

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: November 2, 2010; Ruling #2011-2787, 2011-2788; Agency: Department of Social Services; Outcome: Agency In Compliance (in part), Agency Not In Compliance (in part).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Nos. 2011-2787, 2011-2788
November 2, 2010

The grievants have requested a ruling regarding the Department of Social Services' (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.¹ The grievants have sought various documents related to the elimination of their former division and their resulting layoffs. In EDR Ruling Nos. 2010-2628, 2010-2629, this Department addressed the agency's estimated costs for the collection and production of the documents requested, which are to be paid by the grievants. Following that ruling, and other additional rulings, the grievants have reduced the number of agency employees whose documents they seek to one individual and the search terms to utilize from 72 to 59. As a result, the agency adjusted its cost estimates. However, the grievants have raised issues with these new estimated charges.

DISCUSSION

Document Charges

The *Grievance Procedure Manual* provides that "[t]he party requesting the documents may be charged the actual cost to retrieve and duplicate the documents."² 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) can be instructive. However, this Department must also review whether the agency's proposed charges are reasonable under the facts of this case.

Document Collection

The agency has estimated costs for the collection of three types of documents: network files, hard drive files, and e-mails. The estimates of 45 minutes to collect one user's e-mail and

¹ See EDR Ruling Nos. 2010-2497, 2010-2498.

² *Grievance Procedure Manual* § 8.2.

15 minutes to collect one user's hard drive files do not appear unreasonable. However, the estimated time of four hours to collect network files must be reduced. In EDR Ruling Nos. 2010-2628, 2010-2629, this estimate appeared reasonable because the network files of many users across multiple network folders were being collected. Now, however, there is only one user and one network folder to be collected. As such, this cost should be substantially reduced to one-half hour, leaving a total of 1.5 hours maximum for collection of all these documents.

Document Searches

The agency has estimated costs for the searches across the three types of documents discussed above. In EDR Ruling Nos. 2010-2628, 2010-2629, this Department determined that a maximum of 10 minutes per search was reasonable when the searches would be run in a combined folder of all users' e-mails. However, now that only one user's e-mail is being searched, it would appear that the agency's original estimate of three minutes per search term is much more appropriate. The agency must adjust its charges to reflect a maximum of three minutes per search for e-mails.

In EDR Ruling Nos. 2010-2628, 2010-2629, this Department had suggested that if the parties agreed to a combined search of all hard drive files ("C & H") for all users, a maximum time per search would be five minutes. The agency has listed five minutes per search for these documents in its latest cost estimate. However, because only one user's files are being searched, the agency's original estimate of two minutes per search is more appropriate. The agency must adjust its charges to reflect a maximum of two minutes per search for these files.

The agency estimates 10 minutes per search term for the network drives. While this figure might seem more reasonable when multiple network folders for many users are being searched, again, this is no longer the case here. Because only one network folder will be collected and searched for one user's files, 10 minutes appears to be too long an estimate. In this Department's opinion, a maximum cap of five minutes per search is reasonable. The agency must adjust its estimated charges to reflect this amount unless it can show that five minutes is an unreasonable timeframe.

Searched Device

The grievants have also raised issues regarding the specific device being searched. Based on information received from the agency, it appears that the original network drive folders exist and will be searched. As to the hard drive files, when the individual left the agency, an image was made of the hard drive. The hard drive was subsequently returned to inventory to eliminate the service cost of keeping it at the agency. Therefore, the device being searched for the individual's hard drive files is the image that was made of the hard drive.

The grievants assert, and this Department has no evidence to dispute, that the image of the hard drive will not contain file fragments and/or partial files from the original hard drive that could contain either deleted files or prior versions of documents. Consequently, the grievants assert that a search of the image will not locate any such files. At this stage, however, we have

reviewed nothing beyond mere speculation as to whether there would be anything relevant, much less material, in any file fragments and/or partial files on the original hard drive, even if it still exists and could be obtained from inventory. Without more, there is no reasonable basis to require the agency to expend the cost and effort to retrieve the hard drive or to employ whatever process might be necessary to extract file fragments and/or partial files from the device. This effort would only create further unnecessary and unreasonable delays in this case. Without some showing beyond speculation as to the existence of relevant and material documents in partial files or file fragments, this Department will not order the agency in this case to undertake such an extraordinary effort under the grievance process.

Harassment/Impeding Agency Operations

The grievance procedure provides that a grievance cannot “be used to harass or otherwise impede the efficient operations of government.”³ To find that a grievant has failed to comply with this provision of the *Grievance Procedure Manual*, there must be evidence establishing that the grievant knew with substantial certainty that his/her actions would impede the operations of an agency.⁴ It may be inferred that a grievant intends the natural and probable consequences of his/her acts.⁵ While neither the number, timing, or frivolous nature of the grievances, nor related burden to an agency, are controlling factors in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors. Such determinations are made on a case-by-case basis.⁶

In EDR Ruling Nos. 2011-2736, 2011-2737, this Department advised that “[f]urther requests for reconsidered compliance rulings on these same issues by the grievants will be relevant in determining whether they are using the grievance procedure to harass or impede agency operations.” As such, the agency has requested that this Department address this matter with regard to the grievants’ current ruling request. However, because the grievants have raised reasonable compliance issues that could not have been raised before, we cannot find that this ruling request is evidence of an intent to harass or impede agency operations. Therefore, the grievances will not be closed at this point. However, both parties should be aware that their conduct in these grievances will continue to be subject to review for any action that would be out of compliance with the grievance procedure.

CONCLUSION

The agency is ordered to provide updated estimates to the grievants consistent with this ruling **within five workdays of the agency’s receipt of this ruling**. The grievants will be responsible for paying one-half of the estimated amount before the document collection and production will progress. The deposit of one-half of the estimated charges will be due **within five workdays of the grievants’ receipt of the updated estimate of charges**. Once the

³ *Grievance Procedure Manual* § 2.4; see also Va. Code § 2.2-3003(C).

⁴ See EDR Compliance Ruling No. 99-138, Sept. 21, 1999. Closing a grievance on these grounds is an extreme sanction. As such, the analysis of such a claim carries a commensurately high burden.

⁵ See *id.*

⁶ See *id.*

documents are provided, the grievants will be responsible for paying the remainder of the estimated charges. However, as indicated in EDR Ruling Nos. 2010-2628, 2010-2629, the agency may not collect amounts from the grievants that exceed the actual time costs incurred.⁷

This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁷ See *Grievance Procedure Manual* § 8.2; EDR Ruling Nos. 2010-2628, 2010-2629 at p.4.

⁸ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).