

Issues: Compliance – Grievance Procedure (Documents and Resolution Steps);
Ruling Date: November 9, 2010; Ruling #2011-2743, 2011-2756; Agency: Virginia
Department of Transportation; Outcome: Documents – Agency in Compliance (in
part), Agency Not in Compliance (in part; Resolution Steps – Agency Not In Compliance
(parties agree to move forward).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULINGS OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2011-2743 and 2011-2756
November 9, 2010

The grievant has requested two compliance rulings regarding his April 7, 2010 grievance with the Department of Transportation (VDOT or the agency). First, the grievant asserts that he has not been provided with documents requested pursuant to his grievance. In addition, the grievant challenges the agency's designation of management resolution step respondents.

FACTS

On April 7, 2010, the grievant initiated a grievance challenging the agency's application of the layoff policy. More specifically, the grievant contends that many of those affected by layoffs at the agency were wrongly placed in newly created positions, rather than in existing vacant positions. Although the grievant himself was not subject to layoff, his primary allegation is that the agency improperly deprived him of the right to compete for newly created positions within VDOT by misapplying the layoff policy to others.

On April 19, 2010, the grievant sent the agency a request for documents pursuant to section 8.2 of the *Grievance Procedure Manual*.¹ The agency has responded to the grievant's April 19, 2010 request for documents, however the grievant challenges the agency's response as noncompliant with the grievance procedure rules. In addition, the grievant challenges the agency's designation of step respondents. These arguments will be discussed below.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any

¹ According to the grievant, he has sent the agency other document requests as well, but the only request at issue in this ruling for the agency's lack of response is the April 19th request for documents.

² *Grievance Procedure Manual* § 6.3.

noncompliance.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.⁴

Documents

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.”⁵ 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.”⁶ 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.⁷ 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.”⁸

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.

The grievant’s April 19, 2010 request seeks five items of documentation and/or information. The agency has responded to all five items, but the grievant challenges the agency’s response to four of those five items. Accordingly, these four document requests and the agency response to these four items will be discussed in turn below.

³ *See Id.*

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party’s noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

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

⁶ *Grievance Procedure Manual* § 9.

⁷ *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁸ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

Item 1

Please provide documentation showing when and by whom the interpretation was made that Newly Created Positions are considered Valid Vacancies and can be utilized as placement options for affected laid off employees. This is requested in accordance with section 8.2 of the Grievance Procedure Manual.

In response to this request, the agency quotes language from the Department of Human Resource Management (DHRM) Policy 1.30, "Layoff," and further states:

The agency head, i.e., VDOT Commissioner, has the authority on behalf of the agency to make the determination of which vacant positions will be used as placement option during layoff. [The] Commissioner [] made the decision in July 2009 to use all vacancies associated with Stage II functional areas as placement opportunities and reviewed the vacancy list on August 14, 2009 prior to the implementation of the Stage II placement process. A vacancy per the interpretation of the layoff policy is any position that is not currently filled, regardless of the origins of the vacancy, which could be used for a placement option during layoff. A valid vacancy is an unfilled position that is determined by the agency head as a position that can be staffed. The Stage II placement process began on 8/25/2009.

[The] Commissioner [] made the decision to use all valid vacancies as placement opportunities and reviewed the vacancy list for Stage III in December 2009.

The grievant challenges the agency's response as incomplete because the agency has not provided any "documentation" to support its statements. In particular, the grievant seeks documentation "showing when and who made the interpretation that Newly Created Positions are considered Valid Vacancies." The grievant further wants to know if it was VDOT or DHRM that made the interpretation and if it was DHRM, or if DHRM concurred with this interpretation, documentation from DHRM indicating their concurrence.

The grievant is challenging the application of the layoff policy and in particular, the placement process utilized during the layoff process, and therefore, the documents he requests in Item 1 appear relevant.⁹ The agency has provided a thorough written response to the grievant's request, and during this Department's investigation indicated that documents supporting its response do not exist. That is, according to the agency, the Commissioner verbally approved the use of all valid vacancies as placement opportunities. Because the grievance procedure does not require a party to create a document that does not exist,¹⁰ this Department concludes that the agency has complied with the grievant's request in Item 1.

⁹ While the agency has made no relevancy objections to the document requests at issue in this ruling, 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." See e.g., EDR Ruling #2010-2566 and EDR Ruling ##'s 2009-2272 and 2009-2289.

¹⁰ *Grievance Procedure Manual* § 8.2.

Item 2

Please provide documentation showing that ALL Vacant and New Created positions utilized for placement options were identified, and by whom, BEFORE the layoff was implemented. Please include the EWPs and the dates they were created for the New Positions. This is requested in accordance with section 8.2 of the Grievance Procedure Manual.

In response to this request for documentation, the agency provided the following:

Attached is a list of vacancies that were used at the beginning of the placement process for Stage II and Stage III. [The] Commissioner [] approved the positions to be utilized as placement options. In addition, he gave the directive that any additional positions that became vacant once the placement process began were to be used as placement options for impacted employees in the next successive round of placement activity. Vacancies for the placement process did not have to be identified before issuing notices of lay off. The vacancies had to be identified prior to the commencement of the placement process. Copies of the EWPs you requested have not been included due to the volume of this request. You are welcome to look through the vacancies identified and used and identify specific positions for which you wish to have the EWP. Section 8.2 of the Grievance Procedure allows the agency to charge the grievant for the cost associated with the retrieval and production of documents. Once you have identified the specific position(s) for which you wish to have copies of the EWPs produced, the agency will assess the cost associated with that request and inform you of that cost prior to production of the document(s).

In response, the grievant states:

I respectfully request that you provide "Documentation" showing that all the positions on these lists were identified as valid vacancies that could be used as placement options, BEFORE Implementation of the Layoff in accordance with DHRM Layoff Policy 1.30. This is requested in accordance with section 8.2 of the Grievance Procedure Manual.

Similar to Item 1, during this Department's investigation, the agency indicated that the Commissioner gave verbal approval regarding which positions could be used as valid vacancies in the placement process and as such, it appears that no further documents exist to support the agency's response to Item 2. As such, this Department concludes that the agency has complied with the grievant's request for documents outlined in Item 2.

Item 3

Employee's position is eliminated and receives lay off notice. Substitution is identified within same division but having different work duties. Why is employee left in the position eliminated and not required to assume job duties of the substitute whose position was not

eliminated. Please investigate this inconsistency and provide documentation of your findings in accordance with section 8.2 of the Grievance Procedure Manual.

In response to this request, the agency states: “Section 8.2 of the Grievance Procedure clearly states that a party shall not be required to create a document if the document does not exist. The requested documentation does not exist.”

In addressing the grievance, the management resolution step respondents could choose to investigate the issue raised by the grievant in Item 3; however, the document production provisions of the grievance process do not require an agency to investigate an issue and produce documentation related to that investigation if such documentation does not already exist. Moreover, the agency has indicated that there are no documents responsive to the grievant’s request in Item 3. As such, this Department concludes that the agency has complied with the grievant’s request in Item 3.

Item 5

Please provide documentation from the “watchful eyes” of the Department of Human Resource Management and the “Civil Rights Professionals” that certified or approved the Layoff and Placement Process, and how Equal Opportunity for all employees was ensured in accordance with the Virginia Department of Transportation’s commitment. This is requested in accordance with section 8.2 of the Grievance Procedure Manual.

The Commonwealth of Virginia has a well defined layoff policy. A copy is attached for your review. The Virginia Department of Transportation requested additional flexibilities to the layoff policy. Multiple meetings were held with staff members of the Department of Human Resource Management (DHRM) over a period time to discuss the details and policy implications of the flexibilities requested. The end result of those meetings is attached - VDOT Blueprint Implementation DHRM Policy Exceptions and Flexibilities. This document reflects the policy flexibilities approved by DHRM and was made available to all VDOT employees prior to implementation of Stage II and throughout Stage III.

The grievant disagrees with the agency’s response to Item 5 and in response states:

Please provide any and all “Documents” and information relative to these meeting that indicate certification, concurrence, or approval by DHRM of the application of the Layoff and Placement Process implemented by VDOT Management. Also, provide any and all information and Documentation from Equal Employment Opportunity Staff members from DHRM and VDOT that indicates concurrence or approval of the Layoff and Placement Process, especially any documentation indicating how Equal Opportunity for all employees was ensured in accordance with the Virginia Department of Transportation’s Equal Opportunity Policy, during the Layoff and Placement Process. This is requested in accordance with section 8.2 of the Grievance Procedure Manual.

As done in response to the other requests, the agency has provided a detailed written response to the grievant's request. However, during this Department's investigation for this ruling, the agency indicated that it has significant documentation in the form of e-mail communication between the agency and the DHRM regarding the meetings between these two agencies prior to the layoffs. Such documents would appear to be responsive to the grievant's request in Item 5. As such, they would be subject to production if relevant to the April 7, 2010 grievance, unless the agency asserts just cause for not producing them. Here, as noted above, the grievance contends that many of those affected by layoffs at the agency were wrongly placed in newly created positions, rather than in existing vacant positions and as such, the agency improperly deprived the grievant of the right to compete for newly created positions within VDOT. Accordingly, only those documents that are relevant to this specific issue are required to be produced absent just cause. Accordingly, within **10 workdays of its receipt of this ruling**, the agency is ordered to produce any such documentation, or, if applicable, provide the grievant with a written "just cause" explanation as to why any such documents will not be produced.¹¹ As noted above, documents pertaining to nonparties may be redacted to protect personally identifiable information so long as relevant information is not redacted.

Step-Respondents

Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency's Human Resources Office and is also available on EDR's website. Each designated step respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.¹² Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management resolution step respondents are appropriate, are known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly.

An agency's careful designation of step respondents, and consistent adherence to those designations, is crucial to an effective grievance process. Step respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances, such as extended illness or serious injury. Further, if a step respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step respondent and should put any agreement in writing. Absent an agreement between the parties, the agency must adhere to the designated list of step-respondents.

In this case, the grievant challenges the agency's attempt to insert a third step respondent into the process rather than the designated third step respondent. According to EDR's list of designated step respondents, the agency has made the following management resolution step respondent designations for its District Office employees, including the grievant: the first step

¹¹ If the agency provides the grievant with a written "just cause" explanation, the grievant may challenge the agency's "just cause" rationale for not producing the documents through the noncompliance provisions of the grievance process. *See Grievance Procedure Manual* §6.3.

¹² *See* Va. Code § 2.2-3003(D).

respondent is the grievant's immediate supervisor, the second step respondent is the "Section Head;" and the third step respondent is the "District Administrator" in all districts except Northern Virginia. However, in this case, because the grievant is challenging the application of the layoff policy, Section 2.4 of the *Grievance Procedure Manual* provides that the grievance "should be initiated with the Human Resources Office of the employee's agency." When a grievance challenging the application of the layoff policy is initiated with the Human Resources Office of the employee's agency, the human resource representative responding to the grievance generally takes on the role of first step respondent. As such, in this case, the human resource representative appropriately responded to the grievance as the first step respondent. After the first step in a grievance challenging the layoff process, the second and third management resolution step respondents are those designated by the agency and approved by EDR. Contrary to the agency's assertion and belief, the second and third step respondents do not change from those previously designated. In other words, in all grievances challenging the layoff process, the first step respondent is generally a representative of the human resources office, but the second and third step respondents are those individuals that have been previously designated by the agency to serve in those capacities (as opposed to successive levels of management in the human resources office).

As noted above, the second step respondent should have been the "Section Head" which in this case, according to the grievant, is the grievant's immediate supervisor. Here, the District Administrator, the designated third step respondent, responded to the grievance as the second step respondent. As such, the grievance was out of compliance at the second management resolution step. However, the grievant desires, and the agency has apparently agreed, to move the grievance forward to the qualification stage. In light of this agreement and in the interest of efficiency and expediency, this Department deems it appropriate for the parties to simply move the grievance forward to the agency head for a qualification determination after the documents issue discussed above has been resolved.

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

Claudia T. Farr
Director

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