

Issue: Compliance – Grievance Procedure (documents); Ruling Date: March 12, 2012; Ruling No. 2012-3196; Agency: Department of Correctional Education; Outcome: Agency Not in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Correctional Education  
Ruling Number 2012-3196  
March 12, 2012

The grievant has requested a compliance ruling relating to his grievance with the Department of Correctional Education (the agency). The grievant asserts that the agency has not provided him with certain documents that he requested pursuant to his grievance challenge to his annual performance evaluation.

FACTS

In the grievance at issue here, the grievant challenges his annual performance evaluation, which he received on October 20, 2011, as: (1) retaliatory; (2) harassing; (3) arbitrary; and (4) inconsistent with policy and Executive Directive No. 1. In conjunction with his grievance, the grievant has requested certain documents from the agency. He seeks: (1) dates and facilities where his supervisors worked as supervisors; (2) the reasons for their transfers; (3) complaints against these two supervisors pertaining to harassment, bullying, unfair treatment, discrimination or policy violations; (4) the race and gender of complaints of complainants; (5) how many performance evaluations were completed at the grievant's facility by one of the supervisors; (6) the ratings of those evaluations; (7) any notes regarding the grievant made by his supervisors; and (8) how many disciplinary write-ups the supervisors have been involved in. The requests and the agency's response are discussed below.

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."<sup>1</sup> 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 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."<sup>2</sup>

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

<sup>2</sup> *Id.*

### *Dates and Locations of Supervisors' Service*

As to the first and second requests—dates and facilities where the grievant's supervisors have worked and the reasons for their transfers—the agency has provided the grievant with a narrative describing the work histories of his supervisors. The grievant appears to seek these documents to show that his supervisors were moved for disciplinary reasons, presumably for the sort of alleged harassment and discrimination he complains of in his grievance. This Department is disinclined to require the agency to provide additional documents relating to this request. The agency has already provided the grievant with information, perhaps more than required. The request, as posed, is potentially overly broad. The grievant appears to seek information that shows a pattern of management actions taken against his supervisors for alleged harassing, discriminating, or unfair treatment. But, the scope of the request, as posed, could require the agency to produce documents that have nothing to do with this grievance. For example, if one of his supervisors had been transferred because of poor organizational skills, such a transfer would presumably have little, if anything, to do with the behavior complained of in the grievance. A narrower request by the grievant such as all disciplinary or management actions taken against his supervisors for harassing, bullying, discrimination, or unfair treatment of employees would presumably fulfill his needs without casting an overly broad net.

### *Complaints Against Supervisors*

As to the third request—complaints against the grievant's supervisor regarding bullying, harassment, discrimination, and unfair treatment—documents related to sustained complaints would presumably be relevant and thus must be provided. The request for complaints regarding any potential misapplication of policy is again potentially overly broad so as to encompass potential violations of policy that have nothing to do with concerns relating to the grievant. If the grievant narrows the scope of his request by identifying specific established policy violations of a nature of those that have had a direct and personal impact on him which have been , the agency may then have an obligation to provide such documents.

### *Gender and Race Information*

The fourth request seeks the gender and race of the employees who may have lodged the complaints referenced in the previous paragraph. The agency has declined to provide any documents because the grievance did not expressly assert discrimination as a possible basis for the harassment, etc. This Department notes that while a grievant cannot add new claims to an existing grievance—that is, new management actions to grieve—a grievant can add new theories as to why he believes the actions challenged in the original grievance may have occurred. Thus, now that the grievant has essentially amended his grievance to assert that he believes that discrimination based on race or gender may have prompted management's actions, the agency has a duty provide responsive documents to appropriately tailored requests for documents that relate to such alleged discrimination. As noted above, the grievance statutes state 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.”<sup>3</sup> Thus, the complaints sought in request number three should be redacted. However, because the race and gender of the complainants could potentially be relevant in terms of establishing a purported pattern of harassment by the grievant’s supervisors, when providing the complaints sought in request three, the agency must identify the race and gender of complainants.

#### *Information Regarding Other Employees’ Annual Evaluations*

The grievant requests the number of performance evaluations performed by one supervisor and the rating of those evaluations. He specifically states that he does not want to know the specific names of those evaluated. The agency asserts that the grievant’s supervisor evaluated seven employees (thus granting the first part of the grievant’s request) and that “[g]iven the small number of staff, such a breakdown would lead to unnecessary speculation regarding who received what rating.”

This Department has explained that in determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well-established and applicable legal privilege,<sup>4</sup> this Department will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party’s particular interests in obtaining the document, as well as the general presumption under the grievance statutes in favor of disclosure.<sup>5</sup> Relevant documents must be provided unless the opposing party can demonstrate compelling reasons for nondisclosure that outweigh the general presumption of disclosure and any competing interests in favor of disclosure.

There are few if any documents more personal than annual performance evaluations. The agency’s position regarding disclosure is understandable. However, the grievant’s interest in obtaining this information is equally understandable, as he claims that he has been unfairly evaluated. The request appears to be relatively limited in that it recognizes that disclosure of names would be extremely intrusive. A compilation that lists overall ratings by category—Extraordinary Contributor and Below Contributor, for example—would seem to strike an appropriate balance of addressing the competing interests by providing the grievant with sufficient information to assess whether his rating is obviously out of line with others (although there could be many legitimate reasons for a disparity from an average or norm) while still providing non-involved individuals with a reasonable degree of privacy. Accordingly, the agency is directed to break down by category the overall ratings of the seven employees.

#### *Supervisors’ Notes Regarding the Grievant*

The grievant seeks notes authored by his supervisors about him contained in their supervisory files. Presumably, notes about the grievant in any supervisory file are work-related and are at a

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<sup>3</sup> *Id.*

<sup>4</sup> Certain well established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. *See, e.g.*, EDR Ruling No. 2002-215 (discussing attorney-client privilege).

<sup>5</sup> EDR Ruling No. 2008-2030.

minimum tangentially related to the performance of his work. In addition, the grievant has a right to these files not only under the grievance procedure but state policy and law as well. Accordingly the agency is directed to provide them.

*Disciplinary Actions Taken Against the Grievant's Supervisors*

The grievant seeks disciplinary write-ups regarding his supervisors. The agency asserts that such documents are “considered confidential and not available for release.” The first question is whether the requested documents are relevant. While past discipline against his supervisors for harassment, bullying, unfair treatment or discrimination would potentially be relevant to the instant grievance, discipline taken against his supervisors for other actions, tardiness, for example, would have no relevance. The remaining question is whether for the potentially relevant documents—disciplinary actions for harassment, etc.—just cause exists for non-disclosure. Again, we must weigh the interests associated with nondisclosure against the interests in obtaining the documents. While discipline is a matter that employees naturally desire to keep confidential and policy appropriately protects disciplinary actions as confidential, in a case such as this, where an employee asserts that he has been the victim of a pattern of harassment, a prior record of disciplinary actions by the alleged harasser could potentially serve as evidence supporting the alleged pattern of behavior that is the subject of the grievance.<sup>6</sup> Accordingly, the agency will provide documents reflecting past discipline against the grievant's supervisors issued for harassment, bullying, unfair treatment or discrimination.

Finally, we note that documents ordered for production are provided to the grievant for the sole purpose of grievance-related use. The grievant is cautioned that unauthorized inappropriate use of such information could result in discipline under the Standards of Conduct.

This Department's rulings on matters of compliance are final and nonappealable.<sup>7</sup>

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Claudia T. Farr  
Director

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<sup>6</sup> This Department has repeatedly held that the restrictions on document disclosure in DHRM policies are overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents. *See* EDR Ruling No. 2010-2575; EDR Ruling No. 2009-2087; EDR Ruling No. 2007-1437; EDR Ruling No. 2006-1199; EDR Ruling No. 2004-853.

<sup>7</sup> Va. Code §§ 2.2-1001(5), 2.2-3003(G).