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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5742
August 6, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) in relation to the alleged failure of Virginia Department of Behavioral Health and Developmental Services (the “agency”) to produce requested documents.

FACTS

On or about July 15, 2024, the grievant initiated a grievance challenging a selection process for a position in which the grievant was not the selected candidate. The grievant claims that the agency has engaged in an “arbitrary, biased, collusive, and unfair selection process” which resulted in the selection of a “substantially less qualified applicant.”

Included as an attachment in his grievance, the grievant has sought the first round interview notes for himself and the selected candidate, the first round interview scores and summary comments of all applicants, the second round interview notes of all applicants, all submitted resume documents of the selected candidate, and any other official Human Resources documentation regarding reasons for the selection. The grievant also requested the dates on which the first round interviews were conducted for the grievant and the selected candidate, the date that Human Resources was informed there would be a second round of interviews, and the dates on which the second round panel members were asked to participate. Finally, the grievant requested “[Human Resources] formulas used to calculate recent psychology department salary increases” and any relevant policies concerning the continued onboarding of the selected candidate.

The agency provided all requested documents relating to the grievant himself and documentation showing when Human Resources was informed of a second round of interviews. However, the agency declined to produce the requested documents relating to all other candidates, primarily due to confidentiality of matters concerning other employees and/or for being irrelevant to the grievance. The agency also asserted that there was no other existing official Human Resources documentation relating to the selection process. As to the requests pertaining to the dates of the first round interviews, the dates of when second round panel members were asked to participate, and the relevant policies concerning onboarding, the agency asserted that such

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documents do not exist. Finally, as to the request for Human Resources formulas used to determine salaries, the agency asserted that such information is not relevant to the grievance.

On or about July 17, the agency provided the grievant with its first step response. The grievant responded on July 19, asserting that the agency was out of compliance for not providing all the requested documents. On July 25, the grievant followed up on his assertion of the agency's noncompliance. The agency responded that same day, affirming that they would not be providing the documents related to other applicants due to "privacy concerns" "[a]t this stage in the process." The grievant now asks EDR to issue a compliance ruling due to alleged noncompliance in failing to produce the requested documentation under the grievance procedure.

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."¹ 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."² 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.³ 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,⁴ 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.⁵ 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."⁶

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

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

² *Grievance Procedure Manual* § 9.

³ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

⁴ 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).

⁵ See, e.g., EDR Ruling No. 2010-2372.

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

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.⁷

In determining whether documents must be produced during the management resolution steps, EDR weighs the relevance—that is, the possible probative value— and materiality of the requested documents against possible competing interests, such as the privacy of other employees not involved in the grievance.

Alleged Irrelevant Documents

Under the grievance procedure, parties can only be required to produce records “relating to the actions grieved.”⁸ The agency argues that the requested documents pertaining to all applicants (other than the grievant and the selected candidate), as well as the requested Human Resources formulas used to calculate recent salary increases, are irrelevant to this grievance.

EDR agrees with the agency that the formulas used to calculate salary increases are not relevant to the selection process being challenged in the July 15 grievance. Issues of salary and salary increases are certainly concerns that can be raised in a grievance, but it is not at issue in the July 15 grievance about a selection process. The issue being grieved here is the grievant not being selected for the position, not whether the grievant was given a disagreeable salary. As such, the agency is not out of compliance regarding the requests of certain Human Resources formulas, but the grievant retains the ability to request them again if he wishes to file another grievance pertaining to his salary.

As to the document requests pertaining to all applicants, specifically the first round interview scores, summary comments, and second round interview notes, EDR considers them relevant to the grievance at hand. However, the relevance of these records and the grievant’s need for obtaining the records would be outweighed by the concerns for privacy of personnel matters concerning nonparties.⁹ As these records’ relevance is outweighed by privacy concerns, the agency is not under a duty to produce the records under the grievance procedure at this time.¹⁰ However, if this grievance were to qualify for a hearing, the hearing officer would have the ability to reassess whether the relevance of such documents outweighs the privacy concerns of the nonparties.

Alleged Nonexistent Documents

The agency has also asserted that documents relating to the first round interview dates of the grievant and selected candidate, the dates the second round panel members were asked to participate, policies specifically relating to onboarding, and any other official documentation relating to the selection decision do not exist. EDR generally considers the nonexistence of responsive documents to be just cause that excuses a party’s failure to provide requested

⁷ *Grievance Procedure Manual* § 8.2.

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

⁹ While the grievance procedure contemplates the production of records of other employees in a manner to preserve their privacy, the grievant would be aware of the subject of the records already and, therefore, redactions would be ineffective at preserving the privacy of any nonparties. See Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

¹⁰ However, to the extent this grievance reaches EDR’s level of review, EDR will be able to review information contained in the records of other applicants to independently evaluate and assess the questions at issue in the grievance.

information. EDR has no basis to dispute the agency's contention that specific documents do not exist to corroborate the outstanding dates in question.

Similarly, there is no basis to suggest that other documents pertaining to Human Resources' selection decision or policies concerning onboarding exist. The agency did provide the grievant with DHRM Policy 2.10, *Hiring*, along with 2.10's accompanying policy guides, and EDR is not aware of any other DHRM policy that specifically concerns onboarding practices. The grievant has also not specified which other document(s) concerning the selection decision may exist, and EDR is not aware of what such documents may be. For the foregoing reasons, because the requested records do not exist, there is no basis to find that the agency has failed to comply with the grievance procedure.

Selected Candidate's Documentation

Finally, the grievant has also requested the first round interview notes and all submitted resume documentation of the selected candidate. While such records would appear to be related to the actions grieved, there is just cause for not producing those records at this time. For similar reasons concerning the interview materials of the other candidates, the relevance of these records and the grievant's need for obtaining the records would be outweighed by the concerns for privacy of personnel matters concerning nonparties. Additionally, documents such as application materials necessarily contain information about individuals that are not parties to the grievance. EDR does not generally require an agency to produce application materials of other candidates at the request of a grievant at this stage of a grievance absent compelling circumstances that are not present here.¹¹ The grievant has not presented an interest or need for obtaining such materials that would overcome the agency's interest in protecting the personal information of other candidates. Accordingly, EDR cannot find that the agency would be in noncompliance for failing to produce interview notes and application materials concerning the selected candidate at this time during the management steps.¹²

CONCLUSION

For the foregoing reasons, EDR declines to rule that the agency has engaged in noncompliance with the grievance procedure. It appears that, when the grievant requested this ruling, the grievance process was temporarily halted after the grievant had received the first step response. The grievant is, therefore, directed to either notify the agency that he wishes to advance to the second step or conclude this grievance **within five workdays of the date of this ruling**.

EDR's rulings on matters of compliance are final and nonappealable.¹³

¹¹ However, like the records for the other applicants discussed above, to the extent this grievance reaches EDR's level of review, EDR will be able to review information contained in the records of the selected applicant to independently evaluate and assess the questions at issue in the grievance.

¹² In the event this grievance is qualified for hearing, the grievant may renew his request for the selected candidate's interview notes and application materials with the hearing officer. If this occurs, this ruling will not bind the hearing officer in making his or her decision regarding whether production is warranted under the grievance procedure.

¹³ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

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