

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: February 3, 2011; Ruling No. 2011-2860; Agency: Virginia Community College System; 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 Virginia Community College System
Ruling Number 2011-2860
February 3, 2011

The grievant has requested a ruling regarding the Virginia Community College System's (the agency's) alleged noncompliance with the grievance procedure in allegedly failing to produce requested documents.

FACTS

On or about September 22, 2010, the grievant received a Group I Written Notice for violating policy related to cell phone usage. The grievant has challenged the Written Notice in his grievance, dated October 2, 2010, and requested various documents. The agency has provided some information to the grievant, but as to the particular requests that are the subject of this ruling, the agency has provided no documents in response. As such, the grievant has sought this compliance ruling.¹

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. "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."³ 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.⁴ 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."⁵

¹ Additional facts as to each particular document request are included below.

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

³ *Grievance Procedure Manual* § 9.

⁴ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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.

Statement accompanying monthly bills

The grievant has requested a statement that allegedly accompanied monthly bills for cell phone use, which included language related to personal use of such cell phones. During the course of this Department's investigation for this ruling, the agency appears to have provided the grievant a copy of such a statement. Therefore, this document request will not be addressed further in this ruling.

Audit report / How brought to supervisor's attention

The grievant has requested an "audit report" that was reportedly completed regarding employee usage of cell phones at the Community College, as well as documents pertaining to how his alleged cell phone misuse was brought to his supervisor's attention. Based on the information we have attempted to gather in this grievance, we cannot determine that there was any kind of formal audit. The agency has stated that periodic spot checks were performed of employee cell phone usage and matters referred for follow-up or discipline depending on the circumstances. Therefore, it is presumed that the grievant's cell phone usage in this case was discovered during one of these spot checks rather than a formal audit, though the difference in terminology may be negligible here.

Documents related to an audit or spot check of the grievant's cell phone use, as well as any documents pertaining to how the grievant's alleged cell phone misuse was brought to the attention of his supervisor, could be relevant to this grievance. As such, the agency is ordered to provide the grievant with documentation of any audit or spot check of the grievant's cell phone use, as well as documentation reflecting how his supervisor discovered the allegedly improper cell phone use, which led to the issuance of the Written Notice in this case.

Method of disciplinary actions of others

The grievant also seeks information about how other Community College employees were disciplined (or not) following allegedly improper cell phone use. Documents reflecting such information, if they exist, could be relevant to the consistency with which the agency has handled issues of discipline for similar instances of misconduct. The agency asserts that such information need not be provided because disciplinary actions of other employees are confidential. While that is generally the case, evidence about the consistency of an agency's disciplinary practices, and therefore, information about how other employees have been disciplined, can be discoverable under the grievance procedure. Policy protections against disclosure of such information do not apply to a document request under the grievance

procedure.⁶ Indeed, the grievance statute specifically contemplates the production of documents related to non-parties.⁷

As such, the agency must produce information responsive to this document request. This ruling makes no determinations, however, as to the relevant scope of such discoverable documents. Rather, we will first leave such matters to the parties to identify what is being sought and what would satisfy the grievant's document requests. For instance, it is currently not clear which employees would be appropriate comparators to the grievant such that the consistency with which the agency treats them would be applicable to the grievant's situation. Rarely would an agency-wide scope be permissible. In addition, there could be different categories of documents that are potentially relevant to this question: disciplinary actions of other employees, counseling of employees whether formal or informal, and/or documents reflecting how employees were flagged during audits or spot checks (to differentiate those who were referred for possible disciplinary actions and those that were not, which could include, but not be limited to, the spot check phone-use records of other employees).

When providing copies of such documents, however, any non-relevant personal information must be redacted, which could include, for example, names, social security numbers, telephone numbers, or home addresses.⁸ Further, the parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of producing of original redacted documents.⁹

Cell phone plan rates

The grievant has requested information regarding the Community College cell phone plan rates. This Department sees no relevance to such documents. To the extent that the specific cell phone plan applicable to the grievant's cell phone is relevant, that information, including the amount of minutes per month, appears on the monthly bills already provided to the grievant. As such, the agency need not provide further documentation to the grievant regarding this request.

Documents supporting prior counseling

On the Written Notice the grievant received, the agency indicated that the grievant had been counseled in 2008 regarding credit card usage and had his credit card revoked. The grievant now seeks documents related to the counseling that support "the claim I made inappropriate charges." The grievant also seeks a copy of the grant to which he allegedly he made inappropriate charges. In response, the agency has stated that "[t]here is no record of a

⁶ E.g., EDR Ruling No. 2009-2087; EDR Ruling No. 2007-1437; EDR Ruling No. 2006-1199; EDR Ruling No. 2004-853.

⁷ Va. Code § 2.2-3003(E) ("Documents 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."); *Grievance Procedure Manual* § 8.2 (same).

⁸ See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁹ E.g., EDR Ruling No. 2006-1312.

disciplinary action in regards to the misuse of school property.” However, it appears the grievant is seeking documents relating to a “counseling” (which would appear in the supervisor’s file) rather than a “disciplinary action” (which would appear in a personnel file). Therefore, the agency’s response does not accurately address the grievant’s request.

Because the agency is apparently relying on the prior 2008 counseling for credit card use as an aggravating factor in this disciplinary action, the counseling itself would appear to be relevant to the grievance. Therefore, the agency is ordered to produce documentation supporting the 2008 counseling resulting from the grievant’s alleged inappropriate credit card charges against a grant. However, the grievant’s request for the entirety of the grant documentation is far too broad. The 2008 counseling memo is only an aggravating factor in this case and not a central question of the grievance. Consequently, full discovery of all grant documentation is not appropriate in this instance as it would include far more information than that which would be even remotely relevant.

Pattern of behavior documents

The grievant also seeks certain documents related to the charge in his grievance about a “pattern of intimidation and inappropriate behavior by human resources.” The documents he seeks relate to a nomination for an award during the period of March/April 2009. The agency has responded to the grievant’s request by stating that “HR has no records” or “No HR records found.”

The grievant has presented no information to this Department that would credibly dispute the agency’s assertion that no such records exist in human resources. However, it is possible that some of those documents could exist outside the human resources department. As such, the agency must respond again to these requests to indicate whether the agency has any of the requested documents in any department, not simply human resources. It is the agency’s duty to determine whether the requested documents exist anywhere in the agency’s custody or control, not just in the particular department to which the document request is directed. If responsive and discoverable documents do exist outside human resources, they must be provided to the grievant.

CONCLUSION

Based on the foregoing, the agency is ordered to produce requested documents in response to the grievant’s requests as identified above **within five workdays of receipt of this ruling**. This Department’s rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

¹⁰ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).