



JANET L. LAWSON
DIRECTOR

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

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

COMPLIANCE RULING

In the matter of the Virginia Information Technology Agency
Ruling Numbers 2024-5662, 2024-5663, 2024-5664
February 13, 2024

The grievant has requested rulings from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to alleged noncompliance with the grievance procedure by the Virginia Information Technology Agency (the “agency”).

FACTS

The grievant filed a grievance, dated December 19, 2023, purportedly challenging her non-selection for a manager position with the agency. The grievance indicates that the grievant was notified on December 6, 2023 that she was not chosen for the position. Her grievance challenges the content of some of the assessments of her interview and overall candidacy for the manager position. As relief, the grievant seeks to be awarded the position. The first-step respondent issued a response on or about December 28, 2023. The grievant sent a notice of noncompliance to the agency on January 16, 2024, alleging that the first-step response did not comply with the grievance procedure. The grievant additionally sent another notice of noncompliance on January 24, 2024, addressing alleged noncompliance by the agency in responding to a request for documents. The agency has provided correspondence taking the position that they are compliant with the grievance process. Thereafter, the grievant submitted a second grievance, dated January 29, 2024, purportedly seeking an independent review of the selection process for the manager position in which she competed unsuccessfully. The agency has administratively closed the second grievance for noncompliance, in part, because the grievance is challenging a management action challenged in another grievance (the December 19, 2023 grievance). The grievant has appealed this determination and seeks rulings concerning the other matters of noncompliance addressed in her notices.

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 problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow

¹ *Grievance Procedure Manual* § 6.3.

five workdays for the opposing party to correct any noncompliance.² 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 EDR finds that either party to a grievance is in noncompliance, its 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 the delay in conforming to EDR's order.³

Adequacy of Step Response

The grievant states that the first-step response does not comply with the grievance procedure because it does not respond to the alleged lack of truthfulness of negative statements made in her interview assessment. Section 3.1 of the *Grievance Procedure Manual* states that the first-step response “must address the issues and the relief requested and should notify the employee of their procedural options.” While the step respondent is not required to respond to each and every point or factual assertion raised by the employee, they must generally address each issue raised and the requested relief.⁴ Having reviewed the first-step response in the context of the particular facts surrounding this case, EDR concludes that it is compliant. The grievant identified two statements in her grievance from her interview assessment, one overall assessment and one applicant weakness. The first-step response responds to each of these points. While the grievant may not agree with the response or how the first-step respondent addressed each point, there is not a basis for EDR to find the response noncompliant with the grievance procedure.⁵

Document Request

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.”⁶ EDR’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.”⁷ For purposes of document production, examples of just cause include, but are not limited to, (1) the documents do not exist,

² *See id.*

³ Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with procedural rules, 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. However, where a party’s noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁴ *E.g.*, EDR Ruling No. 2018-4718; EDR Ruling No. 2015-4155.

⁵ The grievant has submitted substantial documentation about how she was assessed in the interview process and the agency’s stated justification for her non-selection. To the extent the agency’s assessments are not supported by the facts, this does not rise to a matter of noncompliance with the grievance procedure. The degree to which the agency’s justification is not supported or changes could, however, be relevant to EDR’s consideration as to whether the grievance qualifies for a hearing, if this grievance reaches that stage of the process.

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁷ *Grievance Procedure Manual* § 9.

(2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.⁸ 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,⁹ EDR 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.¹⁰ The grievance statutes further provide 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."¹¹

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. All such documents must be provided within five workdays of receipt of the request. If it is not possible to provide the requested documents within the five-workday period, the party must, within five workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than ten workdays from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or "just cause," the withholding party must provide the requesting party with a written explanation of each claim, no later than ten workdays from receipt of the document request.¹²

At issue in this ruling is the grievant's request for "communications to and/or from panel members and/or candidate chosen" regarding the position she applied for. The agency states that an electronic search of email records for the identified individuals was conducted and responsive emails produced. The grievant responded to the agency's production seeking more information about documents withheld. The agency identified the records that were withheld, none of which appear to have been the communications sought by the grievant. The grievant responded further to specifically identify that she was seeking documentation concerning "the creation of the position, approval of the position, drafting and distribution of the EWP for the position, interview setup dates and times for this position, etc." The agency treated this clarification/response as a new request for records and responded accordingly, producing the requested information. Further, the agency has represented to the grievant and to EDR that no additional communications have been withheld.

In consideration of the above, EDR finds that the agency has complied with the grievance procedure in responding to the grievant's request for documents as to the issues identified in the grievant's ruling request. The agency has confirmed that it conducted a search for the requested communications, produced said communications, and confirmed that no other communications were withheld. The grievant's ruling request does not present any information that reasonably

⁸ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

⁹ 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).

¹⁰ See, e.g., EDR Ruling No. 2010-2372.

¹¹ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

¹² *Grievance Procedure Manual* § 8.2.

questions these statements and instead seeks further clarity. EDR's review of the relevant correspondence and as reiterated in this ruling describes that such clarity has been provided as a matter of compliance with the grievance procedure.

Duplicative Grievance

EDR's assessment of the grievant's December 19, 2023 grievance is that it is a challenge to the selection process for the manager position in which she competed unsuccessfully. The grievant challenges how the panel assessed her interview performance and seeks to be placed in the position as relief in her grievance. In the January 30, 2024 grievance, the grievant seeks an independent review of that same selection process. Section 2.4 of the *Grievance Procedure Manual* states that a grievance may not "challeng[e] the same management action or omission challenged by another grievance." It is apparent that both grievances address the selection process for the same manager position in which the grievant competed. As the grievance process can only be utilized for those matters that affect the grievant's own employment personally and directly,¹³ EDR views both grievances as challenges to the same selection process and the grievant's non-selection. Accordingly, we find that the January 30, 2024 grievance is duplicative of the December 19, 2023 grievance and will remain administratively closed.¹⁴

Based on the foregoing, EDR finds that the agency has substantially complied with the requirements of the grievance procedure. To proceed with the grievance, the grievant must either advance the December 19, 2023 grievance to the next step or notify the agency's human resources office in writing that she wishes to conclude the grievance **within five workdays of receipt of this ruling**. EDR's rulings on matters of compliance are final and nonappealable.¹⁵

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹³ *Grievance Procedure Manual* § 2.4.

¹⁴ To the extent the grievant has discovered facts during the course of the December 19, 2023 grievance that are additional reasons why she challenges the agency's decision not to select her for the manager position, she can raise those claims as part of the issues identified in her December 19, 2023 grievance.

¹⁵ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).