance Hearings* V(B) (permitting a hearing officer "to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents . . . as the hearing officer or the EDR Director had ordered.").

<sup>17</sup> See Va. Code § 2.2-3003(G).

agreeable to the combined search method for the hard drive document and data files. If the parties come to no further agreement, the grievants will be responsible for the agency's actual costs consistent with the limitations provided in this ruling. The grievants must pay one-half of the estimated amount before the document collection and production will progress. If the grievants choose not to submit the deposit, the document requests will be considered waived and the grievance process must proceed to the appropriate step.

This Department's rulings on matters of compliance are final and nonappealable.<sup>18</sup>

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Claudia T. Farr  
Director

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<sup>18</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).