

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: May 22, 2012;
Ruling No. 2012-3342; 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 2012-3342
May 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 a requested document.

FACTS

On April 6, 2012, the grievant initiated a grievance with the agency, challenging his termination. To support his claims, the grievant requested: “How many employees are currently employed at [] Correctional center with misdemeanor convictions on their record?” On April 26, 2012, the agency responded by email that the requested “list does not exist,” nor does the agency maintain that information. In addition, on April 26, 2012, the agency mailed a letter to the grievant, reiterating that the requested documentation was not available.

Now, the grievant seeks a compliance ruling on this matter, alleging that it is unreasonable that the agency does not maintain such a list because correctional officers are required to submit a copy of any misdemeanor conviction to the agency for personnel purposes.

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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

³ *Id.*

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. “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”⁶ 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.⁷ 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.”⁸

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.

In this case, the agency asserts that the requested list does not exist. Specifically, the agency asserts that it uses the Virginia Department of State Police headquarters' VCIN database to obtain criminal background information about an agency facility employee before it hires or promotes an employee. However, the VCIN database only allows the agency to inquire about a specific, named individual, and it does not have the ability to run a general inquiry about how many agency facility correctional officers hold misdemeanor convictions. Hence, the agency asserts that grievant's requested list is unattainable. Furthermore, when this Department questioned the Virginia Department of State Police headquarters' VCIN representative about the VCIN database's ability to pull the requested list, the representative maintained that a general inquiry into the VCIN database is not only impossible, but he asserts that such an inquiry is disallowed under agency policy as well. The grievant is dissatisfied with the agency's response and believes that documents reflecting the number of employees with misdemeanor convictions are available, but have not been produced by the agency.

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 *Grievance Procedure Manual* § 9.

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

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

Beginning with the agency's contention that it cannot provide the grievant with the list that he seeks because the system the agency uses to check for criminal violations (VCIN) is not designed to run such reports, this response does not adequately address the grievant's request. The agency essentially asserts that it can run a query for only one person at a time. If that is the case, while it may be time consuming, the agency could nevertheless, assuming otherwise appropriate under policy and law, run a query for employees individually to gather the documentation requested. In other words, it may not be simple, but it apparently could be done. The agency could charge the grievant the actual cost to retrieve and duplicate the documents generated through such a search.⁹ As explained below, however, it may be that running such individual queries is not required under the particular facts of this case.

The grievant seeks the requested information to show that he has been treated differently from similarly situated employees, that is, employees who work at the correctional center, and who have been convicted for misdemeanors but were allegedly treated more favorably by agency management than he. The VCIN information may be of little to no value in this case because it is not enough for an employee to show up as having a conviction. The key is that the agency is aware of such a conviction and took either no action or a less harsh action in response.¹⁰ Thus, relevant documentation would consist of documents within personnel or other files that evidence any such convictions and any related disciplinary actions, including, but not limited to, written notices or counseling memoranda, taken against employees based on those convictions. In addition, documents in the personnel file that indicate an employee reported a conviction—whether or not reflecting any formal disciplinary response by the agency—would presumably be responsive and thus need to be produced. Again, the agency can charge for this search. Disclosures of results from personnel and other folder searches can potentially be limited to only misdemeanor convictions of the same nature and character of the offense for which the grievant was terminated, unless, for example, the agency asserts that it discharges employees for any misdemeanor conviction, in which case documents relating to any conviction would presumably be relevant.

In sum, the agency is ordered, consistent with this ruling, to provide responsive documentation to the grievant (or a response asserting just cause for not providing the documents, or that no such responsive documentation exists, if that is the case), within five workdays of receipt of this ruling. This Department's rulings on matters of compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

⁹ *Grievance Procedure Manual* § 8.2.

¹⁰ See *Rules for Conducting Grievance Hearings* § VI (B)(1) which list inconsistent discipline of similarly situated employees as an example of a mitigating circumstance.

¹¹ Va. Code § 2.2-3003(G).