

Issue: Compliance – Grievance Procedure (documents); Ruling Date: February 11, 2011; Ruling No. 2011-2864; Agency: Virginia Department of Transportation; Outcome: Agency In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Transportation  
Ruling Number 2011-2864  
February 11, 2011

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

FACTS

On September 7, 2010, the grievant received a Group II Written Notice for a violation of safety rules, failure to follow a supervisor’s instructions or otherwise comply with established written policy, and improper use of state equipment. The grievant challenged the Written Notice in his October 2, 2010 grievance, alleging the Written Notice was a form of workplace harassment, workplace violence, and discrimination. Additionally, the grievant alleges he has been denied access to his personnel records and has been denied his right to employee training and development. To support his claims, the grievant requested that the agency provide all documents including handwritten and typed notes, statements, electronic messages, human resource advice, and any findings that were documented at any meeting or through any investigation regarding the grievant.

In response, on October 19, 2010 the agency mailed the grievant a copy of his personnel file, supervisor’s file, and training record by certified, first-class U.S. mail. On November 29, 2010, the grievant emailed a notice of noncompliance to the agency, indicating he had not received any of the requested documents and broadening his request to include “all documents such as statements, electronic messages, HR advice, notes (handwritten or typed) taken at meetings or through investigations by [seven named individuals], and the grievant’s supervisor’s file.” Additionally, the grievant attached an itemized list of documents he was specifically seeking.

In response to the November 29<sup>th</sup> noncompliance email, on December 13, 2010 the agency sent by certified, first-class U.S. mail several of the items requested in the grievant’s list, including all counseling memos, performance evaluations, self evaluations, letters of commendation, and certificates of training that were in the agency’s possession. Furthermore, the agency responded to grievant’s itemized list line by line and provided a response for each item, explaining why some of the documents could not be produced.

The grievant sent two subsequent emails to the agency on December 17, 2010, and December 21, 2010, indicating he had not received all of his requested documents. In the December 21<sup>st</sup> email, the grievant once again attached the itemized list of documents he was seeking, and again the scope of the itemized list was expanded. In response, the agency decided it was best to make copies of all the previously requested documents and have the grievant pick them up at the agency location. On January 3, 2011, the grievant came to the agency and signed a receipt for these documents. Although the first and second packet did not include certain requested documents, the third packet of documents did include handwritten notes from supervisors and human resources, daily diaries, and records from previous supervisors that concerned the grievant.

On January 20, 2011, the grievant sent another noncompliance email to the agency and once again attached the itemized list of documents he was seeking. The scope of this itemized list had been expanded even further from the prior two lists and included six pages of document requests and/or explanations of why certain documents were needed by the grievant. On January 21, 2011, the agency responded to grievant's list line by line and provided a response for each item, explaining that most of the information the grievant was seeking had either been previously produced or did not exist.

On February 2, 2011, the grievant sent another noncompliance email to the agency and attached the itemized list of documents he was seeking. The scope of this list was more expansive than before and included nine pages of document requests and/or explanations of why certain documents were needed by the grievant. The agency has not responded to this most recent request.

The grievant continues to allege he is missing several of the requested documents.

### 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, in a timely fashion.”<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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

<sup>2</sup> *Grievance Procedure Manual* § 9.

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

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

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. All such documents must be provided within five workdays of receipt of the request. If it is not possible to provide the requested documents within the five workday period, the party must, within five workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than ten workdays from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or “just cause,” the withholding party must provide the requesting party with a written explanation of each claim, no later than ten workdays from receipt of the document request.<sup>5</sup>

In this case, some of the grievant’s documents were not timely produced. For example, the handwritten notes from human resources and management relating to a September 22<sup>nd</sup> meeting were requested in October 2010 but were not produced until January 3, 2011. This has understandably caused the grievant some concern as to whether the agency is conducting a reasonable search for the requested documents. The document discovery provisions of the grievance procedure are put in place in order to help alleviate these types of concerns and it is vital for parties to provide information in a timely manner. However, under the facts, it would appear that the agency has attempted in good faith to reasonably and voluntarily resolve all purported noncompliance issues with the grievant. Specifically, the agency mailed two packets and hand-delivered two additional packets of requested documents to the grievant over the course of the last three months. Furthermore, the agency has responded twice to the grievant’s itemized list and has explained why certain documents cannot be produced. The grievant has engaged in multiple email correspondences with the agency in the last several months. Although many of these emails address alleged noncompliance issues, each subsequent email seems to also expand the scope of the grievant’s document requests. Overall, it appears the agency has conducted a reasonable search for the requested documents. While the grievant continues to be dissatisfied with the agency’s responses and believes that several of the requested documents are available, but have not been produced by the agency, this belief appears to be unsupported speculation.

In light of all the above, this Department finds the agency has complied with the document discovery provisions of the grievance procedure. We also note that under the grievance process, while a party is allowed to make multiple document requests, that party should refrain from making repeated requests to which the other party (in this case, the agency) has already responded. Each document request should be clear, concise, and not be used to harass or otherwise impede the efficient operations of government.<sup>6</sup>

Furthermore, the grievance procedure requires both parties to address document requests and noncompliance through a specific process.<sup>7</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems

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<sup>5</sup> *Grievance Procedure Manual* § 8.2.

<sup>6</sup> *See Grievance Procedure Manual* § 2.4.

<sup>7</sup> *Grievance Procedure Manual* § 6.3.

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.<sup>8</sup> If the opposing party fails to correct the noncompliance within this five-day 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.<sup>9</sup>

Thus, in this case, if the grievant sends a new document request, the agency has five workdays upon receipt to either provide the relevant documents or explain in writing why such production is not possible. If responsive documents are withheld due to a claim of irrelevance and/or "just cause," the agency must provide the grievant with a written explanation of each claim no later than ten workdays from receipt of the new document request. Then, if the grievant believes the agency is out of compliance, he must first notify the agency head in writing of the alleged noncompliance. This Department strongly cautions that repeated disregard for these rules could result in a decision against the noncompliant party.<sup>10</sup>

This Department's rulings on matters of compliance are final and nonappealable.<sup>11</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> *Id.*

<sup>9</sup> 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.

<sup>10</sup> See, e.g., EDR Ruling Nos 2003-049 and 2003-053, 2007-1470, 2007-1420, 2010-2536.

<sup>11</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).