

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: June 21, 2012; Ruling No. 2012-3337; Agency: Old Dominion University; Outcome: Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Old Dominion University
Ruling Number 2012-3337
June 21, 2012

The grievant has requested a ruling regarding Old Dominion University's ("ODU's" or "the agency's") purported failure to provide him with certain requested documents.

FACTS

The grievant plead guilty to two charges of misdemeanor assault and battery. The agency terminated the grievant's employment following those convictions.¹ The grievant challenged his discharge through an April 11, 2012 grievance. In conjunction with his grievance, the grievant requested "all records of Old Dominion University employees who have ever been involved in any Criminal Offenses" within the past 10 years. The agency refused to provide documents relating to other employees on the basis that "[d]ocuments related to other employee actions are personnel records and are not available to you and/or are not relevant to your grievance." In response, the grievant notified the agency head that the agency was in noncompliance with the grievance procedure by not providing him with documents. In turn, the agency responded by stating that he was not entitled to the documents because he was only entitled to documents of similarly situated employees.

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."² This Department's interpretation of the mandatory language "shall be made available" is

¹ The Written Notice that terminated the grievant's employment reads as follows:

On Tuesday, March 6, 2012 you were convicted of two misdemeanor charges in Norfolk General District Court. You pled guilty to acts of violence toward a citizen and a law enforcement official. You were sentenced to 12 months in prison for your actions. Your convictions are of such a nature that to continue your employment could constitute negligence in regard to the university's duty to the public or to other state employees.

² Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

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.”³ 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.⁴ 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.”⁵

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.

In this case, the grievant has requested documents which he apparently believes would establish that he was treated more harshly than other employees. He seems to believe that others have been convicted of crimes but not lost their jobs. Accordingly, the grievant has requested “all records of Old Dominion University employees who have ever been involved in any Criminal Offenses” within the past 10 years.

The document request in this case is not dissimilar from the one in EDR Ruling Number 2010-2566 where the grievant sought “all counseling memoranda or other written disciplinary notices issued to [the grievant’s superior] from December 1, 2007 to present.” In EDR Ruling 2010-2566, this Department explained:

The request for “all” counseling memoranda or other written disciplinary notices could potentially include irrelevant disciplinary documents because only documents that relate to similar misconduct are typically relevant. As we noted in a recent ruling:

The key is that the misconduct be of the same character. Thus, for example, in a case such as this where the grievant was issued a Written Notice for failing to follow his supervisor’s instruction, only documents that are associated with any alleged failure by comparators to follow their supervisor’s instructions are relevant. Documents pertaining to agency responses to other dissimilar alleged incidents of misconduct, such as disruptive behavior or tardiness, are generally irrelevant.

³ *Grievance Procedure Manual* § 9.

⁴ *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

Thus, in this case, the agency need only provide documents relating to comparable offenses committed by the superior from December 1, 2007 to present.

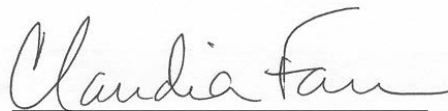
Using the rationale of EDR Ruling 2010-2566, this Department finds that the request in this case is overly broad in two respects. First, ten years is an excessive timeframe. The parties are urged to work together to determine a more reasonable timeframe. If the parties can reach no agreement, a five year limit will be utilized.⁶

Secondly, the scope of the request—all convictions—is overly expansive. The grievant was disciplined for two assault and battery convictions. The agency is therefore required to provide the grievant with all documents including but not limited to, Written Notices, counseling memoranda, correspondences, e-mails, and all other documents that reflect the conviction of any employee for assault and battery (within the five year timeframe described above) and all documents relating to how the individual was treated as a result of the conviction. The agency is ordered to produce the above-described responsive documents to the grievant within **ten workdays of its receipt of this ruling**.⁷

CONCLUSION

For the reasons set forth, the agency is ordered to produce the requested documents as identified above. When providing copies of such documents, however, any non-relevant personal information may be redacted, which could include, for example, social security numbers, telephone numbers, or home addresses.⁸

This Department's rulings on matters of compliance are final and nonappealable.⁹



Claudia T. Farr
Director

⁶ See EDR Ruling Number 2010-2453 (five year limit used for recruitment selection document request).

⁷ The agency had objected to disclosure of information on the basis of that the grievant was not entitled to the personnel information of others. This argument is wholly without merit. This Department has long held that the fact that a document may be a personnel record of another employee does not mean that it is immune from disclosure. See, e.g. EDR Ruling Number 2009-2272, 2009-2289.

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

⁹ Va. Code §§ 2.2-1001(5), 2.2-3003(G).