

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: September 23, 2010; Ruling #2011-2773; Agency: Virginia Department of Transportation; Outcome: No Ruling (no jurisdiction).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2011-2773
September 23, 2010

The Virginia Department of Transportation (“VDOT” or “agency”) has requested a ruling regarding a document request from the grievant related to his March 25, 2010 grievance.

FACTS

During a phase of the agency’s restructuring, the grievant was not selected for layoff, but volunteered to be a substitute for any matched employee whose position was being eliminated. Had he been selected to serve as a substitute, it appears that the grievant’s employment with the state would have ended and he would have received enhanced retirement benefits under the Workforce Transition Act (WTA).¹ The agency, however, did not select him as a substitute, thus the grievant did not retire with enhanced benefits. The grievant asserts that the agency’s failure to select him as a substitute was inconsistent with the agency’s published sequence of consideration of matches. The grievant argues that in at least two cases, the agency failed to select him as the correct and most closely matched substitute based on his position and seniority.

The grievant challenged the agency’s action through a March 25, 2010 grievance. The grievance progressed through the agency management steps but was not qualified by either the VDOT agency head or this Department. The grievant has appealed the denial of qualification to the circuit court. In conjunction with his appeal, the grievant has requested the agency to provide him with additional documents. The agency has requested that this Department issue a ruling as to the grievant’s “right to obtain documents at this point as he does not have a valid grievance issue.” The agency contends that the grievant’s “appeal should be based on the information submitted to EDR for consideration in rendering the decision that his grievance does not qualify for a hearing and not on additional information that [the grievant] would like to add to the record.” In addition, the agency contends that there is no way to produce the requested document without protecting the identity of individuals not personally involved in this matter.

¹ Va. Code §§ 2.2-3200 et seq.

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.³

As an initial point, we note that the March 25th grievance is currently not under the jurisdiction of this Department, but rather that of the circuit court. We cannot conclude, however, that because this grievance has advanced to the circuit court, the grievant no longer has a right to request documents that relate to the actions grieved. That is because the circuit court “in its discretion, may receive such other evidence as the ends of justice require” when considering a qualification appeal.⁴ We note as well that if the circuit court were to qualify the grievance, this Department would resume jurisdiction as the grievance moved to hearing. For grievances qualified for hearing, hearing officers have express authority to order the production of documents.⁵ For now, though, the circuit court has jurisdiction over the grievance and is the appropriate tribunal to address requests for the production of documents and related objections. Accordingly, this Department will not intervene in the document request at this time.

Claudia T. Farr
Director

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

³ “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9. 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. *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ. 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.” Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁴ Va. Code § 2.2-3004(E). “Other evidence” appears to refer to evidence outside of the grievance record.

⁵ *Rules for Conducting Grievance Hearings*, (“Rules”) § III (E).