

Issue: Compliance – Grievance Procedure (documents); Ruling Date: May 9, 2011;
Ruling No. 2011-2959; 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 Number 2011-2959
May 9, 2011

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

FACTS

On February 3, 2011, the grievant received a Group III Written Notice with termination from the agency. According to the Written Notice, the grievant was charged with fraternization because he allegedly admitted to giving contraband items to incarcerated offenders. The grievant challenged the termination in a grievance dated February 4, 2011, alleging that the accusations are false. The agency received the grievance on February 8, 2011. To support his claims, the grievant sent a letter to his facility’s human resource manager on February 18, 2011, requesting that the agency provide all documentation relating to his grievance including incident reports, investigative reports, any witness statements, findings of fact, or any recommendations for discipline. On March 8, 2011, the grievant sent a notice of noncompliance to the agency head indicating that he had not received a response nor any of the requested documents from the agency.

The facility human resource manager indicates that he received the grievant’s February 18th and March 8th letters, but that he did not respond because (i) he did not possess the requested documents, (ii) he did not have any indication that a grievance had been filed until April 14, 2011, and (iii) he had not received the grievant’s response to the second resolution step management response. Now, the grievant seeks a compliance ruling on this matter, asserting the documents requested are relevant to the action grieved and should be made available to him.

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

¹ *Grievance Procedure Manual* § 6.3.

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 Where a grievant asserts that the agency is noncompliant, the grievant must notify the agency head of the noncompliance.³ 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.⁴

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.”⁵ 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.

The grievance 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.”⁶ While a party is not required to create a document if the document does not exist,⁷ 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 production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

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.

² *Id.*

³ *Id.*

⁴ 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.

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

⁶ *Id.*

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

In this case, the grievant challenges the agency's failure to provide the requested documents. The information sought by the grievant is clearly relevant to his grievance as it relates to his termination. Moreover, the agency admits it has not responded to the grievant's document request. Accordingly, we find that the agency failed to comply with the grievance procedure. The agency is therefore ordered to produce the requested information to the grievant within 10 work days of its receipt of this ruling.

This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁸ Va. Code § 2.2-3003(G).