

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: April 20, 2011;
Ruling No. 2011-2921; Agency: Virginia Department of Health; Outcome: Agency
Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Health
Ruling No. 2011-2921
April 20, 2011

The grievant has requested a ruling regarding the Department of Health's (the agency's) alleged noncompliance with the grievance procedure involving a request for documents and the agency's proposed costs for collection and production.

FACTS

In his January 5, 2011 grievance, the grievant has challenged the agency's denial of a requested salary increase. In conjunction with his grievance, the grievant has requested documents regarding the agency's salary alignment practices. More specifically, the grievant reportedly seeks from the files of four named employees: "any and all of the following, to which you have access, which involved you or any other employee of the [agency]: Documents, records, communications, e-mails, transcripts, and transactions related to, referring to, describing or inquiring about salary alignments at the [agency] for the period December 1, 2005 through February 10, 2011." In response, the agency has provided an estimate of costs to collect and produce the requested documents. The agency estimates at least 3500 hours of work and requests that the grievant pay \$162,000 to the agency for the documents to be collected and produced. The grievant has requested this ruling to challenge the reasonableness of the agency's proposed costs.

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,

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

² *Grievance Procedure Manual* § 9.

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.

Reasonableness of Agency’s Proposed Costs

The Grievance Procedure Manual provides that “[t]he party requesting the documents may be charged the actual cost to retrieve and duplicate the documents.”⁵ In applying this section, EDR will review whether the agency’s proposed charges are reasonable under the facts of this case, and will look to other analogous laws and regulations for guidance if needed. As such, principles and approaches arising under the Virginia Freedom of Information Act (FOIA) are instructive.⁶

The agency’s cost estimate is based upon the hours allegedly needed for a manual search through all electronic files (primarily e-mail) of three individuals, as well as those individuals’ other paper files, plus time and materials costs for printing and redacting. For this collection of documents, the agency has estimated that over 3500 hours of work would be required at an estimated cost, based on the salaries of the searching employees, of \$162,000. We conclude that under the grievance procedure, the agency’s proposed charges are objectively unreasonable.

The number of estimated hours far exceeds anything that would represent a reasonable search for a fairly defined set of materials (i.e., those dealing with the agency’s practices regarding salary alignment). The agency’s time estimate amounts to one employee working solely on this document request for about one and a half years of 40-hour work-weeks. A page-by-page review of every e-mail and electronic or paper document is not a reasonable approach to this document collection. The custodian of requested records should have some idea of where documents about particular subjects should generally be. For instance, documents could be kept in separate files, folders, or other means of organization that would assist with locating the information for use by the agency or for a record request.

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.

⁵ *Grievance Procedure Manual* § 8.2.

⁶ For instance, under FOIA, an agency must notify a requester of documents if the agency will be charging for the search and production of materials sought and can further request payment of a deposit in advance before producing the documents in certain cases. Va. Code § 2.2-3704. Such a practice would appear to be reasonable under the grievance process.

Relevance of Grievant's Document Request

Under the grievance procedure, a party is only able to obtain documents that are relevant⁷ to the actions grieved. In this case, the grievant has essentially requested, for roughly the past five years, all documents pertaining to salary alignments in the possession of four employees at the agency. While this request is limited in topic, it is certainly not limited in its scope. Although we cannot determine at this early stage that such documents are wholly irrelevant to the grievance, it is unclear whether the grievant has demonstrated a material need to essentially audit the entirety of the agency's salary alignment practices for the last five years.

For instance, whether the agency granted or denied particular salary adjustment requests based on alignment issues four or five years ago, especially if there is no commonality between the particular employee and the grievant's situation, would hardly be relevant to the grievant's challenge to his recently denied salary adjustment. However, the grievant has presented some theories about the agency's broad practices regarding salary alignments and alleged delays or holds. Indeed, it appears the grievant argues that one of his own prior requests for salary adjustment was impacted by these practices in 2006 or 2007. Generally speaking, documents about the agency's broader practices could at least be arguably relevant to his grievance, rather than documents showing what happened to each individual employee.

This Department notes, however, that the parties have not fully addressed the scope of the document request between themselves. Before this Department rules on such issues for the parties, the prudent approach here is to allow such discussions to take place. The parties should attempt to work out the issues that have arisen with the grievant's document request to determine what documents have been sought and what are actually needed. For instance, the grievant may be able to articulate a need for information on specific issues. Indeed, there may be alternative ways for the agency to gather the particular information the grievant is seeking rather than having to collect and produce a large volume of documents. Obviously, the document collection and production costs are an issue that should be discussed in conjunction with, and will be impacted by, the eventual scope of the documents that are sought. To assist in the discussions, this Department provides the following parameters that will be applicable to any proposed costs for document collection and production in this case.

Electronic Searches

While there may be some cases when a page-by-page review of e-mails is the only way to find certain documents, the preferred approach in any document collection for electronic records would be an appropriately tailored and effective electronic search process using search terms. Using an electronic search is not a process that the holder of documents must have approved by

⁷ Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citations omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citations omitted)).

the requesting party, nor must the requesting party approve the list of search terms. For instance, an agency is free to develop a list of search terms on its own, apply those terms in a search process, and collect and produce the resulting relevant documents. In such a situation, the agency could consult with the grievant on appropriate search terms, but that consultation is certainly not required as long as the terms are appropriately tailored to maximize the chances of collecting all requested documents. In this case, it appears that this document collection, if it proceeds as currently stated, should utilize electronic searches. Consequently, any new estimate of costs proposed by the agency must reflect costs associated with an appropriately tailored electronic search.

Actual Costs

At no time may an agency charge a grievant more than the actual time costs incurred. For example, if the agency is able to complete electronic searches in less time than estimated, the charge to the grievant would be correspondingly reduced. Further, in conducting an electronic search, if the document collector is able to perform other work while an electronic search runs without any further input needed during the search, that search time could not be charged to the grievant. As such, the time of the document collector(s) must be accurately documented so that a grievant is not charged for any time in addition to the actual work done on the document collection.

Hourly Rates

The agency's current estimated costs are based on the salaries (broken down to an hourly rate) of the actual custodian of the documents, as if they performed the searches themselves. While an agency is certainly free to have the actual custodian of the documents perform the search, it would be unreasonable under the grievance procedure for an agency to pass on to a requesting party the salary cost of, for example, a high level manager, rather than that of the lowest paid employee with the qualifications to perform the task. For example, if a grievant requests materials from the files of a Deputy Director, the agency could have the Deputy Director search his/her files, but the agency could not base its estimated costs on the salary of the Deputy Director. Rather, the agency could only estimate costs based on the salary of the lowest paid employee with the qualifications to accomplish the task, such as an Administrative and Office Specialist perhaps.

Consolidation of Files

In most instances, e-mail and other electronic files can be consolidated into one directory or folder so that all the materials can be searched at one time. This approach saves time and expense so that the document collector does not have to conduct a search for the same search term multiple times across different users' sets of documents. As such, in approaching electronic searches, electronic files should be consolidated to the extent practicable to enhance the efficiency of the document collection process. In some cases, a grievant may request that documents not be consolidated, if the original location of the documents could not be

maintained. In such instances, a consolidated search may not be the chosen method, which could lead to higher proposed costs to the grievant.

CONCLUSION

The parties are ordered to take all due measures to work together and come to an agreement addressing the reasonable scope of the grievant's document request and/or the collection and production methods as discussed in this ruling. Once those discussions are complete, the agency is ordered to provide the grievant with an updated cost estimate consistent with the provisions of this ruling.

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).