

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: May 4, 2011;
Ruling No. 2011-2906; Agency: Virginia Department of Transportation; Outcome:
Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

RECONSIDERED COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2011-2906
May 4, 2011

The grievant has requested that this Department reconsider its compliance determination in Ruling No. 2011-2864 (the “initial compliance ruling”), which found the agency to be compliant with the document discovery provisions of the grievance procedure.¹ For the reasons discussed below, we find no error with the February 11, 2011 initial compliance ruling.

FACTS

At issue in the February 11, 2011 initial compliance ruling was whether the agency had conducted a reasonable search and response to the grievant’s November 29, 2010 notice of noncompliance and bulleted list of documents sought in connection with his October 2, 2010 grievance.² In response to his November 29th notice of noncompliance and bulleted list, on December 13, 2010, the agency provided certain relevant documentation and explanations to the grievant as to why other documentation could not be produced.³ The grievant was not satisfied with the agency’s response and on December 26, 2010, he sought a compliance ruling from this Department.

In the initial compliance ruling, this Department determined that the agency had complied with the document discovery provisions of the grievance procedure.⁴ In his request for reconsideration, however, the grievant claims that his document requests of January 6, 2011; January 20, 2011; January 28, 2011; January 30, 2011 and February 2, 2011 were made for both his October 2, 2010 grievance, and a second December 14, 2010 grievance. He asserts that in the initial compliance ruling this Department improperly failed to consider his document requests with respect to both grievances.

¹ EDR Ruling No. 2011-2864.

² *Id.*

³ *Id.*

⁴ *Id.*

DISCUSSION

The grievance procedure requires both parties to address document requests and noncompliance through a specific process.⁵ 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. If the agency is alleged to be out of compliance, the grievant must provide written notice of noncompliance to the agency head.⁶ If the agency fails to correct the alleged noncompliance within the five-day period, the grievant may seek a compliance ruling from the EDR Director, who may in turn order the agency to correct any noncompliance or, in cases of substantial noncompliance, render a decision against the agency on any qualifiable issue. In general, a request to EDR for a compliance ruling will temporarily halt the grievance process. The grievance process will resume once EDR issues its ruling.⁷

The scope of the initial compliance ruling pertained to the grievant's November 29th notice of noncompliance and bulleted list of requested documents. However, in the interest of comprehensively reviewing the document requests in this case, this Department considered as well the grievant's document-related communications of December 21, 2010, January 6, 2011, January 20, 2011,⁸ January 28, 2011, January 30, 2011, and February 2, 2011, regardless of which of his two grievances may have applied. In addition, this Department considered the agency's responses to the above communications.

In considering all this for the initial ruling, we found that several of the grievant's communications were duplicative or merely follow-up inquiries. For example, the December 21st and January 6th communications were essentially follow-up statements and/or inquiries pertaining to the grievant's November 29th noncompliance notice and bulleted list of requested documents. Similarly, the January 30th communication was merely a follow-up email to the agency regarding his past document requests. Moreover, as to the grievant's January 28th correspondence, the agency did not receive it until February 2nd, thus the requests referenced by the grievant as "January 28" and "February 2" are the same.⁹ Hence, this Department's initial compliance ruling specifically addressed only the November 29, 2010, January 20, 2011 and February 2, 2011 document requests, as these contained actual, nonduplicative requests for documents, as opposed to other correspondence simply inquiring or following up on previously made requests.

⁵ *Grievance Procedure Manual* § 6.3.

⁶ *Id.*

⁷ *Grievance Procedure Manual* § 6.1.

⁸ The grievant refers to the January 20, 2011 document request throughout his reconsideration request. Although the document request was submitted to the agency on January 20, 2011, it appears that the grievant refers to this document request within his lists as the "1/18/2011 request."

⁹ The agency did not receive the January 28, 2011 list until February 2, 2011 when the grievant realized he did not attach the requested list to his January 28, 2011 email.

We also note that while the investigation for this Department's initial compliance ruling was pending, the grievant continued to send noncompliance notices to agency staff. (These noncompliance notices should have been sent to the agency head.¹⁰) Furthermore, it appears the grievant was also including new document requests within this same noncompliance correspondence. Specifically, it appears the January 20th correspondence listed fifteen new document requests and the February 2nd correspondence listed six new document requests. These new document requests were not clearly marked as such and they were inconspicuously buried within previous requests.¹¹ Moreover, the agency did not respond to these new document requests because this Department had not yet issued a ruling in response to the grievant's December 26, 2010 compliance ruling request. The agency's lack of response at that time was appropriate as the grievance was then "on hold" and the new document requests were not within the scope of the grievant's December 26, 2010 request for compliance ruling. Finally, the grievant admits that for each of the bulleted document requests within his November 29th notice of noncompliance, the agency responded by stating either that the documents were provided or that they do not exist. Following the investigation for our initial ruling, we were unable to conclude that any documents listed as part of the November 29th noncompliance notice were improperly withheld by the agency. On reconsideration, our position has not changed.

In any event, it appears the grievant has consolidated all of his remaining document requests into one list, which was provided to the agency on March 14, 2011. The agency must respond to his March 14, 2011 request, as it appears that many of the listed items are indeed new document requests. The agency has **five workdays upon receipt of this ruling** to either provide all newly requested, relevant documents or to explain in writing why such production is not possible within that timeframe, and then produce such documents no later than ten workdays from receipt of this ruling. If requested 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 this ruling. In addition, to avoid any future misunderstanding as to whether the grievant received a particular document or not, the agency's response and any additional documents provided to the grievant shall be scanned and sent via email to the grievant, with a copy emailed to this Department at administrator@edr.virginia.gov. Then, if the grievant believes the agency is out of compliance, he must first **notify the agency head** in writing of the alleged noncompliance and give the agency five workdays to correct any alleged non-compliance. If after five workdays the grievant still feels that the agency is noncompliant, then he may request a ruling from this Department.

To the extent the grievant has any additional document requests beyond those listed in the March 14, 2011 document request, any new document request needs to be clear, concise, and not

¹⁰ See *Grievance Procedure Manual* §6.3.

¹¹ For example, the first bullet point on the grievant's document request list was sent to the agency on November 29, 2010. The agency responded to this bullet point on December 13, 2010 and January 21, 2011. On January 20, 2011 the grievant combined the first and second bullet points of his list into one bullet point request and added an additional document request within the "1/18/2011" subsection of that bullet point. On February 2, 2011, the grievant sent the same bullet point list and repeated this same additional document request within the "1/28/2011" section as well.

be used to harass or otherwise impede the efficient operations of government.¹² Again, this Department strongly advises the grievant to refrain from making repeated requests to which the agency had already responded and cautions that repeated disregard for the grievance rules by either party could result in a decision against the noncompliant party.¹³

Also, it appears that each of these two grievances may proceed to hearing since each challenges formal discipline. If these grievances proceed to hearing, the grievant is free to raise any issue of non-disclosed documents and he may seek an order for the production of any such documents from the hearing officer.¹⁴ If the agency fails to produce relevant documents without just cause, the hearing officer has the authority to draw an adverse factual inference against it as to the documents not provided.¹⁵

This Department's rulings on matters of compliance are final and nonappealable.¹⁶

Claudia T. Farr
Director

¹² See *Grievance Procedure Manual* § 2.4. It appears that the manner in which the grievant has presented his concerns may have heightened the confusion in this case. Repetitions and inconsistencies may have hampered the agency's ability to respond directly. See footnotes 8, 9, and 11.

¹³ See, e.g., EDR Ruling Nos. 2003-049 and 2003-053, 2007-1470, 2007-1420, 2010-2536.

¹⁴ *Rules for Conducting Grievance Hearings* ("Rules") § III(E).

¹⁵ *Rules* at § V(B).

¹⁶ See Va. Code § 2.2-1001(5).