

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: March 10, 2011; Ruling No. 2011-2898; 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 No. 2011-2898
March 10, 2011

The grievant has requested a ruling regarding the Department of Corrections' ("DOC" or "agency") alleged noncompliance with the grievance procedure involving her requests for documents.

FACTS

On August 16, 2010, the grievant received a Group II Written Notice for failure to follow a supervisor's instructions with respect to a May 19, 2010 incident. The grievant challenged her Written Notice in a September 9, 2010 grievance. To support her claims, the grievant requested certain emails from the agency related to the May 19th incident, which DOC did not produce. The agency asserts that during the ordinary course of business, emails remain on its server for only 60 days; thereafter emails are kept on a backup tape for fourteen months by the agency's IT service provider. DOC alleged that because the requested emails were no longer on its server, retrieval from the backup tape would pose an undue burden. The agency, however, provided no estimate of the cost of retrieval or any other evidence of the degree of burden involved. The grievant sought a compliance ruling from this Department, asserting the emails she requested were relevant to the action grieved and must be produced.

On December 17, 2010, this Department issued compliance ruling 2011-2827, ordering the grievant to provide DOC with a list of named individuals to limit her email search criteria. DOC was then ordered to produce the emails to the extent they exist or else demonstrate why just cause exists for not producing them. On December 27, 2010, the grievant mailed the limited list of named individuals to the agency. According to the grievant, the agency failed to provide a response to her document request. The grievant contends that her last contact with DOC before requesting this ruling was by phone on January 20, 2011, when the agency indicated they were having difficulties in obtaining the requested emails.

DOC has indicated that it has been trying to retrieve the requested emails through the Virginia Information Technology Agency ("VITA") since November 2010, but VITA has not delivered on the agency's requests. Specifically, DOC attempted to obtain status updates from

VITA regarding the costs associated with retrieving the emails on November 23, 2010, November 30, 2010, December 2, 2010, December 8, 2010, December 15, 2010, and January 21, 2011. After this Department issued the December 17th ruling, DOC also emailed to VITA on January 19, 2011 the grievant's shortened list of named individuals. A week later, DOC emailed VITA specific dates to search for, as well as a copy of this Department's December 17th ruling. On February 11, 2011, VITA informed DOC that it was working on the email retrieval, but was unable to provide a projected completion date. Human resources staff at the DOC facility where grievant works have indicated they have tried for months without success to obtain the needed information from VITA and feel they have done about all they can do.

The grievant seeks a compliance ruling on this matter, asserting that the emails would be relevant to the action grieved, as our December 17th ruling had concluded, and stating that DOC has had ample time to produce the emails as ordered by this Department. Furthermore, she asserts that a substantial procedural requirement of the grievance procedure was violated without just cause, and asks this Department to render a decision against the agency and remove the Group II Written Notice from her file.

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 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 the delay in conforming to EDR's order.

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. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

As to the production of documents, the grievance statute provides 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.”³ 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. 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.

Pursuant to this Department’s December 17th ruling, the grievant provided DOC with the shortened list of named individuals on December 27, 2010. Unfortunately, DOC did not provide VITA with this list of search criteria until several weeks after receiving it from the grievant. Now, still awaiting VITA, DOC has yet to produce the requested emails, nor has it provided specific reasons, such as expense and time figures, to demonstrate that retrieval is unduly burdensome.

In light of VITA’s apparent failure to deliver on DOC’s months-old requests to provide cost information and to search for responsive emails, this Department cannot find that DOC’s noncompliance with our December 17, 2010 ruling was driven by the agency’s bad faith or gross disregard for the grievance procedure. Several attempts appear to have been made by certain DOC staff to obtain information from VITA. Thus, the grievant’s request to render a decision against the agency and to remove the Group II Written Notice from her file will not be granted at this time.

However, DOC’s delay in contacting VITA after receiving the grievant’s list of names is troubling. Furthermore, notwithstanding VITA’s failure to provide DOC with the requested information, the email records remain DOC’s data and thus remain DOC’s responsibility under the grievance procedure to either produce or provide just cause for not producing. The facts so far do not appear to demonstrate that DOC has done all it reasonably could to pursue this matter with VITA, escalating up the chain of command at both agencies as necessary, to ensure that VITA timely provides DOC with a written cost estimate and/or search results for the emails in question (or in the alternative, a written explanation as to why VITA cannot provide a cost estimate or search for or provide DOC with the requested emails).

Accordingly, because DOC has not provided the grievant with the requested emails nor just cause for nondisclosure as ordered in this Department’s December 17, 2010 ruling, DOC is ordered to correct its noncompliance **within twenty work days of the receipt of this ruling** by (1) providing the emails to the grievant, or (2) providing the grievant with a detailed response as to why the agency and/or VITA cannot produce the emails. Ordinarily, this Department would

³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

require a party to produce the documents no later than ten work days from the receipt of this ruling; realistically, however, we acknowledge there may be an additional delay in this particular case since the agency is awaiting a response from VITA. Therefore, this Department finds it reasonable for the agency to correct its noncompliance within twenty work days of the receipt of this ruling. This Department strongly cautions that future noncompliance could result in a decision against the noncompliant party.⁴

This Department's rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

⁴ At this time, we find that DOC's inability in this case to retrieve the requested information and/or emails from VITA does not constitute bad faith, gross disregard, or indifference on DOC's part to the grievant's rights under the grievance process. Nevertheless, we conclude that it is DOC's obligation in this case to make a strong, sustained, good faith effort, by members of the agency's central office executive management team if necessary, to obtain the emails and/or related information needed from VITA, in order to avoid the appearance of indifference to or gross disregard of the grievant's rights under the grievance process in the coming weeks. *See, e.g.*, EDR Ruling Nos. 2007-1470, 2003-049 and 2003-053, 2007-1470, 2007-1420, 2010-2536.

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