

Issue: Compliance-Documents; Ruling Date: August 19, 2002; Ruling #2002-117;  
Agency: Department of Mental Health, Mental Retardation and Substance Abuse  
Services; Outcome: Agency out of 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. 2002-117  
August 19, 2002

By letter dated May 17, 2002, the grievant requests a compliance ruling from this Department. The grievant claims that management has failed to provide her with documents and information requested relative to her grievance initiated on May 6, 2002.

FACTS

Grievant is employed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) at a psychiatric hospital. Departmental Instruction #78 of the DMHMRSAS employee handbook states that, "Employees who are arrested, charged or convicted must notify their supervisors within five (5) workdays of the event. Failure to report the event as required may result in disciplinary action."

In March 2001 and again in October 2001, grievant was charged with a traffic offense.<sup>1</sup> Grievant did not report these offenses to her supervisor, as required under Departmental Instruction #78. On April 22, 2002, grievant's supervisor issued grievant a Group II Written Notice for failure to report an arrest and conviction within five (5) workdays of the event.

In response to the Group II Written Notice, grievant initiated a grievance on May 6, 2002. The grievant claims that the Group Notice is unwarranted because: (1) the hospital unfairly applied hospital policies, procedures, rules and regulations; (2) she is being retaliated against for reporting an office violation to the hospital police; and (3) hospital management is inconsistent in its issuance of discipline to employees with similar offenses.

On the same day that she initiated her grievance, grievant sent a memorandum to her supervisor requesting

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<sup>1</sup> Grievant's attachment to Grievance Form A states that the second offense October 2002, presumably meaning October of 2001.

all documents/documentation relating to the actions being grieved including documentation/information obtained that prompted disciplinary action and copies of documents of “public information” documenting the offense and the source of said information.

I [grievant] am also requesting all records of employees who are non-parties to this grievance with traffic infractions who have reported their offense to the management as this information is relevant to the grievance.

On May 9, 2002, grievant’s supervisor, at the first resolution step, reduced the Group II Written Notice to a Group I Written Notice, but did not provide grievant with the documentation requested. On May 13, 2002, grievant sent another memorandum to her supervisor seeking the previously requested documentation/information. When grievant’s supervisor failed to comply with grievant’s second request, grievant notified the hospital director in writing of her requests for documentation. Despite numerous communications between the grievant and the hospital director regarding the requested documentation/information, the hospital director did not provide the requested information. As a result, the grievant seeks a ruling from this Department on whether the agency has failed to comply with the grievance procedure.

#### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department’s involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>3</sup> If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department.<sup>4</sup> Should this Department find that the party has violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may render a decision against the noncomplying party unless that party can establish just cause for its noncompliance.<sup>5</sup>

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<sup>2</sup> See *Grievance Procedure Manual*, § 6.1, pages 16-17.

<sup>3</sup> See *Grievance Procedure Manual* § 6.3, page 17. In a case where the agency is purportedly out of compliance, the notification of non-compliance is directed to the agency head.

<sup>4</sup> It should be noted that the grievant notified the *facility* head (the hospital director) of the agency’s alleged non-compliance rather than the *agency* head (the DMHMRSAS Commissioner). The facility head responded to the grievant’s notice of non-compliance on May 14, 2002. By letter dated July 31, 2002, the agency head waived notice of the noncompliance and stated that he agreed with the hospital director’s decision. As such, grievant’s ruling request will proceed.

<sup>5</sup> *Id.*

Request for Records

The grievance statute provides that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party.”<sup>6</sup> This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance 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.”<sup>7</sup> Documents, as defined by the Rules of the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”<sup>8</sup> However, a party is not required to create a document if the document does not exist.<sup>9</sup> To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

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.

The first paragraph of the grievant’s documentation/information request memorandum to her supervisor seeks, “all documents/documentation relating to the actions being grieved including documentation/information obtained that prompted disciplinary action and copies of documents of ‘public information’ documenting the offense and the source of said information.” For clarification purposes, this Department has broken the first paragraph down into two requests, which will be discussed separately.

First, the grievant seeks “all documents/documentation relating to the actions being grieved...” Under the grievance procedure, grievant is generally entitled to all documents that are relevant to the actions being grieved.<sup>10</sup> As stated previously, the Group Notice is being grieved on the grounds of unfair application of policy, retaliation, and inconsistency in the issuance of disciplinary actions in similar situations. As such,

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<sup>6</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2, page 21.

<sup>7</sup> *Id.*

<sup>8</sup> See Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).

<sup>9</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.

<sup>10</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2, page 21.

the grievant is entitled to documents relating to any and/or all of these allegations, including, but not limited to, disciplinary action taken against other employees who have failed to report traffic offenses/convictions. Absent a showing of just cause, such information must be produced in a manner as to preserve the privacy of individuals not personally involved in the grievance within five (5) workdays from receipt of this ruling.

Second, the grievant seeks “documentation/information obtained that prompted disciplinary action and copies of documentation of ‘public information’ documenting the offense and the source of said information.” This Department concludes that although the agency has provided some documentation that prompted the disciplinary action and “public information documenting the offense”, such information is irrelevant to the actions being grieved.<sup>11</sup> The grievant has admitted to the traffic offenses/convictions and, as such, what public documentation the agency has regarding the offenses/convictions is irrelevant. While the *source* (the internet court record system) of the information is not relevant to the grievance, the motivation behind the agency’s decision to review the court records is relevant to the grievant’s retaliation claim. Accordingly, if the agency has in its possession any documents that relate to the agency’s decision to review the court records, it must provide those documents in a manner that preserves personal privacy or show just cause why such documents should not be provided.

The second paragraph of the grievant’s documentation/information request seeks, “all” records of employees with traffic infractions who have reported their offense(s) to management. Management maintains that it cannot release “all” information relating to other employees because such information is irrelevant and confidential.<sup>12</sup> This Department concludes that the agency is correct in denying grievant’s request for “all” records of employees with traffic infractions who have reported their offense(s) to management. Such records are irrelevant because this grievance relates to inconsistent disciplinary action for employees who have not reported traffic offenses to management.

Accordingly, the agency should conduct a reasonable search to obtain documentation required to be produced in accordance with this ruling. After a reasonable search, hospital management should respond to the grievant’s request by either providing the requested documents or a specific written explanation as to why any of the requested information will not be provided (e.g., no such documents exist, the documents exist but are protected by a legal privilege, the documents would be overly burdensome to collect). Any documentation provided to the grievant should be redacted, where appropriate, to protect the legitimate privacy interests of third parties and shall be produced within five (5) workdays of receipt of this ruling. Finally, as a general rule, an agency may charge a grievant its actual cost to retrieve and duplicate requested documents.

If the grievant is dissatisfied with management’s response to her request – its production of documents, its written response to her request, and/or its cost assessment --

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<sup>11</sup> Grievant’s supervisor obtained information relating to the grievant’s traffic offenses on the internet court system. A printout of the information obtained from the internet was provided to the grievant.

<sup>12</sup> *Id.*

she may raise the issue again at the qualification phase of the grievance. Furthermore, if the grievance qualifies for a hearing, the issue may be raised again, if need be, at a prehearing conference with the hearing officer. Absent just cause, the agency's failure to provide the grievant with any of the requested documents could result in adverse inferences drawn against the agency during the qualification and/or hearing stages. For example, if documents are withheld absent just cause, and those documents could resolve a disputed material fact pertaining to the grievance, this Director at the qualification stage or a hearing officer at the hearing stage could resolve the factual dispute in the grievant's favor.

### CONCLUSION

This Department directs agency management to respond to the grievant's May 6, 2002 document requests in accordance with this ruling, within five workdays of its receipt of this ruling. Within five workdays of her receipt of the agency's response, the grievant must either advance or conclude her grievance. Any additional issues concerning the production of documents may be raised at the qualification stage of the grievance, and if the grievance is qualified, with the hearing officer at the prehearing conference. This Department's rulings on matters of compliance are final and nonappealable.<sup>13</sup>

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<sup>13</sup> Va. Code § 2.2-3003(G).