

Issue: Compliance/other; Ruling Date: March 12, 2003; Ruling #2002-238; Agency: University of Virginia; Outcome: agency in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of University of Virginia/ No. 2002-238
March 12, 2003

The grievant has requested a compliance ruling in her November 15, 2002 grievance. Essentially, the grievant alleges the following against the University of Virginia ("University" or "agency"): (1) the University has failed to provide her with access to records related to her grievance; (2) the University and its staff have violated the grievance procedure by failing to provide sufficient notice of the charges against her and a reasonable opportunity to respond; and (3) the Assistant to the General Counsel "overstepped her role" at the second step meeting, and (4) the President's Chief of Staff failed to advise her that she could request a compliance ruling from EDR.¹

FACTS

The grievant was an Administration/Office Specialist III with the agency until October 22, 2002, when she was issued a second Group II Written Notice with removal for failure to follow supervisor's instructions and failure to perform assigned work. An attachment to the notice further described the charge as follows:

Despite repeated oral and written counseling, and a prior Group II and suspension for similar behavior, [grievant] refuses to follow the instructions of her management concerning the appropriate interactions and activities with patients in Dr. [A's] practice. Her actions jeopardize this practice and patient care. [Grievant] refuses to perform the routine, daily tasks that she has repeatedly been instructed by management are her responsibility as secretarial support to Dr. [A's] practice. She has been repeatedly instructed in the proper performance of her position, but chooses to do what she thinks she should do and not what her management has instructed her to do. She is recalcitrant and wholly resistant to any management direction. She has consistently, and often with vehement assertions of the correctness of her position, failed to follow supervisors' instructions and/or perform assigned work.²

The grievant filed a grievance on November 15, 2002, claiming that she was "discharged without just cause" and in "retaliation for engaging in a protected activity,

¹ The grievant also raised numerous other contentions, all of which were carefully reviewed and found to be without merit, but will not be addressed individually in this ruling.

² See Written Notice dated October 22, 2002.

including whistleblowing.”³ On December 10, 2002, the grievant emailed a notice of noncompliance to the University President.

DISCUSSION

Access to Records

The grievance statute provides that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia,⁴ relating to actions grieved shall be made available, upon request from a party to the grievance, by the opposing party.”⁵ 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.”⁶ However, a party is not required to create a document if the document does not exist.⁷

Claims as to Email

The grievant asserts that the agency refused to provide her with needed documentation by blocking her access to her email account on October 22, 2001, the date of her termination.⁸ Further, the grievant contends that when she tried to arrange email access, she was informed of restrictions on reviewing, printing and removing the information.⁹ Our review of the facts for this ruling, however, shows that the agency had timely offered and has continued to offer the grievant access to her email, with the mutually agreed upon condition that confidential patient information would be protected from disclosure. The grievant has presented no facts to support her claim that the agency's actions with respect to her email have been in violation of the grievance procedure.

*Claims as to Records of Employee Discipline*¹⁰

³ See Grievance Form A-Expedited Process dated November 15, 2002.

⁴ See Rules of the Supreme Court of Virginia, Rule 4.9(a)(1) (defining documents as “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.”)

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Compliance Ruling Request to this Department dated December 24, 2002, page 3.

⁹ *Id.*

¹⁰ While not specifically included in the grievant's notice of noncompliance to the agency head or in her request to this Department for a compliance ruling, in the interests of expediting this grievance for the benefit of both parties, the specific issue of third party employee disciplinary records will be viewed as part of the document issue to be determined, and will be addressed in this ruling for guidance purposes.

The grievant also asserts that records related to the discipline received by other employees are relevant to her case, as they could be used to show whether management has applied discipline consistently or whether she was disciplined more severely than similarly situated employees. Thus, she has requested records for the years 2001 and 2002 regarding (1) the discipline of all other employees for Group II offenses, and (2) the discipline of all other employees alleged to have violated patient confidentiality or privacy by obtaining and/or examining patient records without authorization or justification. The agency asserts that such documents are irrelevant to the grievant's case and formed no basis for the discipline she is challenging.

We conclude that documentation pertaining to all employees who committed Group II offenses is overly broad and would involve irrelevant information. Indeed, Group II offenses can range from unlawful use of a controlled drug, to sexual harassment, to safety violations. However, documents regarding employees who are similarly situated to the grievant, in other words, those who in 2001 or 2002 received Group II notices, with or without removal, for failure to follow supervisor's instructions and/or to perform work, are relevant to the grievant's contention that she has been more severely disciplined than others who are similarly situated. Similarly, documentation from the years 2001 or 2002 showing the disciplinary treatment of employees alleged to have obtained or examined patient records without authorization or justification may be relevant to the grievant's claim that her termination is unwarranted and inappropriate in light of the agency's disposition of similar charges.

In light of the above, it would appear that the agency should provide to the grievant documentation concerning employees who in 2001 or 2002 received Group II notices, with or without removal, for failure to follow supervisor's instructions and/or to perform work, along with any documentation from the same time period showing the disciplinary treatment of employees alleged to have obtained or examined patient records without authorization or justification. Any records provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of those employees, and the University may charge the grievant the actual cost to retrieve, duplicate and redact the documents. In the alternative, the agency could elect to organize the same information in a single chart or other format for production to the grievant, omitting any personally identifying information, but holding unredacted copies of the originals for any in-camera inspection by a hearing officer, should a hearing officer deem it appropriate. The parties should note that this guidance regarding the production of discipline-related documents has no bearing on the merits of either party's allegations in this grievance.

Actions of University Personnel

Notice and Opportunity to Respond to Anticipated Discipline and Termination

The grievant alleges that agency personnel violated the grievance procedure by failing to adequately document the charges against her in the Group II Written Notice and by denying her an opportunity to respond to those charges prior to her termination. These allegations,

however, allegedly occurred prior to the filing of the grievance in question, and thus cannot be addressed as a grievance procedure compliance issue.¹¹ To the extent that the grievant is claiming that even after she filed her grievance, the agency continued to provide inadequate documentation concerning the charges against her, she has used and may continue to use the grievance procedure's document gathering provisions to collect any additional relevant documents. Also, during the pre-hearing conference, the grievant may obtain further clarification on the charges against her if the hearing officer deems it necessary for due process purposes.¹²

Second Step/Fact-finding Roles

The grievant claims that the Assistant to the General Counsel overstepped her role at the second step meeting and elsewhere by advising the University and/or its witnesses on issues such as the type of information that could be shared, which the grievant asserts caused delay and "obstructed" her attempt to ascertain the facts.

As a preliminary matter, the second step meeting is an opportunity for management to look at the facts, with the grievant, and resolve a grievance at the management level, thus avoiding the need for a hearing with an independent hearing officer. The second step meeting is presided over by the second step respondent, and is not intended to serve as a means of formal discovery for either party, or as a court proceeding. Both the second step respondent and the grievant may select an individual to attend the meeting with them.

It appears that the University's second step respondent chose the Assistant to the General Counsel to attend the meeting with him, just as the grievant could and presumably did choose her attorney to accompany her. While the grievant takes issue with the advice that the Assistant to the General Counsel provided to the second step respondent and other agency representatives, nothing in the grievance procedure prohibits the dispensing of advice. And nothing in the University's response to that advice constituted a violation of the grievance process, or was so unreasonable as to amount to an abuse of that process.

¹¹Moreover, we note that as a matter of due process, a public employee dismissed for alleged cause is entitled to a "very limited hearing" prior to her termination, followed by a more comprehensive post-termination hearing. In addition, due process does not mandate that all evidence on a charge or even the documentary evidence be provided prior to termination, only that such descriptive explanation be given as to permit the public employee to identify the conduct giving rise to the dismissal and thereby enable her to make a response. *Gilbert v. Homar*, 520 U.S. 924, 929 (1997). *See also Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 546 (1985) in which the U.S. Supreme Court explained that the pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell her side of the story.

¹² *See Rules for Conducting Grievance Hearings* (III)(D), page 4. *See also Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 546 (1985)(a state must afford the following post-termination due process rights to an employee: (1) adequate notice; (2) specification of charges against him; (3) an opportunity to confront the witnesses against him; and (4) an opportunity to be heard in his own defense.

Failure to Inform of Compliance Ruling Option

The grievant claims that the Chief of Staff violated the grievance procedure by failing to inform her that she had the option of requesting a compliance ruling from this Department if she was not satisfied with the University's responses. While it is not unusual for an agency to notify a grievant of the right to request a compliance ruling with this Department, there is no requirement in the *Grievance Procedure Manual* that an agency provide such notice. Indeed, this Department has long held that it is incumbent upon both parties to know their rights and obligations under the grievance procedure. In any event, it is evident here that the grievant in fact knew of her option to request a compliance ruling during the course of a grievance.

CONCLUSION

For all the above reasons, this Department concludes, as guidance to the parties, that the agency should provide to the grievant, consistent with this ruling, certain documents related to the discipline of other employees. As to the grievant's remaining contentions, we find that the University has not violated the grievance procedure through the alleged actions or inactions. The grievant must either advance or conclude her grievance within five work days of her receipt of this ruling. 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.¹³

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¹³ Va. Code § 2.2-1001(5).