

Summary: Compliance-Conduct of Hearing; Ruling Date: May 3, 2002; Ruling #2002-095; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services/No. 2002-095
May 3, 2002

ISSUE:

Did the hearing officer abuse his authority under the grievance procedure by ordering the agency to produce to the grievant the disciplinary records of another specifically-named employee, after removing all personally identifiable information, where the grievant alleges that discipline had been administered unfairly and inconsistently as between him and the other employee?

RULING:

No. The parties are advised to proceed to the hearing, as scheduled with the hearing officer, in a manner consistent with this ruling. This Department's rulings on matters of compliance are final and nonappealable. (See Va. Code § 2.2-3003(G)).

EXPLANATION:

By statute, hearing officers have the power to order the production of documents. (Va. Code § 2.2-3005(C)(3)). Moreover, the grievance statutes provide that "[a]bsent just cause, all documents . . . relating to the actions grieved, shall be made available, upon request from a party to the grievance, by the opposing party. Documents 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." (Va. Code § 2.2-3003(E)).

In this grievance, the agency asserts that "just cause" exists for withholding the other employee's disciplinary record from the grievant on the basis that state personnel policy generally precludes the disclosure of personal information to "third parties" without the subject employee's written consent. (See DHRM Policy No. 6.05). However, DHRM Policy No. 6.05 also provides a list, expressly described as *not all inclusive*, of certain

individuals and entities to whom an agency *may* disclose personal information without the subject employee's consent (e.g., the subject employee's supervisor, upper management, the agency head, agency human resource employees as necessary, and private insurance companies). In addition, that policy provides that agencies must comply with court subpoenas ordering the production of documents containing the personal information of an employee.

In this case, the hearing officer interpreted DHRM Policy No. 6.05 as not providing "an absolute prohibition against disclosure." He also viewed the function of a grievance hearing officer's order, in the context of that policy, as similar to that of a subpoena. (See April 30, 2002 Letter of Hearing Officer, note 2.) On that basis, and on the basis of the grievance statutes cited above, he denied the agency's request that he reconsider his order for the production of documents. We cannot rule that the hearing officer acted outside the scope of his authority under the grievance procedure by ordering the production of documents in accordance with his interpretation of DHRM policy and the grievance statutes. We call to his attention, however, in addressing this issue further, that if he deems personally identifiable information as essential to the resolution of a grievance, he "should work with the parties to obtain the information in a format that does not violate the privacy rights of nonparties . . . and should exercise care in preserving confidentiality when nonparty records . . . are exchanged or admitted into evidence." (*Rules for Conducting Grievance Hearings*, page 9.)

In addition, the parties should note that a hearing officer's order is not a subpoena and therefore, the agency cannot be compelled to produce any of the requested documents. If the agency fails, without "just cause," to produce the documents, factual inferences could be drawn against it in the hearing decision with respect to any disputed material fact that could have been resolved by producing the documents. The meaning of the statutory term "just cause" and its application to this case could be determined by a circuit court through an appeal of the final hearing decision.

Further, the parties may consider, as the hearing officer suggested, other ways to meet the competing interests of preserving the confidentiality of employee records and allowing a full and fair presentation of the evidence in support of an employee's grievance claims. For example, instead of producing only the documents pertaining to one specifically-named employee, documents for all similarly situated employees, including the named individual, could be produced, with identifying information removed and the documents separately but anonymously referenced (e.g., Employee A, Employee B, Employee C, etc.). Also, the agency could disclose the information to the grievant on the condition that he sign an agreement to keep it confidential. In addition, the hearing officer was willing to review the requested documents *in camera* to assure their relevance prior to disclosure to the grievant.

Finally, hearing officers must draft their decisions in a manner that seeks to preserve personal privacy. (See *Rules for Conducting Grievance Hearings*, page 10.) Hearing officers and their decisions may also order that any confidential personal information

May 3, 2001
Ruling #2002-095
Page 4

pertaining to nonparties that is disclosed during the hearing process remain confidential and not be further disclosed outside the hearing process, unless in accordance with applicable state laws and policies.

Claudia T. Farr
Director