

Issue: Compliance – Grievance Procedure (documents); Ruling Date: April 2, 2013;
Ruling No. 2013-3548; Agency: Department of Behavioral Health and Developmental
Services; Outcome: Agency Not in Compliance.



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

COMPLIANCE RULING

In the matter of the Department of Behavioral Health
and Developmental Services
Ruling Number 2013-3548
April 2, 2013

The grievant has requested a ruling regarding the Department of Behavioral Health and Developmental Services (the agency's) alleged noncompliance with the grievance procedure in failing to produce requested information.

FACTS

On or about November 15, 2012, the grievant initiated a grievance challenging her designation as an essential employee and her related inability to receive sixteen hours of leave during Hurricane Sandy.¹ She subsequently asked the agency to provide her with time and leave data for all regular employees assigned to her work location during October 29 and 30, 2012, and information for those same employees regarding leave adjustments reflected in leave balances the week of December 10, 2012. The agency denied the grievant's request, and she gave written notice of noncompliance to the agency head. After the agency head again denied the grievant's request, the grievant asked EDR to issue a compliance ruling.

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."² 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."³ 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

¹ The grievant did not work during this period and as a result was forced to use her accrued leave time.

² Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

³ *Grievance Procedure Manual* § 9.

documents are protected by a legal privilege.⁴ 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.”⁵

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.

In this case, the grievant has requested time and leave data for other employees during the period the Governor had declared a state of emergency for Hurricane Sandy. She asserts that this information will allow her to show that despite its stated policy, all employees at her facility are not treated as essential employees; that decisions regarding essential employee designations may or may not have an effect on pay and/or time and it is unknown how decisions in this regard are made; and that the facility knowingly or unknowingly misleads employees as to their responsibilities during an emergency. The agency has denied the grievant’s request on the grounds that the information sought is irrelevant to her grievance; that the request is overly broad; and that the information requested will neither prove nor disprove her grievance claims.

In effect, the grievance challenges two agency actions: the grievant’s designation as an essential employee under the facility’s Inclement Weather policy and having to take leave time for the unworked days. These claims may fairly be viewed as challenging not simply her designation as essential under the Inclement Weather policy, but also the manner in which the agency applied the policy to her. As such, data relating to how the agency applied the policy to other employees in this instance may pertain to her grievance.

The grievant’s request for time and leave information regarding all employees at her facility is overly broad, however. Rather, the grievant is entitled only to the requested time and leave information for those employees who, like her, were designated as essential⁶ and failed to report to work during Hurricane Sandy. While this subset of information may include data about employees whom the agency asserts are not otherwise similarly situated to the grievant (such as non-exempt employees or employees who had verifiable medical excuses for their absences), the agency’s treatment of these other employees could nevertheless have probative value, depending on other facts and circumstances presented.


Accordingly, the agency is ordered to produce the requested time and leave data for those essential employees at the grievant’s facility who did not report to work on October 29 and 30, 2012 **within five workdays of receipt of this ruling**. Appropriate redactions may be necessary

⁴ See, e.g., EDR Ruling No. 2008-1935, 2008-1936.

⁵ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁶ It is EDR’s understanding that all employees at this facility are designated as essential.

if the requested record contains personal information of a nonparty. EDR's rulings on matters of compliance are final and nonappealable.⁷



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⁷ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).