

Issue: Compliance – Grievance Procedure (documents); Ruling Date: November 17, 2017; Ruling No. 2018-4636; Agency: Department of State Police; Outcome: Hearing Officer Not in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**COMPLIANCE RULING**

In the matter of the Department of State Police  
Ruling Number 2018-4636  
November 17, 2017

The Department of State Police (the “agency”) has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management to challenge the hearing officer’s pre-hearing order regarding the production of documents in Case Number 11072.

FACTS

The grievant was employed by the agency as a Special Agent. On or about June 23, 2017, the grievant was notified that he would be removed from employment with the agency effective September 1, 2017. The agency explained that the grievant was being separated due to the results of a fitness for duty evaluation conducted on June 21, 2017, in which an evaluating physician had determined he was unable to perform the essential functions of his position. The grievant timely filed a grievance challenging his separation, and the agency qualified the grievance for a hearing.

After EEDR appointed a hearing officer to the case,<sup>1</sup> the grievant requested an order for the production of documents. The grievant requested, among other things, a copy of the “Fitness for Duty Evaluation [] report and findings” of the evaluating physician.<sup>2</sup> The agency objected to production of the report, on the basis that Section 32.1-127.1:03(F) of the Code of Virginia prohibits the disclosure of the report to the grievant. That section of the Code relates to the privacy of health records and states that, if an “individual’s treating physician or the individual’s treating clinical psychologist has made a part of the individual’s [health] record a written statement that, in the exercise of his professional judgment, the furnishing to or review by the individual of such health records would be reasonably likely to endanger the life or physical safety of the individual or another person,” then the health record in question “shall not be furnished to such individual or anyone authorized to act on the individual’s behalf . . . .”<sup>3</sup> The physician attached such a written statement to the grievant’s fitness for duty evaluation report.

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<sup>1</sup> EEDR initially appointed a hearing officer on August 8, 2017; however, the case was reassigned to a different hearing officer as of October 16, 2017.

<sup>2</sup> The grievant has apparently given the agency a signed form authorizing the release of the report to either him or his legal counsel.

<sup>3</sup> Va. Code § 32.1-127.1:03(F).

On October 16, 2017, the hearing officer issued an order directing the agency to produce the fitness for duty report.<sup>4</sup> In the order, the hearing officer determined that the agency had not shown the grievant's treating physician or treating clinical psychologist had made a written statement as referenced in the Code section, and as a result found the Code Section was not applicable to restrict the grievant's access to the report. The agency requested a compliance ruling from EEDR on October 19, 2017, arguing that the hearing officer's order is not in compliance with the grievance procedure because there is just cause for nonproduction of the report.

### 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.”<sup>5</sup> EEDR's interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided. Further, a hearing officer has the authority to order the production of documents.<sup>6</sup> As long as a hearing officer's order is consistent with the document discovery provisions of the grievance procedure, the determination of what documents are ordered to be produced is within the hearing officer's discretion.<sup>7</sup> For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.<sup>8</sup>

In support of its position, the agency asserts that there is just cause for it to withhold the fitness for duty reevaluation report because disclosure of the report to the grievant is prohibited by Section 32.1-127.1:03(F) of the Code of Virginia. In response, the grievant argues that the hearing officer correctly determined the evaluating physician was not a “treating physician” or “treating clinical psychologist” as referenced in the Code section, and thus there is nothing in the Code to restrict production of the report to him.

Having carefully reviewed the facts of this case and the arguments presented by the parties, EEDR finds no factual basis to support a conclusion that the provisions of Section 32.1-127.1:03(F) prohibiting the grievant from having access to the report would be inapplicable here. The evaluating physician attached a cover letter to the report citing that section of the Code and stating that, in his opinion, disclosure of the report to the grievant would be “inappropriate and could potentially result in harm to individuals.” When such a statement has been attached to an

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<sup>4</sup> The grievant requested an order for the production of other documents, which the agency apparently claims it does not possess. The hearing officer directed the agency to produce any documents responsive to these other requests, to the extent they exist. The agency has not appealed that portion of the hearing officer's order and, accordingly, those requests will not be discussed further in this ruling.

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

<sup>6</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>7</sup> *See, e.g.*, EDR Ruling No. 2012-3053.

<sup>8</sup> *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) (“We have recently defined as relevant ‘every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.’” (citation and internal quotation marks omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) (“Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue.” (citation omitted)). In this case, the report would undoubtedly be relevant because it served as agency's basis for separating the grievant. That a requested document may be relevant, however, does not by itself overcome an appropriate assertion of just cause.

individual's health record, the Code provides that the record may not be disclosed to either the "individual or anyone authorized to act on the individual's behalf . . ." <sup>9</sup> Although it is not within the authority of this Office to determine, with finality, questions of law such as those presented by this case, it is at least arguable that the evaluating physician could be considered a "treating physician" or "treating clinical psychologist" for purposes of Section 32.1-127.1:03(F). <sup>10</sup>

The prohibition on an individual like the grievant receiving a health record to which this Code section applies is very specific and appears to represent a blanket prohibition. Without reaching the issue of whether the authority granted by the Code for the production of documents under the grievance procedure can overcome this specific prohibition, EEDR has also considered the policy exhibited in this prohibition for a patient to not receive such records. That policy is persuasive in this instance and represents just cause for not providing the record under the grievance procedure. In this regard, EEDR is also persuaded that the Code provides an alternative means by which a patient, such as the grievant, could potentially obtain the record. <sup>11</sup> Because the Code provides a specific manner by which the prohibition can be overcome, that appears to be the more appropriate way for the grievant to obtain this record if warranted. Accordingly, EEDR finds that the agency has presented just cause for withholding the document as a matter of the grievance procedure, based on its assertion that production of the report is prohibited by Section 32.1-127.1:03(F) of the Code of Virginia.

Although the agency has presented just cause for withholding the report itself, it may be possible to redact those portions of the report that the evaluating physician believed would create a safety risk if the report were disclosed to the grievant. Similarly, the agency may be able to create an executive summary or other document compiling the information contained in the report in a manner that would eliminate the evaluating physician's safety concerns. While the grievance statutes do not mandate the production of a document that is not already in existence, the hearing officer could discuss this matter further with the parties and determine whether production of the report in such an alternate format would be acceptable to the agency and the evaluating physician, upon request by the grievant. There is an insufficient factual basis before EEDR to make any findings one way or the other as to an alternative means of production. As

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<sup>9</sup> Va. Code § 32.1-127.1:03(F).

<sup>10</sup> The terms "treating physician" and "treating clinical psychologist" are not defined in the Code as used in this section. For purposes of the section, however, the Code defines "health services" as "examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind . . ." Va. Code § 32.1-127.1:03(B). Based on this definition, it appears the grievant received health services from the evaluating physician. The circumstances under which a physician who provides health services to an individual would not be considered a "treating physician" or "treating clinical psychologist" are unclear to EEDR.

<sup>11</sup> Section 32.1-127.1:03(F) of the Code describes the process by which an individual who disagrees with a statement restricting his access to a health record under that section may essentially appeal such a determination. The individual may "designate, in writing, at his own expense, another reviewing physician or clinical psychologist, whose licensure, training and experience relative to the individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based," who "shall make a judgment as to whether to make the health record available to the individual." Va. Code § 32.1-127.1:03(F). In the alternative, the individual may "request in writing that [the] health care entity designate, at its own expense, a physician or clinical psychologist, whose licensure, training, and experience relative to the individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose professional judgment the denial is based and who did not participate in the original decision to deny the health records, who shall make a judgment as to whether to make the health record available to the individual." *Id.* In either case, "[t]he health care entity shall comply with the judgment of the reviewing physician or clinical psychologist." *Id.*

such, the hearing officer is directed to hold a conference with the parties or their representative(s) to determine whether such an alternative production is viable.

CONCLUSION

Based on the foregoing, the hearing officer is directed to reconsider his order for the production of documents consistent with this ruling. EEDR's rulings on matters of compliance are final and nonappealable.<sup>12</sup>



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Christopher M. Grab  
Director  
Office of Equal Employment and Dispute Resolution

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<sup>12</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).