

Issue: Compliance - Grievance Procedure (Documents); Ruling Date: July 13, 2012;
Ruling No. 2012-3374; Agency: Department of Corrections; Outcome: Agency in
Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Corrections
EDR Ruling Number 2012-3374
July 12, 2012

The grievant has requested a ruling regarding the alleged noncompliance with the grievance procedure by the former Virginia Department of Correctional Education, now the Virginia Department of Corrections (the “agency”), in not providing requested documents. This ruling finds the agency has complied with the document discovery provisions of the grievance procedure.

FACTS

The grievant was employed by the agency as a Program Support Technician. On January 25, 2012, the grievant was terminated. On February 24, 2012, the grievant initiated a grievance challenging her termination. On March 22, 2012, the grievant requested copies of all documents used to terminate her employment. The grievant alleges the agency failed to respond to her document request. On May 30, 2012, the grievant e-mailed a notice of noncompliance to the agency head, indicating she had not received a response from the agency, nor received any of the requested documents from the agency. The grievant alleges the agency has yet to respond to her May 30th notice of noncompliance. As such, the grievant seeks a compliance ruling from this Office.

On June 21, 2012, EDR received an email from the agency’s human resources director, indicating that he had not determined “whether the information [the grievant] requested was ever shared with her by the first step respondent,” but that he would forward the information to the grievant immediately. In a July 9, 2012 e-mail, the agency confirmed all of the requested documents were sent to the grievant. EDR has made several attempts to contact the grievant to inquire whether she received the requested documents. To date, the grievant has yet to respond to EDR.

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

¹ *Grievance Procedure Manual* § 6.3.

other about the noncompliance, and resolve any compliance problems voluntarily, without 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 EDR, 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

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 EDR's interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance 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.”⁶ While a party is not required to create a document if the document does not exist,⁷ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

EDR 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.

² *Id.*

³ *Id.*

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR 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 *Id.*

⁷ *Id.*

In this case, the grievant challenges the agency's failure to provide the requested documents. The information sought by the grievant is clearly relevant to her grievance as it relates to her termination. However, the agency asserts that it has produced all of the grievant's requested documents, and the grievant has yet to respond to the contrary. Accordingly, we find the issue is now moot because the grievant has presumably received the requested documents. Should the grievant find she is not satisfied with the agency's response, she can renew her request for additional documents or seek a compliance ruling, after providing the agency head with notice of noncompliance, regarding the agency's production of documents thus far.

In light of the above, EDR finds the agency has complied with the document discovery provisions of the grievance procedure. EDR's rulings on matters of compliance are final and nonappealable.⁸

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⁸ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).