

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: October 14, 2010; Ruling #2011-2785; Agency: Department of Corrections; Outcome: No Ruling – premature.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2785
October 14, 2010

The grievant requests a compliance ruling from this Department regarding the grievance he initiated with the Department of Corrections (DOC or the agency) on July 14, 2010. The grievant claims that management has failed to properly respond to his request for documents and information relative to his grievance.

FACTS

The grievant is employed as a Correctional Sergeant with DOC. The grievant was issued a Group I Written Notice for unsatisfactory job performance: allegedly making inappropriate statements over the telephone to a Corrections Officer. The grievant challenged the disciplinary action by initiating a grievance on July 14, 2010.

On or about August 10, 2010, the grievant requested various documents and/or information allegedly relevant to his grievance. The agency responded on August 20, 2010, stating that the requested documents had either been destroyed¹ or were not relevant to the grievance. On August 24, 2010, the grievant requested additional

¹ This ruling does not address whether the agency was required under law or policy to keep the documents that were destroyed. As noted in prior EDR rulings, the grievance procedure permits 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." EDR Ruling No. 2009-2269; *Rules for Conducting Grievance Hearings* V(B). This is akin to the missing evidence inference (also known as the spoliation inference) recognized by state and federal courts in Virginia. *See, e.g., Wolfe v. Virginia Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 580-81, 580 S.E.2d 467, 475 (2003) ("[W]here one party has within his control material evidence and does not offer it, there is [an inference] that the evidence, if it had been offered, would have been unfavorable to that party. . . . A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.") (internal quotation omitted) (alteration in original). Thus, the grievant would not be precluded from arguing at hearing or in court (should the grievance proceed to one of those venues), that an adverse inference on the factual merits of the grievance should be drawn against the agency based on the destruction of requested documents. The Virginia Public Records Act and/or DHRM Policy may or may not be relevant to such a claim.

documents from the agency, apparently his third document request. To this third request, the agency responded that the documents sought were not relevant to his grievance.² Not satisfied with the agency's responses to his document requests, the grievant sent a letter of noncompliance to the agency head on September 9, 2010. That same day, the grievant requested qualification of his grievance. In response to the grievant's notice of noncompliance, on September 16, 2010, the agency sent the grievant a letter indicating that it has provided the grievant with all the documents that "exist and relate to your grievance." As such, the grievant seeks a compliance ruling from this Department on whether the agency has failed to comply with the grievance procedure.

The grievant presented his compliance ruling request to this Department on September 27, 2010, ten days after the agency qualified the grievance on September 17, 2010, and five days after this Department's September 22, 2010 receipt of a request for appointment of a hearing officer to preside over adjudication of this grievance. A hearing officer has not yet been appointed pending the outcome of this Department's compliance ruling.

DISCUSSION

In a case such as this where the agency's request for the appointment of a hearing officer was received in advance of the grievant's compliance ruling request, it makes little sense to halt the grievance process so that EDR can sort out the document production dispute. At this late stage in the grievance process, the *only* purpose for which the requested documents have any bearing is the grievance hearing. Moreover, the hearing officer who will preside over the hearing will be called upon to make relevancy determinations on *all* evidence presented at hearing. For both the hearing officer and this Department to rule on the document issues *at this stage in the grievance process* would be redundant and an inefficient use of state resources. Thus, allowing the hearing officer to make the determination of whether a particular document should be produced, once the grievance has been qualified, is simply a matter of administrative efficiency and is consistent with prior EDR precedent.³

² The ruling request appears to be silent as to any documents requested during the second request. Therefore, this Department assumes that the grievant is now satisfied with any agency response to that request. If this assumption is incorrect, consistent with the general holding of this ruling, the grievant may voice any objection to the agency's response to the hearing officer appointed to hear this case and request that he order the production of such documents, assuming they exist.

³ If the grievance were still at the resolution steps stage of the grievance process or even at the agency head's qualification stage, the grievance process would have halted as the requested documents may have had some bearing on an agency respondent's response or the agency head's determination. Because this grievance has proceeded through all resolution steps and was qualified prior to the compliance ruling request, the requested documents could have no bearing on any agency management action. Therefore, there is no reason to stop the grievance process. We note also that §8.2 of the *Grievance Procedure Manual* states that if documents are denied prior to the appointment of a hearing officer, the requesting party *may* seek relief from this Department. This provision is intended to provide general guidance to parties as to whom they should direct their request for relief. This provision does *not* divest from this Department the discretion to pass to the hearing officer the initial determination of document relevancy

Accordingly, all remaining disputes relating to the production of documents should be presented to the hearing officer, once appointed, for his determination. If either party to this grievance later believes that the hearing officer exceeded his authority or failed to comply with the grievance procedure by ordering or failing to order the production of specific documents, that party may then request a compliance ruling from this Department.

The parties are advised to contact the hearing officer prior to the scheduled hearing date to request and discuss the production of documents in this matter. This Department's rulings on matters of compliance are final and nonappealable.⁴

Claudia T. Farr
Director

when, as in this case, the grievance has passed through each of the resolution steps and has been qualified for hearing. *See also* EDR Ruling No. 2008-2001.

⁴ *See* Va. Code § 2.2-1001(5), 2.2-3003(G).