Issue: Compliance – Grievance Procedure (Documents); Ruling Date: December 17, 2010; Ruling No. 2011-2827; Agency: Department of Corrections; Outcome: Agency Not In Compliance.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2827
December 17, 2010

The grievant has requested a ruling regarding the alleged noncompliance with the grievance procedure by the Department of Corrections (the "agency") in not providing requested documents. This ruling finds the agency has not complied with the document discovery provisions of the grievance procedure.

FACTS

On August 16, 2010, the grievant received a Group II Written Notice for failure to follow a supervisor's instructions. According to the Written Notice, the grievant had a confrontation on May 19, 2010, with a fellow Sergeant in which she allegedly was disrespectful to her co-worker. Subsequently, the grievant was reprimanded by her Captain and Major for her alleged disruptive behavior and disregard for their directives. The grievant challenged the Written Notice in her September 9, 2010 grievance alleging such issues as the untimely issuance of the Written Notice, violation of due process, inconsistent reports and statements, inconsistent treatment, and extreme punishment. To support her claims, the grievant requested that the agency provide any emails, correspondence, incident reports, or documents sent, received, or written by the Warden, Major, Captains, Lieutenants, Sergeants, Human Resource Office, or any other staff at the facility where grievant works regarding the incident that occurred on May 19, 2010, which involved the grievant.

In response, the agency provided one email and all the incident reports**,** but the agency questions whether the additional emails requested are relevant and has not produced them. The grievant seeks a compliance ruling on this matter, asserting the documents requested are relevant to the action grieved and should be made available to her.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[1] 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 noncompliance.[2] If the opposing party fails to correct the noncompliance within this five-day

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[1] *Grievance Procedure Manual* § 6.3.
[2] *Id*.

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 its delay in conforming to EDR's order.[3]

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, in a timely fashion."[4] 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."[5] 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.[6] 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."[7]

Moreover, this Department has 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.

In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well established and applicable legal privilege,[8] this Department will weigh the interests expressed by the party for nondisclosure of relevant documents against the requesting party's particular interests in obtaining the documents, as well as the general presumption under the grievance statutes in favor of disclosure. Relevant documents must be provided unless the opposing party can demonstrate compelling reasons for nondisclosure that outweigh the general presumption of disclosure and any competing interests in favor of disclosure.

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[3] 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.

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

[5] *Grievance Procedure Manual* § 9.

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

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

[8] Certain well established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. *See, e.g.,* EDR Ruling No. 2002-215 (discussing attorney-client privilege).

Here, the agency asserts the emails are irrelevant, stating that "it is irrelevant whether [the grievant] feels supervisors are talking about her or not, or like her or not." On the other hand, the grievant argues that the e-mails are relevant in that she needs to review the emails to assess the consistency of the reports and statements made about the incident, to review the consistency of treatment among her co-workers, and to determine whether the Written Notice was timely issued.

It would appear that the documents related to the May 19, 2010 incident are likely relevant to this grievance and potentially material to many of the grievant's claims. The May 19th incident served as the basis for the discipline against the grievant, thus it is difficult to see how these documents would not be relevant. The agency may be correct in saying that it is irrelevant whether the grievant <u>feels</u> as though supervisors are talking about her, however, <u>if</u> they <u>are</u> talking about her in the context of the May 19th incident, the content of those discussions could be relevant, indeed, highly relevant and material. Evidence indicating whether supervisors "like" or, more importantly, dislike the grievant, could also be relevant to this grievance as a possible mitigating circumstance.[9]

The agency has also expressed that to the extent that these emails are recoverable, they will not retrieve these emails due to the high-cost, time-intensive nature of the search and the undue burden it would place on the agency. The agency explains that during the ordinary course of business, the agency stores all employee emails on their server for sixty days. Thereafter, the only email retrieval method available to the agency is tape backup; tape backups are kept for a total of fourteen months by Northrop Grumman. A tape backup is kept by date and includes all the employees' (over 10,000 employees total) emails for a particular date. In order to find a specific email on the tape backup, the agency would need the exact date and a specific name to try and pinpoint the requested documents. This process is very time-intensive based upon the sheer volume of emails that would be searched. However, the agency has disclosed there are other options that may be available to retrieve the requested documents. For example, the agency can look at any personal storage type (PST) files saved in Microsoft Outlook, any emails saved on their server, or any emails that may have been saved on a hard drive of a computer as long as they know the precise name and tag number of the computer they need to search. The agency has not attempted these alternative search methods at this time. Likewise, the agency has failed to disclose exactly how much or how long it will take to retrieve the emails from tapes in order to determine whether an undue burden exists.

When balancing the interests of both parties, and in light of available facts, we cannot find that just cause exists for nondisclosure. As discussed above, to the extent such e-mails exist, they are likely relevant. Moreover, while the agency asserts that producing e-mails currently stored on backup tapes would be unduly burdensome, the agency does not appear to have attempted to use or consider alternative search methods such as looking for responsive PST files saved in Microsoft Outlook, emails saved on the agency's server, or any emails that may have been saved on hard drives. In addition, the grievant has agreed to further limit the scope of her request to certain individuals.[10] Accordingly, the grievant should provide the agency with her

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[9] *Rules for Conducting Grievance Hearings,* VI (B)(1). Mitigating circumstances can include "improper motive."

[10] The grievant's original request was for documents from the Warden, Major, Captains, Lieutenants, Sergeants, Human Resource Office, or any other staff at the facility regarding the incident that occurred on May 19, 2010,

list of named individuals and the agency shall attempt retrieval based upon this additional information. If there are additional questions about what specific information the grievant is seeking, the parties should communicate directly to clarify those concerns. Once the grievant provides the agency with her limited search criteria, the agency is ordered to produce documentation to the extent it exists through alternative search methods as described above, unless it is prepared to demonstrate why just cause exists for not producing them. Should the grievant find she is not satisfied with the agency's response, she can renew her request for additional documents, such as those potentially contained on backup tapes, and the agency will then be required to show why just cause exists (e.g., expense and time figures demonstrating that retrieval is unduly burdensome).[11]

This Department's rulings on matters of compliance are final and nonappealable.[12]

Claudia T. Farr
Director

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which involved the grievant. This group of individuals would appear to be sufficiently narrow by the terms of the request—it is limited only to those employees who are discussing the incident for which she was disciplined. The grievant is willing to provide the agency with names of specific individuals that she apparently believes may have been witnesses or decision makers regarding her discipline. As a general rule, an employee will not be required to name particular individuals because the employee may not be aware of who was involved in a discussion or who may have witnessed a particular event.

[11] While this Department recently held that production of documents on backup tapes would not be required (EDR Ruling No. 2010-2628, 2010-2629), this case appears to be factually distinguishable. In the case addressed in Ruling No. 2010-2628, 2010-2629, the grievants asked the agency to undertake a substantial document review and the agency's collection method resulted in a failure to provide certain documents. The agency was ordered to perform a second electronic document search, using the same processes, computers, servers, files, and accounts of those employees identified as before, but by using 72 additional search terms for 25 different users. In that case, the Department found that requiring the agency to access backup drives would create unnecessary and unreasonable delays, expense, and expended effort for likely no additional relevant or material documents since the relevant documents appeared to be readily available from other sources. Here, the requested documents may not be available from any other source than the backup tapes. Although the agency internally retained the requested emails for sixty days, the agency states the emails are no longer readily available and that they may be required to search the backup tapes to retrieve the requested documents. It is noteworthy that the grievant was not disciplined until more than 60 days had passed following the May 19, 2010 incident. Thus, she had no reason to grieve at that point and, more importantly, no basis upon which to request documents under the grievance procedure. Thus, by the time she timely grieved her discipline, once issued, emails would have already been archived.

[12] *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).