

Issue: Grievance Procedure/Documents; Ruling Date: December 5, 2006; Ruling #2007-1473; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: grievant out of compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling No. 2007-1473
December 5, 2006

The grievant has requested a qualification ruling in his August 17, 2006 grievance against the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). In addition, the grievant seeks a compliance ruling due to the agency's failure to reply to his requests for documents relating to his grievance.

FACTS

The grievant is employed as a Trades Technician III with the agency. On July 14, 2006, the grievant was allegedly verbally and physically assaulted by his supervisor. The grievant complained about his supervisor's behavior and an agency investigation of the July 14th incidents ensued. Thereafter, on July 26, 2006, the grievant received a counseling memorandum for his alleged inappropriate complaints to staff about the condition of chairs and failure to conduct himself in a professional manner.

On August 1, 2006, the grievant requested "copies of any and all statements from [facility] employees regarding the incident [with] my supervisor and or [facility] employees in [building] 25 or any other [building] that may apply." The grievant's request specifically invoked the Virginia Freedom of Information Act (FOIA) as its basis. The agency responded to the grievant's document request by letter dated August 7, 2006. In its response, the agency stated: "[t]he incident with your supervisor involved a Police Investigation and Virginia Department of Human Resource Policy 6.05 does not allow the disclosure of this investigative information, which includes witness statements, without the consent of the subject employee."

Thereafter, on August 17, 2006, the grievant initiated a grievance challenging the agency's response to his supervisor's alleged violent behavior. In addition, the grievant challenges the July 26th counseling memorandum as retaliatory. On Form A of his grievance, the grievant states that he has "made an information request and [has] been refused relevant

documents.” In a September 21, 2006 response, the third step respondent responds to the grievant’s request for documents by stating: “State Personnel Policy No. 6.05 does not permit release, dissemination, or disclosure of personnel records or information therein” and “state Code 2.2-3705.01 [sic] details that access to personnel records shall be denied without the written consent of the subject of such record.”¹ Thereafter, on September 29, 2006, the grievant forwarded his grievance to the agency head for qualification. In an attachment to his grievance, the grievant again requests “all witness statements concerning the incident which occurred on 7-14-06, and the original complaints from buildings # 25 and 32.” The agency head subsequently denied the grievant’s request for qualification, but makes no mention of the grievant’s request for documents.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance issues -- such as the document issues presented here -- through a specific process.² That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without EDR’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. If the party fails to correct the alleged noncompliance, the other party may request a ruling from EDR. Should EDR find that the agency violated a substantial procedural requirement, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its noncompliance; rendering such a decision is reserved for the most egregious of circumstances. For instance, if a party ignores a previous compliance order from EDR, a ruling in favor of the opposing party may be granted.³

In this case, the grievant’s request for a compliance ruling is premature because the grievant has not shown that he first notified the agency head in writing of the alleged procedural violations, as required by the grievance procedure.⁴ Assuming that the grievant has still not received the requested documents, he must notify the agency head, in writing, of the

¹ Va. Code § 2.2-3705.1 is a section of the Virginia Freedom of Information Act that exempts certain records from public disclosure. The section specifically referenced in this case is § 2.2-3705.1(1) which reads:

Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.

² See *Grievance Procedure Manual* § 6.3.

³ This Department has no authority to enforce the provisions of the Virginia Freedom of Information Act. Rather, a person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA’s provisions in a court of law. See Va. Code § 2.2-3713(B). Accordingly, we will not address any claim that the agency has failed to comply with FOIA in this ruling.

⁴ See EDR Ruling No. 2006-1183 (“For a letter of noncompliance to satisfy this procedural prerequisite, it must, at a minimum, provide clear notice that the party writing the letter considers the other party’s conduct to constitute noncompliance, and it must advise the opposing party of the specific conduct which is alleged to be noncompliant.”).

alleged noncompliance. If it is not corrected within five days of receipt of the notice, the grievant may then request, in writing, a compliance ruling from this Department.

Further, as a general rule, a party may raise a claim of noncompliance at any point in the grievance process.⁵ However, because the grievant's request for qualification is also pending with this Department, if he intends to request a compliance ruling regarding his requests for documents, he must give written notice to the agency head **within ten work days of the date of this ruling**. If he fails to do so, this Department will rule on his request for qualification without regard to the alleged noncompliance. However, if the grievant gives the agency head timely notice of noncompliance, this Department will stay its ruling on the grievant's qualification request until resolution of the compliance matter.

We are also compelled to note that the grievance statute provides 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.”⁶ 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.”⁷ In addition, this Department has held in prior rulings, and explains in the *Frequently Asked Questions* section of our website, that document requests under the grievance procedure are no longer associated with the FOIA and that Act alone cannot be used as the reason for refusing to produce documents.⁸ Likewise, this Department has held that the Department of Human Resource Management (DHRM) Policy 6.05 personnel document disclosure provision is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.⁹

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

⁵ *Grievance Procedure Manual* § 6.3.

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2. “Just cause” is defined as “a reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9. Examples of “just cause” include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.

⁷ *Id.* 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.” See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

⁸ See EDR Ruling Nos. 2006-1312, 2004-629, and 2004-634; see also <http://www.edr.virginia.gov/faqs.htm>.

⁹ See EDR Ruling Nos. 2006-1199, and 2004-853; Cf. EDR Ruling No. 2004-683 (an agency may not deny a grievant access to otherwise relevant documents relating to a selection process on the ground that such disclosure is prohibited by DHRM Policy No. 2.10, Hiring).

¹⁰ See Va. Code § 2.2-1001(5).