

Issue: Compliance/grievant claims agency failed to provide documents; Ruling Date: December 28, 2005; Ruling #2006-1199; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: agency ordered to produce requested information



*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  
Ruling Number 2006-1199  
December 28, 2005

By letter dated November 29, 2005, the grievant requests a compliance ruling from this Department. The grievant claims that the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) has failed to provide her with requested documents related to her September 28, 2005 grievance.

FACTS

The grievant is employed by the agency as a Psychiatric Practical Nurse. On September 28, 2005, the grievant initiated a grievance challenging her non-selection for a position as a Direct Associate III. The grievant alleges that the hiring decision was the result of pre-selection, bias, discrimination, and a conflict of interest, and that the agency misapplied policy in the selection process.

The same day that the grievant initiated her grievance, she made a written request to the agency for "all pertinent information used in the hiring of position # [xxx], Direct Associate III," to include, but not limited to, "copies of all applications, resumes and interview summaries." The grievant alleges that the agency failed to respond to this request. On or about November 1, 2005, the grievant gave the agency head written notice of noncompliance.<sup>1</sup>

On November 9, 2005, the agency advised the grievant by e-mail that the "documentation that is available to you is only that information that is yours." On or about November 15, 2005, the grievant sent a second noncompliance letter to the agency head, alleging that the agency had failed to provide the requested documentation or acknowledge her document request. The grievant states that at the time she wrote the November 15<sup>th</sup> letter, she was unaware of the agency's November 9<sup>th</sup> e-mail, as she did not have access to her e-mail until November 23, 2005.

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<sup>1</sup> In her November 1<sup>st</sup> letter of noncompliance, the grievant also objected to an alleged failure by the agency to timely process her grievance. This issue was subsequently resolved and is not a basis for the grievant's request for a compliance ruling.

By letter dated November 22, 2005, the agency advised the grievant that it had prepared the requested information, including the grievant's own interview summaries and application, but that under Department of Human Resource Management (DHRM) Policy 6.05, Personnel Records Disclosure, the agency could not release information regarding other applicants for the position without their consent. The agency also advised the grievant that it would seek consent from the other applicants if the grievant made a written request to the agency.

By letter dated November 29, 2005, the grievant requested a compliance ruling from this Department regarding the agency's failure to provide requested documentation. In the course of this Department's investigation, the grievant stated that she had received all requested documentation related to her own interviews and application, but that she had not received documentation regarding the other candidates. She further indicated that she does not seek documents regarding the unsuccessful candidates for the Direct Associate III position, but rather only documents related to the successful candidate.

### DISCUSSION

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>2</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>3</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>4</sup> While a party is not required to create a document if the document does not exist,<sup>5</sup> parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. 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.

This Department 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

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<sup>2</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

<sup>3</sup> *Id.*

<sup>4</sup> See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

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

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 challenges the agency's failure to provide documentation relating to the successful candidate for the Direct Associate III position. The agency asserts that providing the requested documentation would be a violation of DHRM Policy 6.05, unless the successful candidate first consents to the production of the documents. The agency does not apparently dispute the relevance of the requested information to the grievant's claims.

The agency is correct that DHRM Policy 6.05 states that applications for employment and results of pre-employment tests "may not be disclosed to third parties without the written consent of the subject employee." However, as this Department has previously explained with regard to DHRM Policy 2.10, to the extent materials otherwise protected by a DHRM policy are sought by a grievant in conjunction with the grievance process, DHRM policy is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.<sup>6</sup> Thus, where documents relating to a selection decision are relevant to a grievance, the provisions of DHRM Policy 6.05 do not constitute just cause to deny access to documents. Accordingly, we find that the agency failed to comply with the grievance procedure in refusing to provide the grievant with the requested information regarding the selected candidate.

The agency is therefore ordered to produce the requested information to the grievant within 10 work days of its receipt of this ruling. The agency may redact any personally identifying information (such as the candidate's social security number, telephone number, and address), provided that information relevant to the grievance is not redacted. The agency may charge the grievant its actual cost to retrieve and reproduce documents. The agency is to produce the information specified to the grievant within 10 work days of its receipt of this ruling.

This Department's rulings on matters of compliance are final and nonappealable.<sup>7</sup>

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Claudia T. Farr  
Director

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Gretchen M. White

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<sup>6</sup> See EDR Ruling No. 2004-683; *see also* Ruling No. 2004-853.

<sup>7</sup> Va. Code § 2.2-3003(G).

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