

Issue: Compliance – Grievance Procedure (Documents and Resolution Steps);
Ruling Date: May 7, 2008; Ruling #2008-1992; Agency: Department of
Mental Health, Mental Retardation and Substance Abuse Services; Outcome:
Agency Not 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
Ruling Number 2008-1992
May 7, 2008

The grievant has requested a compliance ruling regarding her February 13, 2008 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency). The grievant claims that the agency has failed to address the issues raised by her grievance and has not provided requested documents.

FACTS

In her February 13, 2008 grievance, the grievant raises a number of issues regarding her work and experiences at work, including “workplace violence and workplace harassment.” The grievance also challenges a Group II Written Notice for failure to follow a supervisor’s instructions and the agency’s mandate that the grievant attend “Interpersonal Communications Skills” training. On February 20, 2008, the first step-respondent provided the following statement in response to the grievance: “I have reviewed the grievance information and decided that the relief that [the grievant] is asking for is not warranted.” In her ruling request, the grievant asserts that the first step-respondent has failed to address the issues as required by the grievance procedure. The grievant has previously provided a notice of noncompliance to the agency head and now seeks a compliance ruling regarding this matter.

The grievant also alleges that the agency has been noncompliant with regard to certain requests for documents she has made. On January 23, 2008, prior to initiating her grievance, the grievant requested documents regarding “complaints” made against her and relied upon by the agency. Pursuant to the Virginia Freedom of Information Act (FOIA), the agency produced documents responsive to this request. Certain information relating to the “names and identities of charging parties” were redacted from the copies provided to the grievant. In Attachment 1 to her grievance and a letter provided to the agency on February 14, 2008, the grievant appears to renew her request for these same documents under the grievance procedure to obtain the original version of the documents without redactions. The grievant also requested various “additional documents” in Attachment 1. She alleges that she has received nothing in response to her document

requests under the grievance procedure. Therefore, she has requested a compliance ruling.

DISCUSSION

Adequacy of Response

Under the grievance procedure, the first step-respondent must provide a written response within five workdays of receipt of the employee's grievance absent an agreement between the parties to extend the deadline. The written response must address the issues and relief requested and should notify the employee of his or her procedural options.¹ While the step-respondent is not required to respond to each and every point or factual assertion raised by the employee, the respondent must address each issue raised and the requested relief.

In the attachments the grievant submitted with her Form A, there are numerous factual issues raised, but they clearly address ongoing and unresolved problems between and among members of the workplace, including the grievant and the first step-respondent. However, the first step response appears limited only to the relief the grievant requested regarding mandatory training and the Written Notice. A step-respondent must not simply respond to the relief a grievant requests. The grievance procedure requires that the issues be addressed as well.

This grievance seems to be about much more than just the Written Notice and mandatory training. For example, the grievant has asserted charges of workplace harassment and violence. The ongoing workplace issues identified by the grievant have not been addressed in the first step response at all. While there is little direct discussion in Attachment 1 to the Form A about why the Written Notice should be rescinded, there is substantial information provided in Attachment 1 and other documents that dispute statements of management and other involved employees. While the first step-respondent need not respond to every point or factual assertion by the grievant, it does appear that the grievant has identified substantial issues in the workplace that were not addressed at the first step. Therefore, because the grievant has properly asserted issues regarding her employment to which the agency has provided no response, the agency has failed to comply with the grievance procedure.² The grievance must be returned to the first step-respondent so that he can properly address the issues raised by the grievant.

Documents – Redactions

The grievance statutes provide 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.”³ This Department's interpretation of the mandatory language “shall be made available” is that

¹ E.g., *Grievance Procedure Manual* § 3.1.

² See EDR Ruling No. 2008-1786; EDR Ruling No. 2004-851.

³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

absent just cause, all relevant grievance-related information *must* be provided. The 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.”⁴

The first issue regarding requested documents concerns “complaints” about the grievant. These materials were originally requested by the grievant before she initiated this grievance pursuant to FOIA. The agency produced documents in response to that request, but “names and identities of charging parties” were redacted to protect the privacy of those involved. After initiating the grievance, the grievant requested that the agency produce these “complaints” documents again, but without the redactions.⁵ The agency’s response to the grievant’s notice of noncompliance indicates that the agency does not believe the grievant has renewed her request for these documents pursuant to the grievance procedure.

While the redactions made to the “complaints” documents may have been appropriate under FOIA, the redactions appear to be overly broad under the grievance procedure. Consistent with the rationale discussed in EDR Ruling 2008-1884, these documents must be provided in their unredacted forms. Although “documents pertaining to nonparties shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance,”⁶ the documents at issue are not “documents pertaining to nonparties.” Rather, they are complaints specifically about the grievant’s work performance. These are not documents to which, in this Department’s interpretation, the statutory language cited above applies. As such, the documents must be provided in their unredacted forms.⁷

Certainly, there are times when information regarding nonparties must be redacted. For instance, in most cases an agency may redact personal information (such as the person’s social security number, telephone number, and address), provided that information relevant to the grievance is not redacted. However, there are cases in which a nonparty’s *name* must be provided to permit a grievance to proceed fairly.⁸ Without knowledge of the identity of an individual who may possess information relevant to the grievance, a grievant would be unable to call this person as a witness at the hearing or properly challenge the information provided in a relevant document.⁹ There could be

⁴ *Id.*

⁵ The grievant’s renewed request of these documents appears on page 5 of Attachment 1 to her grievance. While the grievant’s request lacks clarity and describes the relevant EDR Ruling (2008-1884) incorrectly, it is apparent that the grievant was effectively attempting to obtain the documents without redactions pursuant to her grievance. Moreover, this renewed request was made even more apparent by a specific letter from the grievant delivered to the human resources office on February 14, 2008.

⁶ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁷ See EDR Ruling No. 2008-1884.

⁸ *Id.*

⁹ Cf. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); *McNeil v. Butz*, 480 F.2d 314, 321-25 (4th Cir. 1973) (following *Goldberg* and requiring that

particular facts regarding the specific individual or the grievant's relationship with that individual that would be relevant in placing the contents of a document in context. Moreover, permitting an agency to withhold potentially relevant grievance-related information about a grievant simply because a nonparty provided it is inconsistent with the purpose of the grievance procedure and prevents a full exploration of the facts.¹⁰

The only result that preserves the fairness of the grievance process and hearing is that documents like those at issue here, i.e., documents not pertaining to nonparties, must be provided without redacting the names of the nonparty witnesses. This is especially true given the strong public policy reflected in the grievance statutes that all documents related to the actions grieved be provided.¹¹ This Department has 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. Therefore, the agency is ordered to produce the requested documents to the grievant without redactions of "names and identities of charging parties" within ten workdays of its receipt of this ruling.¹²

Documents – Additional Documents Requested

The grievant has also requested additional documents in conjunction with her grievance. On pages 8 and 9 of Attachment 1 to the grievance, the grievant identified many documents related to outgoing telephone calls, meeting minutes, coversheets, and electronic spreadsheets. There is no indication that the agency has responded to these requests in any way. During the investigation for this ruling, the agency indicated that these documents might not be relevant to the grievance. However, the grievant has stated that the documents could support her arguments in this grievance, including the argument that she was charged based on false information and through an inconsistent application of policies by agency management. Based on the grievant's statements, this Department cannot find that the documents lack relevance to this grievance. The agency has put forth no other arguments to explain why there would be just cause to withhold these documents at this time. Therefore, the agency is ordered to respond to the grievant's request for additional documents by producing the documents to the grievant or otherwise

discharged government employees be provided the opportunity to cross-examine at hearing their "nameless accusers").

¹⁰ See Va. Code § 2.2-3000 ("[T]he grievance procedure shall afford an immediate and fair method for the resolution of employment disputes.").

¹¹ Va. Code § 2.2-3003(E).

¹² During this Department's investigation for this ruling, the grievant has also objected to the format in which the agency provided some of the "complaints" documents in that they were summary in nature and did not include the actual questions asked and specific answers provided. Section 8.2 of the *Grievance Procedure Manual* provides that "[a] party shall not be required to create a document if the document does not exist." Therefore, if no other documents exist that recorded the specific discussions, this information would not be something that the agency must create in a document and provide to the grievant under the grievance procedure. However, this information might be relevant to the grievance and potentially a proper subject of testimony at hearing if this grievance is eventually qualified.

responding pursuant to *Grievance Procedure Manual* § 8.2 within five workdays of its receipt of this ruling.¹³

CONCLUSION

Based on the foregoing, the agency is ordered to produce the documents requested by the grievant consistent with this ruling. Further, within five workdays of receipt of this ruling, the first step-respondent must respond to the issues raised by the grievance, not simply the relief requested. However, if the first step-respondent needs additional time to investigate and respond to the issues raised, the parties may extend the time limit upon mutual agreement.¹⁴ Such an agreement must be in writing.¹⁵ This Department's rulings on matters of compliance are final and nonappealable.¹⁶

Claudia T. Farr
Director

¹³ A member of the agency's human resources staff has indicated that the grievant has access to some or all these "additional documents" in her job at the agency. She also indicated that she would have no opposition to the grievant printing these documents herself. If agreeable to both parties, the grievant could be allowed to access and print these documents herself, as long as she was permitted the time and resources while at work during her work hours to do so and any concerns about redactions (e.g., client names) are addressed. All other documents to which the grievant does not have access would have to be provided in another manner.

¹⁴ *Grievance Procedure Manual* § 8.4.

¹⁵ *Id.*

¹⁶ Va. Code §§ 2.2-1001(5), 2.2-3003(G).