

Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 6, 2011;
Ruling No. 2011-2858; Agency: Department of Corrections; Outcome: Agency Not in
Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULINGS OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2011-2858
July 6, 2011

The grievant has requested a compliance ruling regarding his two November 15, 2010 grievances with the Department of Corrections (DOC or the agency). The grievant asserts that he has not been provided with documents requested pursuant to his grievance.

FACTS

On November 15, 2010, the grievant initiated two grievances with the agency. The first grievance ("Grievance #1) challenges the grievant's receipt of a Group II Written Notice for failure to obey a direct order given by his supervisor. The second grievance ("Grievance #2) challenges the grievant's 2009-2010 performance evaluation, which references the Group II Written Notice that is the subject of Grievance #1.

In both grievances, the grievant asserts that the Written Notice and the performance evaluation are the most recent examples of ongoing harassment he endured during his approximately five months of employment at Facility A. Other alleged harassing acts cited by the grievant include, but are not limited to, the following: selective nonsupport from supervisory staff at Facility A, frequent post changes, especially after a complaint has been lodged by an offender, and denial of his leave request to attend an interview for promotion. The grievant further asserts that Facility A supervisors harass and terminate the "good" officers when they attempt to do their job correctly and if you are not part of the "click," [sic] you are targeted for "destruction." In addition, the grievant asserts that the agency had misapplied agency policies and procedures.

In connection with his grievances, the grievant has made several requests for documents, including:

1. Copies of the log book pages from 09/18/10;
2. Copies of the log books from AB Building for the period of time that the grievant was assigned there;
3. For the time period of 5/25/10 through 09/18/10, the following:
 - a. Roster sheets for A group day;
 - b. The number of employees that were not moved from their assigned post to another post;
 - c. The percent to total days of each employee that was moved from their assigned post to another post;

4. Copies of offender complaints against the grievant;
5. For the past two years, date and subject matter of grievances filed by other employees at the grievant's facility who received written notices broken down by work group and shift;
6. For the past two years, information regarding resignations and terminations of other employees at the grievant's facility broken down by work group and shift;
7. For the past two years, the date of other employee grievances filed by those at the grievant's facility and the age, sex and race of these employees; and
8. For the past two years, the date of employee grievances filed by those at others facilities in the region and the age, sex and race of these employees.

The agency has provided the grievant with the log book pages for 09/18/10 (Request #1 above) and appears to have given the grievant that part of the roster sheets relevant to him only. However, it has denied the grievant's other requests on the basis of relevancy and undue burden. As such, the grievant seeks a compliance ruling from this Department.

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.”¹ 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.”² 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.³ 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.”⁴

This Department has also 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.

Log Book Pages for AB Building (Request #2)

As noted above, Grievance #2 challenges the grievant's 2009-2010 performance evaluation. According to the grievant, the log book pages for AB Building would demonstrate that he made rounds every 10-20 minutes, while others did not, and would support his contention

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

² *Grievance Procedure Manual* § 9.

³ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

that the rating he received on his 2009-2010 performance evaluation was undeserved. The log book pages for AB building relate to the grievant's performance of his duties and thus "relate to" his grievance. Moreover, there is insufficient evidence of any undue burden. At the time of his performance evaluation, the grievant had been assigned to Facility A (and therefore to AB Building) for no more than approximately five months. As such, to the extent such documents exist, the agency is ordered to produce the documents requested **within 10 workdays of its receipt of this ruling.**

Roster Sheets (Request #3)

The grievant asserts that he has been harassed because he is frequently reassigned from his assigned post to other posts. According to the grievant, post changes are reflected on the daily roster sheets and he seeks copies of the roster sheets to support his assertion that he was harassed by being frequently reassigned from one post to another. Roster sheets that show reassignment of officers from one post to another could demonstrate that the grievant was treated differently and thus, such documents appear relevant to his grievances and as such must be provided. The agency has apparently agreed to provide, or has provided, the grievant with roster sheets showing when he was moved but not when other officer's post locations have been changed. The grievant asserts that in order to demonstrate that he was treated differently by management at Facility A, he needs to see the roster sheets in their entirety without redactions.

Under circumstances such as those present here, this Department will weigh the requesting party's particular interests in obtaining the unredacted document against the interests expressed by the party for redaction. The privacy of nonparties will be protected unless the party seeking full disclosure of the documents can demonstrate overriding reasons for such disclosure that outweigh the interests of protecting the privacy of nonparties and any competing interests in favor of redactions.

When balancing the interests of both parties, and in light of available facts, we cannot find that the agency's interest in redacting the names of others on the roster sheets outweighs the grievant's interest in obtaining the roster sheets in unredacted form. As noted above, the grievant is alleging that he was treated differently by being frequently reassigned from one post to another. The reassignment was apparently reflected on the roster sheets and in particular, when a reassignment took place, the name of the individual to be reassigned was "whited out" on the roster sheet. As such, according to the grievant, while the name of the individual being reassigned is not necessarily of great importance, what was happening in the name column was important as this is where the alleged differential treatment of the grievant would be reflected. Accordingly, **within 10 workdays of its receipt of this ruling**, the agency is ordered to produce the roster sheets requested. The roster sheets may be redacted so long as relevant information and in particular, that information showing when an officer was reassigned from one post to another is not redacted.

As to the grievant's other requests with regard to the roster sheets (i.e., the number of employees that were not moved from their assigned post to another post and the percent to total days of each employee that was moved from their assigned post to another post), the grievant appears to be asking the agency to compile information and create a document that is not currently in existence. The grievance procedure does not require a party to create a document

that does not exist.⁵ As such, the agency has not violated the grievance procedure by failing to provide such information.

Offender Complaints (Request #4)

The grievant also seeks copies of offender complaints and/or offender grievances against him. The agency argues that these documents are not relevant and/or would be unduly burdensome to produce. Given the grievant's contention that his post reassignments were often connected to complaints by offenders housed at Facility A, this Department cannot find that the requested materials are not related to the grievance, as asserted by the agency. Further, while the agency has asserted that producing the documents would be overly burdensome, this assertion seems to be based on the workload of the human resource officer at Facility A. The day-to-day workload of the individual responsible for gathering the documents requested, alone, is insufficient to assert that a request itself is overly burdensome. Moreover, these documents directly relate to the grievant's alleged failure to obey a direct order. Therefore, the interests weigh in favor of disclosure. However, given that sensitive personal information of inmates is contained in these documents, identifying information may be redacted,⁶ and the grievant must make every reasonable effort to preserve the confidentiality of these documents. Moreover, because this ruling only resolves the issue of document production under the grievance procedure rules, the grievant is permitted to use the documents solely for purposes of his grievances.⁷ Accordingly, within **10 workdays of its receipt of this ruling**, the agency is ordered to produce any such documentation.

Remaining Requests for Documents (Requests ## 5 - 8)

The grievant's remaining requests seek information related to grievances initiated by others at Facility A for the past two years; grievances initiated by employees of other facilities in the same region as Facility A; the age, race and sex of the individuals employed at Facility A and other facilities in the region that filed grievances in the past two years; and resignations and terminations of other employees at Facility A for the past two years. The agency has declined to provide any of these documents on the basis of relevancy and/or because compiling the documents would be overly burdensome. The grievant asserts that he needs the documents to demonstrate a pattern and history of harassing behavior by management at Facility A.

At this early stage of the grievance process, this Department cannot conclude that the documents requested are wholly irrelevant to the grievances as alleged by the agency. However, when balancing the interests of both parties under the facts of this particular case, including but not limited to, the probative value of the documents to the grievant, the confidentiality of those not personally involved in the two November 15, 2010 grievances and the burden to the agency to produce such documents, this Department concludes that the grievance and/or disciplinary documents requested need not be disclosed.

⁵ *Grievance Procedure Manual* §8.2

⁶ See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2; see also *infra*.

⁷ Nothing in this ruling is intended to preclude the grievant from requesting, obtaining, and using these and/or other similar documents pursuant to some other provision of law.

In particular, as noted above, the grievant is alleging that he has been harassed by management at Facility A. During this Department's investigation of this ruling request, the grievant indicated that he wanted information regarding grievances, resignations, and terminations over the past two years to show a potential pattern of harassment by management at Facility A. That is, the grievant apparently believes that a significant number of grievances, resignations and terminations by those employed at Facility A will support his contention that management at that facility harasses its employees more than at other facilities in the region and as such, his performance evaluation and the disciplinary action taken against him were also harassing. This Department disagrees as to the probative nature of any such documents. Even if the grievant were to obtain from the agency numerous grievances initiated by those at Facility A and/or proof of high turnover at Facility A, this information would be of little probative value to the grievant's two November 15, 2010 grievances. Simply establishing a high number of grievances filed and/or high turnover at Facility A (while potentially indicative of unsatisfied employees at Facility A) does not demonstrate that harassment or any other improper motive was the reason for the Group II Written Notice he received for failure to follow instructions or the performance ratings he received.

Given the tenuous probative value of these particular documents versus the privacy interests of those not personally involved with the grievance and the concerns raised by the agency, we find that the agency's failure to produce the documents requested in Requests ## 5 – 8 above does not constitute noncompliance with the document production provisions of the grievance process and these documents need not be produced. This ruling does not mean, however, that the grievant is prohibited from attempting to raise the issues of harassment or improper motives at hearing. This ruling simply concludes that pursuant to Section 8.2 of the *Grievance Procedure Manual*, the documents requested need not be produced.

In conclusion, the agency is ordered to produce documents as set forth above. This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

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