

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 28, 2010; Ruling #2011-2771; Agency: Department of Minority Business Enterprise; Outcome: Agency Not In Compliance / Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Minority Business Enterprise
Ruling Number 2011-2771
September 28, 2010

The agency has requested that this Department administratively close the grievant's July 1, 2009 grievance.

FACTS

In his July 1, 2009 grievance, the grievant raised issues concerning harassment and discrimination based on race. The grievant provided an attachment of specific examples of statements or practices by the Senior Manager that the grievant believes indicate harassing or discriminatory conduct. Pursuant to his grievance, the grievant requested "all emails or related documents to my grievance" from a specific set of agency employees. The agency denied the grievant's request for documents because "[s]ome of the issues in [the] grievance are so broadly stated that is [sic] would be difficult, if not impossible, to determine what information is related to your grievance." The grievant appealed that denial and requested a compliance ruling from this Department.

In EDR Ruling No. 2010-2381 this Department held that:

While the grievant's document request does appear to be rather broad, it cannot be fairly said that the agency could not respond at all to what appears to be a general request for e-mails from a specific set of agency employees related to the issues raised in his grievance (at least with regard to some of the grievant's allegations). The grievant has cited to specific examples he alleges indicate harassing and/or discriminatory conduct. For instance, the grievant lists at least three allegations that directly concern e-mails sent by or involving the Senior Manager. The grievant has raised issues concerning his title change (and related e-mails), the Senior Manager's 30 minute e-mail response time requirements and replies by the Senior Manager to those employees who do not meet such response times, and e-mail statements by the Senior Manager about the agency's treatment of outside agencies and colleges. These allegations do not appear to be so broadly stated such that the agency could not respond to the document request. As such, it was premature for the agency to deny the grievant's request without either

conducting a reasonable search for at least some documents and/or communicating with the grievant for further clarification. The agency has failed to satisfy its duty to conduct a reasonable search to determine whether the requested documentation is available.

Therefore, the agency is ordered to conduct a search of its records to determine what documents are available to respond to the document request concerning at least the allegations identified above. The agency must also revisit the grievant's document request generally to determine what, if any, documents may be responsive. To the extent the agency is unable to determine what else the grievant is seeking, the agency should ask the grievant to clarify what he is seeking. There may not be e-mails related to all the grievant's allegations, but it does not appear that the allegations themselves are too broad for the agency to comprehend. However, to assure a common understanding, the grievant must provide additional detail to the agency to clarify the documents he wants the agency to produce.¹

The agency appears to contend that the grievant has not been cooperative in terms of clarifying his document request and in the instant request for administrative closure the agency asserts that:

On August 28, 2009, the [Senior Manager]² wrote [grievant]. This letter included the statement, "Please be advised that at this time, it is practically impossible to determine with reasonable specificity the nature of your request for information and we will need further clarification of what you are seeking. I will await your written response on how we can better coordinate the retrieval of the information you have requested."

The agency further asserts that "[n]o further action has been taken by either party in regard to this grievance," and that the grievant agreed that because "the subject of his grievance is no longer employed by the Commonwealth of Virginia there is little, if any, merit to continuing to pursue his concerns." The agency concludes that "[s]ince June there have been several contacts/conversations with [the grievant] but to date he has not taken any action to formally close the grievance." Thus the agency has requested that this Department close the grievance. During the investigation for this ruling, the grievant asserted that in fact he met with the former Senior Manager to discuss the grievance and the documents sought. The grievant also states that he still wants to continue with his grievance.

DISCUSSION

As noted above in EDR Ruling No. 2010-2381, the agency was ordered to conduct a search of its records to determine what documents are available to respond to the document

¹ Footnote from original ruling omitted.

² The Senior Manager, who appears to have been the person with whom the grievant was primarily concerned in his July 1, 2010 grievance, is apparently no longer with the agency.

request concerning at allegations of harassment and discrimination based on race. In addition, the agency was instructed to “revisit the grievant’s document request generally to determine what, if any, documents may be responsive.” The Ruling further instructed that “the agency is unable to determine what else the grievant is seeking, the agency should ask the grievant to clarify what he is seeking.” The ruling also noted that “to assure a common understanding, the grievant must provide additional detail to the agency to clarify the documents he wants the agency to produce.”

In this case, it appears that both parties made an initial attempt to comply with EDR Ruling No. 2010-2381. However, it also appears that attempts to communicate and clarify issues surrounding the document request have broken down. It is not evident why this breakdown occurred. This Department has “strongly encourage[d]” parties to a grievance to “communicate with each other when there are discovery disputes.”³ We have observed that disputes can potentially “be clarified through direct communication between the parties to address any differences in understanding what is being sought.”⁴ It would appear that this is such a case. To the extent discussions broke down and the grievance process halted at some point, either party could have notified the other in writing of any non-compliance, and allowing five-workdays to correct it.⁵ This notification process assures that the parties first communicate with each other about perceived noncompliance and resolve any compliance problems voluntarily, without this Department’s (EDR’s) unnecessary involvement.

Accordingly, the parties are instructed, within five-workdays of receipt of this ruling, to again confer regarding any remaining issues over requested documents and any remaining questions regarding the grievant’s intent to pursue his grievance. Both parties are to make a good faith effort to resolve any remaining procedural compliance issues and must notify the other party in writing on any potential non-compliance and allow five workdays to correct any noncompliance.⁶ As we noted in EDR Ruling No. 2009-2258, the EDR Director has the authority to render a decision against a party who has violated a substantial procedural requirement of the grievance procedure without just cause.

This Department’s rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

³ EDR Ruling No. 2009-2258.

⁴ *Id.*

⁵ *See* Grievance Procedure Manual § 6.3 (Party Noncompliance).

⁶ *See Id.*

⁷ *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).