Issues: Compliance – Grievance Procedure (5-Day Rule, Documents, and General Issues); Ruling Date: March 16, 2012; Ruling No. 2012-3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3163; 2012-3245, 3246, 3247, 3248, 3249, 3250, 3251, 3252; 2012-3268, 3269, 3270, 3271, 3272, 3273, 3274, 3275, 3276, 3277, 3278, 3279, 3280, 3281; Agency: Virginia Department of Transportation; Outcome: Grievant Not in Compliance / Agency Not in Compliance.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling Nos. 2012-3149 through 2012-3163, 2012-3245 through 2012-3252,
and 2012-3268 through 2012-3281
March 16, 2012

The grievant has requested three compliance rulings regarding the alleged noncompliance with the grievance procedure by Virginia Commonwealth University (the "agency"). For the reasons discussed below, this Department finds noncompliance on the part of the agency and the grievant.

FACTS

The grievant has initiated fifteen grievances with the agency. These grievances include:

1. On April 28, 2011, the grievant initiated four grievances with the agency. Theses grievances are labeled "1," "2," "3," and "4." All four grievances relate to the agency's sexual harassment investigation against the grievant.

2. On April 30, 2011, the grievant initiated two grievances with the agency. These grievances are labeled "5" and "6." Both grievances relate to the agency's sexual harassment investigation against the grievant.

3. On June 2, 2011, the grievant initiated a grievance with the agency. This grievance is labeled "12B." The "12B" grievance relates to the agency's sexual harassment investigation against the grievant and the grievant's allegation of uncompensated overtime.

4. On July 26, 2011, the grievant initiated eight expedited grievances with the agency. These grievances are labeled ".01," ".02," ".03," ".04," ".05," ".06," ".07," and "1A." The grievances labeled ".01" through ".07" allege faulty service of eight Written Notices that the agency issued on June 24, 2011. The "1A" grievance states sixteen different charges, including but not limited to, the agency's alleged corrupt sexual harassment investigation against the grievant and the agency's alleged improper service of the eight Written Notices to the grievant.

Since August 2011, the grievant has made several document requests to the agency, asking that it provide all documentation related to his fifteen grievances. The grievant asserts that the agency failed to timely halt the grievance procedure pending his receipt of the requested documents. The grievant also alleges the agency continued to withhold requested documents that are relevant to his grievances. Furthermore, the grievant states that the agency failed to timely issue written management step responses to the ".01," ".02," ".03," ".04," ".05," ".06," ".07," and "1A" grievances while the document requests were pending. As such, the grievant sent five notices of noncompliance to the agency head on September 13, 2011, September 14, 2011, September 15, 2011, September 21, 2011, and October 7, 2011 regarding the document and procedural noncompliance issues. The agency asserts that it responded to all of the grievant's noncompliance concerns, including all document requests submitted through October 25, 2011. However, in an email addressed to this Department on January 30, 2012, the grievant provided a list of 73 documents that he alleges the agency has continued to withhold from him. Now, the grievant seeks a compliance ruling from this Department regarding whether the agency has complied with the document discovery provisions of the grievance procedure and whether the agency failed to timely respond to the ".01," ".02," ".03," ".04," ".05," ".06," ".07," and "1A" grievances.

The grievant also alleges that in attempts to settle his "12B" grievance, the agency offered to pay the grievant for the overtime hours he worked. He states the agency has yet to pay him this settlement amount. The agency asserts that the settlement proposal was offered in attempts "to resolve the large volume of grievances and nothing more." Moreover, the agency alleges that the proposal was rejected by the grievant on September 19, 2011. Now, the grievant seeks a compliance ruling from this Department, alleging that the agency was noncompliant with the grievance procedure when it allegedly offered and subsequently rescinded its settlement offer without payment to the grievant.

On January 31, 2012, the agency rescinded five of the grievant's eight Written Notices and administratively closed grievances labeled "1," "2," "3," "4," "5," "6," ".01," ".02," ".03," ".04," ".05," ".06," ".07," and "12B" because the agency alleges the grievances are duplicative and challenge the same management action as grievance "1A." In an email to this Department on February 3, 2012, the grievant conceded that "some of the 14 grievances have parts that are duplicative or challenge the same management action(s)." The grievant indicates further that all the grievances were filed for different reasons, but most notably, grievance "12B" does not speak to the same issues addressed in grievance "1A." Finally, the grievant alleges the agency has used the grievance process to harass and intimidate him. The agency asserts that the grievant's "continued document requests, postponements and other efforts to halt the grievance process, is viewed as an attempt to manipulate and impede the process as well as harassing the agency." The grievant now seeks a compliance ruling from this Department regarding whether the agency improperly administratively closed fourteen of his fifteen grievances and whether the agency has used the grievance process to harass 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 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]

Administrative Closure

The grievance procedure provides that a grievance must not challenge the same management action challenged by another grievance.[5] If this requirement is not met, the agency may administratively close the grievance for noncompliance.[6] The grievant then has the right to request a compliance ruling from the EDR Director to overturn the closing of the grievance,[7] as the grievant has done in this case.

Grievances "1," "2," "3," "4," "5," and "6" challenge how the agency conducted its sexual harassment investigation against the grievant, which the grievant asserts was in violation of "wrongful termination policies," "due process policies," agency, state, federal, and public policies as well as in violation of state laws and federal statutes. Grievance "1A" challenges the "corrupt" sexual harassment investigation, which the grievant asserts was in violation of "wrongful termination policies," his due process rights, the "fruit of the poisonous tree doctrine," and federal laws as well as a form of retaliation against the grievant. The agency claims that the grievances "1," "2," "3," "4," "5," and "6" challenge the same management actions grieved in the grievant's "1A" grievance. This Department agrees that the grievant is essentially

[1] *Grievance Procedure Manual* § 6.3.
[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] *Grievance Procedure Manual* § 2.4.
[6] *Id.*
[7] *Id.*

challenging the same management action – the agency's sexual harassment investigation. Consequently, we conclude that the agency may administratively close grievances "1," "2," "3," "4," "5," and "6."[8]

Grievances ".01," ".02," ".03," ".04," ".05," ".06," and ".07" challenge how the agency served the eight Written Notices, which were issued on June 24, 2011, to the grievant. Grievance "1A" challenges the "faulty" service of the eight Written Notices. The agency claims that the grievances ".01," ".02," ".03," ".04," ".05," ".06," and ".07" challenge the same management action grieved in the grievant's "1A" grievance. This Department agrees that the grievant is essentially challenging the same management action – the agency's alleged faulty service of the eight Written Notices. Therefore, we conclude that the agency may administratively close grievances ".01," ".02," ".03," ".04," ".05," ".06," and ".07."

Grievance "12B" challenges the grievant's April 25, 2011 pre-disciplinary leave notice and the grievant's alleged inability to report and receive pay for overtime hours he worked while classified as a non-exempt employee with the agency. The agency claims that the grievance "12B" challenges the same management action grieved in the grievant's "1A" grievance. However, while the "12B" grievance and the "1A" grievance both assert that the agency's sexual harassment investigation was handled improperly, the grievances appear to challenge differing management actions. The "12B" grievance challenges alleged management conduct occurring *prior* to the agency's sexual harassment investigation (the overtime hours), whereas the grievant's "1A" grievance challenges alleged management conduct occurring *during* and *after* the conclusion of the agency's sexual harassment investigation (the agency's alleged "corrupt" sexual harassment investigation and the alleged faulty service of eight Written Notices). Because the "12B" grievance challenges different management conduct, it is not barred by the grievant's "1A" grievance, even though the grievances allege related management activity.[9] Accordingly, we conclude that the grievant's "12B" and "1A" grievances are in compliance with the grievance procedure.

Alleged Harassment

The grievance procedure provides that a grievance cannot "be used to harass or otherwise impede the efficient operations of government."[10] This prohibition is primarily intended to allow an agency to challenge issues such as the number, timing, or frivolous nature of grievances, and the related burden to the agency.[11] However, to find that a grievant has failed to comply with

[8] We note that grievances "1," "2," "3," and "4" were initiated on April 28, 2011, and that grievances "5" and "6" were initiated on April 30, 2011. Grievance "1A" was initiated on July 26, 2011. Typically this Department will order administrative closure of the subsequent duplicative grievances and find the first grievance initiated may proceed through the grievance process. However, because grievance "1A" addresses the same management action addressed in grievances "1," "2," "3," "4," "5," and "6", this Department orders administrative closure of grievances "1," "2," "3," "4," "5," and "6" for the most efficient operation of the grievance process.

[9] *See generally* Phillips v. Public Serv. Co. of New Mexico, 33 Fed. Appx. 950, 952 (10th Cir. 2002). *See also* EDR Ruling No. 2006-1098.

[10] *Grievance Procedure Manual* § 2.4.

[11] *See* EDR Ruling No. 2002-224.

this provision of the *Grievance Procedure Manual*, there must be evidence establishing that the grievant knew with substantial certainty that his/her actions would impede the operations of an agency.[12] It may be inferred that a grievant intends the natural and probable consequences of his/her acts.[13] While neither the number, timing, or arguably frivolous nature of the grievances, nor related burden to an agency, are controlling factors in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors. Such determinations are made on a case-by-case basis.[14]

The grievant argues that the agency's "hundreds" of emails and "arduous communications with various actors at the agency," five prior compliance ruling requests, initial refusal to participate in facilitation services, demeanor in its responses, and its rescinded offer to settle the grievant's claims were attempts to silence, harass, and intimidate the grievant. The agency counters that the grievant's "continued document requests, postponements and other efforts to halt the grievance process, is viewed as an attempt to manipulate and impede the process as well as harassing the agency." The agency also appears to argue that the grievant's fifteen grievances, which allege similar charges, were initiated for no purpose other than to harass or impede the operations of government.

This Department finds that the number of grievances in which this grievant has initiated is comparatively high. For example, in EDR Ruling No. 99-138, the grievant who was found to be harassing and/or impeding the operations of government had filed 24 grievances in a span of about two years, many of which were submitted within days of each other.[15] Here, the grievant has filed fifteen grievances in a span of three months, many of which challenge the same management action. (In fairness to the grievant, we are compelled to note that the agency had presented him with eight Written Notices, five of which it has subsequently rescinded.)

Moreover, the agency asserts that the grievant "has demonstrated a pattern of postponing confirmed second step meetings, by requesting additional documents and attempting to halt the process the day before the scheduled second step meeting. He has promised to pay for and pick up requested documents, only to place another document request at a later date, and he has failed to attend confirmed meetings." This Department finds record email evidence to support the agency's contention. For example, the grievant submitted ten document requests, with multiple sub-parts within each document request, during July, August and September. During the month of August, the agency attempted to schedule the second step resolution meetings for several of the grievances. The agency produced the requested documents, and on August 22, 2011, the grievant emailed the agency that he would pay for the requested the documents the following week. He did not. On September 2, 2011, the grievant emailed a letter to the agency, stating he would make payment and pick-up some of the requested documents during the week of September 5, 2011. Once again, he did not. Because the grievant did not pick-up the requested

[12] S*ee* EDR Compliance Ruling No. 99-138, Sept. 21, 1999. Closing a grievance on these grounds is an extreme sanction. As such, the analysis of such a claim carries a commensurately high burden.
[13] *See id.*
[14] *See id.*
[15] *See* EDR Ruling No. 99-138.

documents, the agency sent the grievant an email on or around September 7, 2011, indicating that the requested documents were available upon receipt of a $216.66 document production search fee. On September 15, 2011, the agency sent a notice of noncompliance to the grievant by U.S. mail, indicating the agency had not received a response from the grievant. Despite not picking up the documents that were already available, the grievant sent a new document request to the agency in November, requesting over 110 additional documents. Meanwhile, the grievant continued to request that the grievance process, including his scheduled second step management meetings, be temporarily halted until he received all the requested documents. Therefore, this Department concludes from the foregoing facts and circumstances that the grievant's actions have had the effect of harassing or otherwise impeding the efficient operations of the agency.

Finally, to the extent the grievant asserts that the agency's alleged failure to timely halt the grievance procedure while his document requests were pending and/or the agency's alleged failure to timely respond to the management resolution steps was a form of harassment, we disagree. This Department finds it more likely that any delay or improper advancement with respect to his grievances was related to understandable confusion over the particular status of any of the fifteen grievances, particularly in light of the many pending document requests. The agency's position that it had complied with the grievant's document requests was hardly unreasonable. For example, the agency had collected a number of documents and informed the grievant that they were available for retrieval. At that point, the agency not unreasonably believed that the process should resume because they had complied with Section 6.3 of the *Grievance Procedure Manual.*

Grievance "12B"Partial Relief

The grievant asserts that the agency improperly rescinded an earlier settlement offer to end all claims with the agency. The agency asserts that the settlement proposal amount was offered in attempts "to resolve the large volume of grievances and nothing more." Any failure of the parties to come to the terms of a settlement agreement does not present a grievance procedure compliance issue. No provision of the grievance procedure is implicated by a failure to reach a settlement agreement. Therefore, the grievant's position here is without merit.

Document Discovery

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."[16] 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."[17] For purposes of document production, examples of "just cause" include, but are not limited to, (1)

[16] Va. Code § 2.2-3003(E); *Grievance Procedure Manual,* § 8.2.
[17] *Grievance Procedure Manual* § 9.

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.[18] 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."[19]

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.[20]

In this case, the grievant alleges the agency has continued to withhold 73 relevant documents. This Department has reviewed the list of 73 documents and will address each request within fifteen separate categories.[21]

1. Sexual Harassment Documents

The grievant has requested all of the agency's sexual harassment investigator's handwritten, typed, or electronic files relating to the grievant's sexual harassment investigation, including documentation from his supervisor to the investigator authorizing the investigation. The grievant labels this as Item 1 in his outstanding document request list. The agency asserts "just cause" for withholding these documents because they either do not exist or are attorney-client privileged. The grievant seeks clarification from the agency why these documents are attorney-client privileged, and asserts these documents are relevant to his "1A" and "12B" grievances.

The purpose of attorney-client privilege is to protect confidential communications between attorneys and their clients.[22] The attorney-client privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public

[18] *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.
[19] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[20] *Grievance Procedure Manual* § 8.2.
[21] This Department will provide a copy of the grievant's outstanding document request list to the agency for its own reference upon issuance of this compliance ruling.
[22] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

interests in the observance of law and administration of justice.[23] The privilege acknowledges that an attorney needs to know all information relating to the client's representation so that the attorney may carry out his or her professional mission.[24] In other words, the purpose of the attorney-client privilege is to "encourage clients to make full disclosure to their attorneys."[25] However, the protection of the privilege extends *only to confidential communications between the client and the attorney* providing informed legal advice, and does not extend to the pre-existing, non-privileged documents which are merely transferred from a client to an attorney for the purposes of consultation.[26] Because the attorney-client privilege can have "the effect of withholding relevant information from the fact-finder, [the privilege] applies only where necessary to achieve its purpose."[27]

Certainly any confidential communications, written or otherwise, between agency management and its legal counsel in this case are protected by attorney-client privilege, absent any waiver. The agency states that the April 20, 2011 email from the agency investigator was sent to the grievant's supervisor and to the agency's legal counsel. Therefore, it appears this email is protected. However, the investigator's final report that was attached to the April 20, 2012 email is not attorney-client communication and thus is not protected by the attorney-client privilege; indeed, this report was issued at the request of the grievant's supervisor and it appears the report would have been issued to the supervisor regardless of whether the agency's legal counsel became involved. Furthermore, any emails between the supervisor and the investigator *prior* to the agency's legal counsel involvement are not attorney-client communications and thus are not protected by the attorney-client privilege. Here, it appears these documents would include the supervisor's original email, transcript, or notes sent to the investigator which authorized and subsequently launched the grievant's sexual harassment investigation. The agency is therefore directed to provide all such documents to the grievant **within ten work days of receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

2. Employee Work Profile Documents

The grievant has requested several documents pertaining to his Employee Work Profile (EWP) on August 4, 2011 and August 5, 2011. The grievant labels these as Items 2, 3, 4, 5, 6, and 7 in his outstanding document request list, and states these documents are relevant to his "1A" and "12B" grievances. On August 12, 2011, the agency's legal counsel emailed the grievant, indicating the documents were available upon receipt of a $216.16 search fee. On September 15, 2011, the grievant sent the agency a notice of noncompliance, alleging that the

[23] *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998).
[24] *Upjohn*, 449 U.S. at 389.
[25] *Id.*
[26] Fisher v. United States, 425 U.S. 391, 403-405 (1976); *see also* EDR Ruling No. 2002-215.
[27] *Id*. at 403.

$216.16 search fee is unreasonable because the agency would be required to search for this evidence for hearing regardless of the grievant's request.

The Grievance Procedure Manual provides that "[t]he party requesting the documents may be charged the actual cost to retrieve and duplicate the documents."[28] 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.[29] As such, principles and approaches arising under the Virginia Freedom of Information Act (FOIA) are instructive.[30]

The agency's search fee is based upon search costs incurred by the agency's Department of Assurance Services. The agency's Department of Assurances Services broke down the cost to produce the documentation as follows:

> Administrative Assistant: 1.5 hours at $24.30 per hour
> Senior Auditor: 2.0 hours at $31.97 hours
> Deputy Director: 1.0 hours at $73.17 per hour
> Director: .5 hours at $85.29 per hour

The agency asserts that the $216.16 search fee "does not include the staff search time for various iterations" of the grievant's EWP or related requested communications. Moreover, the agency states that "[s]earch costs are based on actual staff time spent identifying, searching for, copying and redacting responsive documents. Costs are not 'per document.' No costs are imposed for legal counsel's review."

The grievant argues that he should not be charged for these documents because, he asserts, the agency will produce these documents as evidence for hearing regardless of his request. No doubt the agency will introduce documentation it used in support of the grievant's three Written Notices (these documents will be addressed in Section 3 below). However, although the agency may introduce some of the EWP documents the grievant has requested, we find that the breadth of the grievant's requests are extensive, and that it is more reasonable than not that the agency will not introduce most, if any, of the requested EWP documents at hearing. The documents requested appear to be related to the grievant's claim that he has been denied overtime rather than any relationship to discipline taken against the grievant. Furthermore, this Department finds the agency's number of estimated hours seems quite reasonable given the voluminous and extensive document requests the grievant has submitted. Therefore, we conclude that under the grievance procedure, the agency's proposed charges are objectively reasonable with the exception to those documents addressed in Section 3 below.

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[28] *Grievance Procedure Manual* § 8.2.
[29] *See, e.g.*, EDR Ruling No. 2011-2921, No. 2011-2787, 2011-2788, and No. 2010-2628, 2010-2629.
[30] 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.

3. Documents Used to Support the Issuance of Eight Written Notices Issued on June 24, 2011

The grievant has requested all of the agency's documents that it plans to use in support of the eight Written Notices issued to the grievant on June 24, 2011. The grievant labels this as Item 8 in his outstanding document request list, and states these documents are relevant to his "1A" and "12B" grievances. On August 12, 2011, the agency's legal counsel emailed the grievant, indicating the documents were available upon receipt of a $216.16 search fee. On September 15, 2011, the grievant sent the agency a notice of noncompliance, alleging that the $216.16 search fee is unreasonable because the agency would be required to search for this evidence for hearing regardless of the grievant's request. On January 31, 2012, the agency rescinded five of the eight Written Notices that it issued to the grievant on June 24, 2011.

To the extent the grievant seeks documentation that the agency used in support of the issuance of the remaining three Written Notices, this Department concludes these documents are clearly relevant to the "1A" and "12B" grievances, and thus the agency is ordered to produce this documentation. The grievant argues that he should not pay for these particular documents, and this Department finds this is an objectively reasonable argument. In fact, the custodian of the requested documents has likely pulled this documentation prior to the three Written Notices being issued, and thus, it seems reasonable that the agency would not have incurred an additional search fee to retrieve these documents. Therefore, the agency is ordered to produce the documents it used in support of the issuance of the remaining three Written Notices to the grievant **within ten work days of receipt of this ruling** at no cost to the grievant with the exception that it may charge the grievant a reasonable photocopy charge if it is the standard practice of the agency to do so.

To the extent the grievant seeks documentation that the agency used in support of the five rescinded Written Notices, this Department concludes these documents are irrelevant to the grievant's "1A" and "12B" grievances and the agency need not produce these documents.

4. Documents Regarding All Written Notices Issued by the Agency Since January 1, 2008

On August 6, 2011, the grievant requested the agency to produce all the Group I, Group II, and Group III Written Notices that it has issued to any agency employee since January 1, 2008, including any supporting documentation that was attached to each Written Notice. The grievant labels these as Items 9, 10, 11, 12, 13, 14, 15, 16, and 17 in his outstanding document request list, and states these documents are relevant to his "1A" grievance. On August 12, 2011, the agency responded, stating that the scope and time frame of this request made it impossible to produce, and more specifically, the agency felt this request was overly broad, exempt from production, irrelevant, and/or attorney-client privileged. The grievant maintains that he needs this information "[t]o defend and present mitigating circumstances" at hearing.

This Department concludes that the grievant's requests with regards to these particular documents are overly broad. However, it would appear at first blush that some of these documents may be relevant to the grievant's claims. Specifically, these documents are:

1. If the agency has issued a Group II Written Notice, from January 1, 2008 until the present, to any employee within the grievant's agency department for failure to follow the agency's purchasing policy as a reviewer of a subordinate's monthly reconciliation, the agency is ordered to produce these Group II Written Notices, with any attachments to that Group II Written Notice including the agency's letter of intent to issue the discipline, to the grievant if they exist.[31] The agency is directed to provide all such documents to the grievant **within ten work days of receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

2. If the agency has issued a Group II Written Notice, from January 1, 2008 until the present, to any employee within the grievant's agency department for failure to follow the agency's overtime policy by allowing staff to claim overtime without prior written approval, the agency is ordered to produce these Group II Written Notices, with any attachments to that Group II Written Notice including the agency's letter of intent to issue the discipline, to the grievant if they exist.[32] The agency is directed to provide all such documents to the grievant **within ten work days of receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

3. If the agency has issued a Group III Written Notice, from January 1, 2008 until the present, to any employee within the grievant's agency department for falsifying his or her state employment application, the agency is ordered to produce these Group III Written Notices, with any attachments to that Group II Written Notice including the agency's letter of intent to issue the discipline, to the grievant if they exist.[33] The agency is directed to provide all such documents to the grievant **within ten work days of receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

[31] These documents are potentially relevant to grievant's claim of disparate treatment. Disparate treatment of similarly situated employees can be a mitigating factor used to reduce discipline.
[32] *Id.*
[33] *Id.*

5. Signature Stamp Documents

The grievant has requested several documents regarding the use of his supervisor's signature stamp. The grievant labels these as Items 18, 19, 32, 33, and 34 in his outstanding document request list, and states these documents are relevant to his "1A" grievance. The agency asserts that this information could not be located and/or does not exist, and further maintains that the request is overly broad, ambiguous, and irrelevant. Moreover, on January 31, 2012, the agency rescinded the Group II Written Notice that was issued for the grievant's alleged unauthorized use of his supervisor's signature stamp on financial documents. Therefore, this Department concludes these documents are irrelevant to the grievant's "1A" grievance and the agency need not produce these documents.

6. Response to the April 2, 2011 Intent to Terminate Email

The grievant has requested a copy of the April 2, 2011 email from Dr. D to his supervisor, which the grievant alleges is the "smoking gun" email that reflects his supervisor's intent to terminate the grievant without due process. The grievant labels this as Item 20, and asserts this document is relevant to his "1A" and "12B" grievances because it will allegedly show the agency's lack of due process as well as its disparate treatment. The grievant admits the agency produced this email, but alleges that the agency redacted the entire email, asserting that it was attorney-client privileged.

As discussed in Section 1, the protection of the attorney-client privilege extends *only to confidential communications between attorney and client* providing informed legal advice, and does not extend to the pre-existing, non-privileged documents which are merely transferred from a client to an attorney for the purposes of consultation.[34] Dr. D's email response to the grievant's supervisor's April 2, 2011 email is not attorney-client communication and thus is not protected by the attorney-client privilege; indeed, this email was in response to the grievant's supervisor's intent to terminate email and it does not appear that this email involved the agency's legal counsel at that point in time. As stated above, any emails between the grievant's supervisor and Dr. D sent without the involvement of the agency's legal counsel are not attorney-client communications and thus are not protected by the attorney-client privilege. The agency is therefore directed to provide Dr. D's email response to the grievant **within ten work days of receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

7. Timesheet, Pay, and Overtime Records

The grievant has requested the timesheets, pay records, after hours sign-in sheets, and pre-approved overtime records for three named staff members from 2008, 2009, and 2010. The

[34] Fisher, 425 U.S. at 403-405.

grievant labels these as Items 21, 22, 23, 24, 25, and 26, and states these documents are relevant to his "1A" grievance because these records will help the grievant defend his case as well as allegedly reflect the agency's disparate treatment. On September 1, 2011, the agency responded, stating the request was overly broad, ambiguous, and irrelevant.

One of the agency's three remaining Written Notices is a Group II Written Notice issued to the grievant for his alleged failure to follow agency policy by allowing staff to claim overtime without prior approval. It would appear that this information sought by the grievant is likely relevant to the "1A" grievance and potentially material to many of the grievant's claims as these documents relate to whether the grievant violated the agency's overtime policy while acting as supervisor of the three named staff members. The three staff members' records likely served as the basis for the discipline against the grievant, thus it is difficult to see how these documents would not be relevant. Moreover, it does not appear that producing three years of documents would be overly broad (or unduly burdensome) to the agency. The agency is therefore directed to produce the documentation in the grievant's request for Items 21, 22, 23, 24, 25, and 26 to the grievant **within 10 work days of its receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

8. Subordinate's Work Hours Documentation

The grievant has requested several documents regarding whether his subordinate took a meal break during her regularly scheduled work hours. The grievant labels these as Items 27, 28, and 29 in his outstanding document request list, and states these documents are relevant to his "1A" grievance. On January 31, 2012, the agency rescinded the Group II Written Notice that was issued for the grievant's alleged violation of policy for allowing his subordinate to work eight hours without taking a meal break. Therefore, this Department concludes these documents are irrelevant to the grievant's "1A" grievance and the agency need not produce these documents.

9. P-Card Files

The grievant has requested all of his supervisor's p-card files that are located in his office (with no mention of any time frame) (Item 30), and all the p-card files in which his supervisor was the designated reviewer of other p-card holders within the time frame of Years 2008, 2009, and 2010 (Item 31). The grievant states that documents responsive to Items 30 and 31 are relevant to his "1A" grievance because these records will help the grievant defend his case as well as allegedly reflect the agency's disparate treatment. On September 1, 2011, the agency responded, stating the request was overly broad, ambiguous, and irrelevant.

One of the agency's three remaining Written Notices is a Group II Written Notice issued to the grievant for his alleged failure to follow agency purchasing policy as a reviewer of Ms. M's purchase card. Specifically, the Group II Written Notice stated that "University policy

requires that the reviewer verify and sign the p-card holder's monthly reconciliation and that they personally maintain those signed reconciliation files." Both the grievant and the grievant's supervisor acted as reviewers of p-card holders. Therefore, it would appear that this information sought by the grievant is likely relevant to the "1A" grievance and potentially material to the grievant's claim that he was disparately treated when he was disciplined for violating the agency's purchasing policy as a reviewer, but his supervisor allegedly was not.

Nevertheless, this Department agrees that the scope of the grievant's request is overly broad. Accordingly, this Department will narrow the scope of the grievant's requests for both Items 30 and 31 to only those documents that exist in 2008, 2009, and 2010.[35] The agency is therefore ordered to produce the 2008, 2009, and 2010 requested information in Items 30 and 31 to the grievant **within 10 work days of its receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

10. Moving Reimbursement Documentation

The grievant has requested several documents about how the agency conducts moving and relocation reimbursement. The grievant labels these as Items 35, 36, 37, 38, 39, 40, and 41 in his outstanding document request list, and states these documents are relevant to his "1A" grievance. On January 31, 2012, the agency rescinded the Group II Written Notice that was issued for the grievant's alleged violation of agency's policy regarding reimbursement for moving and relocation expenses. Therefore, this Department concludes these documents are irrelevant to the grievant's "1A" grievance and the agency need not produce these documents.

11. February 24, 2010 Attorney Email

The grievant has requested a February 24, 2010 email from the agency's legal counsel to the grievant. The grievant labels this as Item 42 in his outstanding document request list, and states this email is relevant to his "1A" grievance because it will help the grievant defend his case as well as allegedly reflect the agency's disparate treatment. On September 1, 2011, the agency responded, stating the request was overly broad, ambiguous, and irrelevant.

This Department finds that this particular document request could be relevant to the "1A" grievance and potentially material to some of the grievant's mitigating claims.[36] Furthermore, 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. Accordingly, if the February 24, 2010 email was indeed sent directly to the

[35] This request has been narrowed in the sense that Item 30 had no time frame associated with it, and here we are limiting it to 3 years (2008, 2009, 2010).

[36] Grievance "1A" is a broad-based challenge to a number of workplace issues (16 issues in total). EDR has not had an opportunity to review the email in question. However, based upon the Grievant's description of the content of this email, it appears that there is a likelihood the email could relate to at least one of the 16 issues grieved.

grievant, the grievant is entitled to receive a copy of this email under the document discovery provisions of the grievance procedure. However, if the February 24, 2010 email was sent to other individuals, but not to the grievant directly, the agency may have just cause for the non-disclosure of this email. Therefore, the agency is ordered to produce the February 24, 2010 email to the grievant **within 10 work days of its receipt of this ruling** unless it deems the email should be withheld due to a claim of "just cause," then the agency must provide the grievant with a written explanation no later than ten workdays from receipt of the document request.[37] Further, the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the document.[38]

12. Counseling Notes

The grievant has requested any counseling notes he received from his supervisor since April 1, 2008. The grievant labels this as Item 43, and states these counseling notes are relevant to his "1A" grievance because they will help the grievant defend his case as well as allegedly reflect the agency's disparate treatment. On September 1, 2011, the agency responded, stating the request was overly broad, ambiguous, and irrelevant.

At hearing, both parties will present evidence regarding the three remaining Written Notices which include: 1) a Group II Written Notice issued to the grievant for his alleged failure to follow agency purchasing policy as a reviewer of Ms. M's purchase card; 2) a Group II Written Notice issued to the grievant for his alleged failure to follow agency policy by allowing staff to claim overtime without prior approval; and 3) a Group III issued to the grievant for his alleged falsification of his state employment application. It would appear that the grievant's supervisor's counseling notes are potentially relevant to the "1A" grievance and potentially material to many of the grievant's claims as these documents could relate to whether the grievant violated agency policy and/or falsified records. The counseling notes, if any, may have served as the basis for the discipline against the grievant, thus it is difficult to see how these documents would not be relevant. In addition, the grievant would presumably have a right to these documents under both the Freedom of Information Act and the Government Data Collection and Dissemination Act. The agency is therefore ordered to produce any of the grievant's supervisor's counseling notes that were given to the grievant since April 1, 2008, to the grievant **within 10 work days of its receipt of this ruling**. Further, the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

13. Overtime Documentation

The grievant has requested the agency to produce: 1) the final overtime audit report with calculations from April 1, 2008 through June 30, 2009; 2) all supporting documentation for the final overtime audit report; 3) all communications between the parties reviewing the overtime calculations; 4) the names, titles, and company of the individuals who performed the grievant's

[37] *Grievance Procedure Manual* § 8.2.
[38] For example, the attorney-client privilege might exist in that circumstance.

overtime audit report; and 5) all supporting documents that Dr. S referred to in the September 19, 2011 meeting with the grievant. The grievant labels these as Item "see 73," and states these documents are relevant to his "1A" and "12B" grievances because they will help the grievant defend his case as well as allegedly reflect the agency's disparate treatment. On September 26, 2011, the agency responded, and appears to state the document request, which relates specifically to a proposed settlement offer, the "12B" grievance, and issues regarding overtime compensation issues, is irrelevant because the grievant rejected the settlement offer and the agency issued its response to the grievant regarding his overtime compensation claim.

The grievant's "12B" grievance asserts the agency should have paid the grievant for overtime hours he worked from April 1, 2008 through March 31, 2011. Therefore, it would appear that the final overtime audit report, and its supporting documentation, sought by the grievant is relevant to the "12B" grievance. The agency is therefore order to produce the final audit report to the grievant **within 10 work days of its receipts of this ruling**. The agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

However, to the extent the grievant seeks all communications, names, titles, and the name of the company who performed the audit, this Department finds the grievant's request is overly broad and irrelevant. It appears that the agency relied upon the final audit report, not the supporting documentation therein, to make its settlement offer, later rescind that offer, and eventually issue its second resolution step management response. Therefore, this Department concludes these documents are irrelevant to the grievant's "1A" and "12B" grievances and the agency need not produce these documents.

To the extent the grievant seeks all supporting documentation referenced by Dr. S in the September 19, 2011 second resolution step meeting for the "12B" grievance, this Department finds this documentation is likely relevant and potentially material to the grievant's claims that he is owed overtime compensation. The agency is therefore ordered to produce all of the supporting documentation that Dr. S referred to in the September 19, 2011 meeting to the grievant **within 10 work days of its receipt of this ruling**. Further, any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties, and the agency may charge the grievant the actual cost to retrieve, duplicate, and redact the documents.

14. Freedom of Information Act Requests

The grievant has requested several documents from the agency pursuant to the Freedom of Information Act (FOIA). The grievant labels these Items 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, and 73, and states these documents are relevant to his "1A" and "12B" grievances. This Department has no authority to enforce the provisions of the Virginia Freedom of Information Act. Rather, a person denied the rights and privileges conferred by FOIA must

seek enforcement of FOIA's provisions in a court of law.[39] Accordingly, we will not address the grievant's claim that the agency has failed to comply with FOIA in this ruling.

15. Grievant's Rescinded Document Requests

The grievant has rescinded several document requests. The grievant labels these as Items 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and 58. Therefore, this Department will not address document discovery in regards to these specific documents.

CAUTION TO BOTH PARTIES

This Department cannot overstate the importance of moving the "12B" and "1A" grievances forward to the hearing qualification phase **as quickly as possible** upon receipt of this compliance ruling. If the grievant has continued questions about documents he believes the agency is withholding without just cause, he may raise these concerns with the hearing officer at the pre-hearing conference, and the hearing officer is free to order the disclosure of certain documents to be produced before hearing. This Department has been required to rule in not less than eight disputes related to the grievances. This number is excessive by any standard. It is the expectation of this Department not to be required to intervene again before these grievances advance to hearing. This Department strongly cautions that any evidence of bad faith in dealing with any further compliance matters that may arise as this process moves forward will likely result in a decision against the noncompliant party.[40] Accordingly, it is unquestionably in the best interest of the parties to make a good faith effort to resolve any disputes that may arise before seeking further prehearing rulings from this Department.

This Department's rulings on matters of compliance are final and nonappealable.[41]

Claudia T. Farr
Director

[39] *See* Va. Code § 2.2-3713(B).
[40] *See, e.g.*, EDR Ruling Nos 2003-049 and 2003-053, 2007-1470, 2007-1420, 2010-2536.
[41] Va. Code § 2.2-3003(G).