

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: February 22, 2012; Ruling No. 2012-3244; Agency: Department of Corrections; Outcome: Agency in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2012-3244  
February 22, 2012

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. For the reasons discussed below, this Department finds no noncompliance on the part of the agency.

FACTS

On September 14, 2011, the grievant initiated a grievance with the agency. To support his claims, on November 8, 2011 the grievant requested that the agency provide all documentation pertaining to his grievance. On November 23, 2011, the grievant received twelve written statements from the agency. On December 5, 2011, the grievant sent a notice of noncompliance to the agency head indicating that he had not received all of the documents pertaining to his grievance, including Mr. K’s investigation summary as well as written statements from Lt. G, Sgt. E, Sgt. B, and C/O T. Moreover, the grievant requested the agency to verify whether the twelve statements he received on November 23, 2011, included the individual statements he specifically requested. On December 20, 2011, the agency mailed a response to the grievant, indicating that the requested documents were being redacted and would be mailed to the grievant shortly. On December 27, 2011, the grievant received a copy of Mr. K’s investigation summary.

In a February 10, 2012 email addressed to this Department, the grievant admits he has received Mr. K’s investigation summary, but maintains that he has not received written statements from Lt. G, Sgt. E, Sgt. B, and C/O T. The agency states that the grievant was provided a redacted copy of Mr. K’s investigation summary and Sgt. B’s written statement, but that written statements from Lt. G, Sgt. E, and C/O T do not exist.

Now, the grievant seeks a compliance ruling on this matter, asserting the requested statements 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.<sup>1</sup> 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.<sup>2</sup> Where a grievant asserts that the agency is noncompliant, the grievant must notify the agency head of the noncompliance.<sup>3</sup> 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.<sup>4</sup>

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.”<sup>5</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. “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”<sup>6</sup> 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, or (3) the documents are protected by a legal privilege.<sup>7</sup> 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>8</sup>

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,

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

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

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

<sup>4</sup> 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.

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

<sup>6</sup> *Grievance Procedure Manual* § 9.

<sup>7</sup> See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

<sup>8</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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.

In this case, the agency asserts that one of the twelve written statements provided to the grievant on November 23, 2011, is Sgt. B's written statement. This Department has verified that Sgt. B's written statement was included in the November 23<sup>rd</sup> packet. The agency also alleges that written statements from Lt. G, Sgt. E, and C/O T do not exist. Specifically, the agency indicates that written statements were not required from Lt. G or Sgt. E, and that C/O T was not available to provide a written statement when the internal investigation took place. The grievant continues to be dissatisfied with the agency's responses and believes that these statements are available, but have not been produced by the agency. This belief, however, appears to be unsupported speculation. As to the grievant's request for a compliance ruling pertaining to the agency's alleged failure to produce Mr. K's investigation summary, that issue is now moot as the grievant has subsequently received those documents.

In light of all the above, this Department finds the agency has complied with the document discovery provisions of the grievance procedure with regards to these written statements. This Department's rulings on matters of compliance are final and nonappealable.<sup>9</sup>

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Claudia T. Farr  
Director

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<sup>9</sup> Va. Code § 2.2-3003(G).