

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: January 9, 2009; Ruling #2008-2044, 2009-2076; 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 Numbers 2008-2044 and 2009-2076  
January 9, 2009

The grievant has requested compliance rulings 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 not adequately responded to her document requests.

FACTS

In her February 13, 2008 grievance, the grievant raised a number of issues regarding her working conditions including “workplace violence and workplace harassment.” The grievance also challenged 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.

The grievant, an Administrative and Office Specialist III, has worked at the facility where she is currently employed for 18 years. She is supervised by the Supervisor of the facility’s Psychology Services Department (Psych. Supervisor). In conjunction with a restructuring, Psychologists from the Residential Services Division were brought into the facility’s Psychology Department. As a result, her supervisor began serving in a dual supervisory role over the newly merged group. The grievant asserts that initially there seemed to be “significant progress in organizing and identifying departmental processes and initiatives to enhance Psychology Services [at the facility.]” According to the grievant, however, things soon began to deteriorate.

The grievant asserts that as operations continued, she witnessed significant and increasing opposition to organizational efforts. The grievant asserts that her supervisor’s reminders to others went unheeded and that his practice of dictating reminder e-mails to her, which she in turn sent out under her name, caused her to be the target of “snide” replies to the reminders. The grievant further asserts that lack of clarity over staff support, lack of budgetary funds, conflicting instructions, and failure to define and adhere to boundaries and protocols, all led to confusion and frustration. According to the grievant, she receives on a nearly daily basis, reports of the dysfunction of her workplace.

She complains that she has experienced insults, demands outside of her role, and the negative effects of increased conflicting instructions.

On January 4, 2008 the grievant met with her immediate supervisor, the Psych. Supervisor, to discuss concerns regarding issues that impact her ability to perform her work. Among other things, the grievant expressed concern that she had become a “scapegoat” who was being unfairly blamed for the shortcomings of others. Not satisfied with her supervisor’s response, the grievant discussed her concerns with her supervisor’s supervisor, the Director of Medical and Ancillary Services (MAS Director).

On January 8, 2008, the grievant asserts that because she expressed concerns about her work environment, she suffered retaliation in the form of false accusations and the loss of job responsibilities. For example, the grievant asserts that her timekeeping responsibilities and meeting minute-taking responsibilities were both removed.

On Jan 14, 2008 the grievant met with the MAS Director to discuss her concerns regarding the alleged retaliation she had suffered and the purportedly hostile workplace. The MAS Director scheduled a follow-up meeting with the grievant which she declined to attend. As a result of her refusal to meet with the MAS Director, the grievant was presented with a Group II Written Notice. The grievant initiated a grievance on February 13, 2008 to challenge the agency’s actions.

#### PROCEDURAL FACTS

The grievant alleges that the agency continues to be noncompliant regarding her requests for certain documents. This Department ruled once previously in this case on the issue of document production.

On January 23, 2008, prior to initiating her grievance, the grievant requested documents regarding “complaints” made against her and apparently 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 an attachment to her grievance and a letter provided to the agency on February 14, 2008, the grievant renewed her request for these same documents under the grievance procedure to obtain the original version of the documents without redactions.<sup>1</sup> The grievant also requested various “additional documents” in an attachment to her grievance. (These documents collectively are referred to in this ruling as the “first document request.”) When the grievant did not receive a response to her first document request, she requested a compliance ruling.

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<sup>1</sup> As Ruling 2008-1992 reflects, the grievant made it clear, via her February 14, 2008 letter to the facility HR Director, that she was renewing her request under the grievance procedure.

In EDR Ruling No. 2008-1992, this Department held that while redactions made to the “complaints” documents may have been appropriate under FOIA, the redactions appear to be overly broad under the grievance procedure. The ruling went on to explain that consistent with the rationale discussed in EDR No. Ruling 2008-1884, these documents must be provided in their unredacted forms.

As to the additional documents requested in conjunction with her grievance (e.g. outgoing telephone call logs, meeting minutes, coversheets, and electronic spreadsheets) EDR Ruling No. 2008-1992 noted that there was no indication that the agency had responded to those particular requests. Because the agency gave no explanation of just cause for withholding the documents, EDR Ruling No. 2008-1992 ordered the agency to respond to the grievant’s request for additional documents by producing the documents to the grievant or otherwise responding pursuant to *Grievance Procedure Manual* § 8.2 within 5 workdays of its receipt of Ruling No. 2008-1992.

On or about May 15, 2008,<sup>2</sup> the agency provided the grievant with a number of the documents that she had requested. The grievant asserts that several other requested documents were not provided.

On June 5, 2008, the grievant made an additional request for 34 groups of documents including policies, protocols, and other information. (The June 5<sup>th</sup> requests are referred to in this ruling as the “second document request.”)

On June 12, 2008, the agency responded to the request by stating that it “had provided the relevant documents supporting the Group II Written Notice and in response to the subsequent grievance you filed challenging this action.” The agency went on to say that it had “continued to try and work with [the grievant] in narrowing down the information” that she was seeking but that “to expend more resources responding to [her] additional request(s) for information could be viewed as impeding the efficient operations of government under [the grievance procedure].” The agency went on to say that the request was overly broad, would be burdensome to produce and was not relevant. The agency went on to point out that the grievant, as a state and agency employee, has access to state and facility policies, procedures, and protocols.

On June 18, 2008, the grievant sent the agency head a notice of noncompliance regarding her document request.

### DISCUSSION

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.”<sup>3</sup> This

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<sup>2</sup> The grievant asserts that she was provided this information on May 12, 2008. The precise date appears to be immaterial to this ruling.

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

Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process."<sup>4</sup> For purposes of document production, examples of "just cause" include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.<sup>5</sup> 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."<sup>6</sup> In addition, this Department has held that an agency may charge a grievant its actual cost to retrieve and reproduce documents.<sup>7</sup>

### **First Document Request**

#### *Questions Posed During Investigation*

The first set of documents requested by the grievant includes: (1) all documents relating to questions asked during an investigation conducted by the MAS Director regarding the grievant, (2) all documents that support responses to those questions, and (3) the identities of those responding.

The agency has apparently conceded the relevance of the statements by co-workers regarding the grievant because the agency provided the grievant with the identities of individuals who provided information about her and a summary of their responses. To the extent that a document exists outlining the questions posed to the respondents, it must be provided within 5 workdays of receipt of this ruling because it will provide context to the co-worker responses. If no such documents exist the agency shall so inform the grievant.

#### *Complaints Regarding the Grievant*

The second set of documents requested by the grievant includes:

A. All complaints regarding the grievant in the possession of the grievant's immediate supervisor, the Psych. Supervisor.

B. All complaints regarding the grievant in the possession of the grievant's supervisor's supervisor (MAS Director).

C. All complaints regarding the grievant in the possession of the facility's Human Resource Department.

D. All complaints regarding the grievant related to: (1) "response to" January 4<sup>th</sup>; (2) "reporting of" January 8<sup>th</sup>; and (3) "meeting of" January 14<sup>th</sup>, 2008.

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<sup>4</sup> *Grievance Procedure Manual* § 9.

<sup>5</sup> See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

<sup>7</sup> See EDR Ruling 2008-1861.

In Ruling #2008-1992, we instructed the agency to either “respond to the grievant’s request for additional documents by producing the documents to the grievant or otherwise responding pursuant to *Grievance Procedure Manual* § 8.2 within 5 workdays of its receipt of this ruling.”<sup>8</sup> The only document provided was the summary of responses to the MAS Director’s interview discussed in the previous sub-section (*Questions Posed During Investigation*).

We begin by noting that language used by the grievant in her request was indeed expansive and appears to reveal an all-inclusive intent.<sup>9</sup> However, notwithstanding the broad language used in her requests, the grievant was nevertheless reasonably specific as to the nature of the documents sought here—she appears to be seeking complaints lodged against her.<sup>10</sup> The grievant asserts that she had been informed that the Human Resource Department had received a complaint against her that had been redirected to her supervisor.<sup>11</sup> Consequently, the grievant appears to have attempted to cover all bases by asking for any complaints in the possession of: (1) her supervisor, (2) the MAS Director, (3) the Human Resource Department, and any complaints related to three particular days in early January (the 4<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup>). Such documents would certainly appear to be relevant to her grievance assertion that she has been the victim of “unfounded/undisclosed accusations and supposed complaints.”<sup>12</sup> Accordingly, within 5 workdays of receipt of this ruling, the agency shall for each of the four groups of documents listed above, provide any such complaint-related documents to the grievant, or, if none exist, so inform the grievant.

#### *Specific Complaint Received by the Human Resource Office*

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<sup>8</sup> Section 8.2 of the *Grievance Procedure Manual (GPM)* states in pertinent part that the agency shall:

Upon receipt of such a request, a party shall have a duty to search its records to ensure that, absent just cause, all such relevant documents are provided. All such documents must be provided within 5 workdays of receipt of the request. If it is not possible to provide the requested documents within the 5 workday period, the party must, within 5 workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than 10 work days from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or “just cause,” the withholding party must provide the requesting party with a written explanation of each claim, no later than 10 workdays from the receipt of the document request.

<sup>9</sup> The grievant has couched her request using all encompassing language specifically asking for “Any and all, including but not limited to, evidences, responses, documents, notes, complaints, electronic or in writing; as well as identities, names, dates, times and remarks to include the contextual nature of the those, against me. . . .”

<sup>10</sup> The broad request for “Any and all, including but not limited to, evidences, responses, documents, notes, complaints, electronic or in writing; as well as identities , names dates, times and remarks to include the contextual nature of the those, *against me. . .*” is referred to hereinafter as “complaints.” (Emphasis added).

<sup>11</sup> Grievance Form A, Attachment, p. 5.

<sup>12</sup> Attachment 1 to Grievance Form A, page 1.

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The third document requested was the complaint allegedly lodged against the grievant by an undisclosed individual to the Assistant Human Resource Director. Again, documents concerning such a complaint would certainly appear to be relevant to this grievance. Thus, within 5 workdays of receipt of this ruling, the agency shall provide any such complaint-related document to the grievant, or, if none exists, so inform the grievant.

*Immediate Supervisor's Phone Records*

The fourth category of documents requested by the grievant is phone records for her immediate supervisor's phone for January 4<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup>, 2008. The agency asserted merely that these records were "unavailable." The grievant counters that they "can be obtained per the Director of the [facility] Security Department with appropriate authorization order(s) obtained by the facility to do so." During the investigation for this ruling, the Director of the facility's Security Department informed the investigating consultant that it was his understanding that phone records were available only in association with criminal investigations and then through court order.

The agency has not objected to providing the phone records on the basis of relevancy, or any other ground, stating only that they are "not available." However, the above response by the Director of the facility's Security Department seems to indicate that phone records are indeed available, albeit under limited circumstances. The fact that securing certain documents may prove difficult, does not alone relieve a party of the obligation to provide them. Moreover, the party providing documents may charge the requesting party its actual costs to retrieve and reproduce documents. Accordingly, within 5 workdays of receipt of this ruling, the agency must inform the grievant of whether the phone records are genuinely unavailable (e.g., do not exist, or are prohibited by law from disclosure, etc.), as opposed to simply a challenge to secure. If they can be obtained, the agency shall provide them to the grievant within 5 workdays of receipt of this ruling. If it is not possible to provide the requested records within the 5 workday period, the agency must, within 5 workdays of receiving this ruling, explain in writing why such a response is not possible, and produce the documents no later than 10 workdays from the receipt of this ruling, unless a third-party's (e.g., the phone company's) inability to timely provide such records to the agency renders the agency unable to conform with this 10 workday directive. In such case, the records shall be provided to the grievant within 5 workdays after they are provided to the agency by the third-party.

*October 22, 2008 Memorandum*

The final document sought by the grievant in her first document request is an October 22, 2007 memorandum that outlined the interdepartmental polices that were to be implemented in the grievant's division. According to the grievant, the memorandum was developed to help guide the integration of the Residential Services into the Psychology Services Department and delineate responsibilities such as the development

of policies and procedures in conjunction with the merger. The agency asserts that the memorandum is “not available.”

The grievant is adamant that such a document exists. She has provided the agency with at least three potential sources for the memorandum. The grievant asserts that this memorandum is relevant to her grievance because it would help to show that interdepartmental policies that should have been developed never were. The grievant asserts that: (1) she has been subjected on a nearly daily basis to complaints of dysfunction, (2) the failure to update policies and protocols has created frustration and confusion, and (3) she has been falsely accused of interference and creating problems. The requested memorandum would appear to be potentially relevant to the grievant’s position that many of the problems in her division are not caused by her but are instead related to the failure of management to implement policies and procedures contemplated an October 22<sup>nd</sup> guidance document. Accordingly, within 5 workdays of receipt of this ruling, the agency is ordered to conduct a good faith search for this document and provide the grievant with a copy once located, assuming the document exists.

### **Second Document Request**

On June 5, 2008, the grievant made an additional request for 34 groups of documents including, but not limited to, a variety of policies, procedures, and protocols. As discussed above, the agency has stated that the grievant’s additional requests for information could be viewed as impeding the efficient operations of government and that her requests are overly broad, irrelevant and would be too burdensome to produce. The agency also insists that the grievant has access to many of the documents that she seeks.

As an initial point, the grievant’s request for 34 groups of documents might, at first blush, appear to be overly broad or too burdensome to produce, as the agency suggests. However, that impression may be largely caused by the somewhat repetitious manner in which the grievant drafted her request. For example, the first seven requests essentially seek all agency, facility, and division written policies regarding the conducting of meetings, recording meeting minutes, and the distribution and retention of the minutes. Likewise, request numbers 8-14 are very similar to one another, as are 15-21. These requests are addressed below, often in groups.

However, before we address the grievant’s specific requests, we are compelled to note that the agency’s response is unacceptable for several reasons. First, a general, blanket refusal to provide documents gives little opportunity for clarification by the requesting party. At a minimum, the agency must identify which particular request(s) it considers irrelevant, which it believes pose an undue burden, and so on. Only with this sort of information can the requesting party refine, and possibly narrow, a request. Secondly, an agency can potentially satisfy a document request for a policy by providing an employee with an e-mail link to the policy if, for example, the policy is posted on the agency’s website and the employee has a work computer. But to essentially tell an employee to go find requested policies is not an appropriate response. An employee may



have no idea where to find each of the applicable policies nor can she be certain that she has located all applicable policies for the relevant time frames involved.

*Policies Regarding Meetings and Meeting Minutes*

In request 2, the grievant has requested “[a]ny and all state, Commonwealth of Virginia (COV), policies, procedures, and/or protocols regarding the conducting of meetings to include any party attendance issues, and the taking and submission of meeting minutes, and the subsequent retention and distribution of those.” She makes virtually identical requests regarding the agency, facility, divisions, departments, and so on in requests 1 and 3-7. The agency did not respond to these seven requests in any specific way. Rather, it provided a blanket response citing irrelevance, undue burden, and efficiency concerns, and stated that the grievant has access to state and facility policies. It did not provide the grievant with any policies or procedures.

The agency should have provided the grievant with responsive documents or a more tailored response so the grievant could refine and possibly narrow her request. It appears that the requested documents would be potentially relevant. The grievant asserts that she has been accused of being disruptive and of trying to run meetings, which has led to the removal of her responsibility for taking meeting minutes. She asserts that “there seems to be some form of disconnection occurring in relation to agendas and meetings,” and that meetings have often become “hotbeds of debate and accusation.” Thus, documents that describe policies and procedures regarding the conducting of meetings, recording of minutes, and so on would appear to be potentially relevant to her grievance. Moreover, while the agency makes a comprehensive assertion that the grievant’s request is unduly burdensome and impedes efficiency, it has provided no specifics as to why it cannot provide responsive documents outlining policies and procedures regarding meetings and minutes. Presumably, if such policies exist and are in effect, then they will be (or should be) reasonably accessible. The mere fact that collecting responsive documents entails some effort does not mean that an agency has been unduly burdened. Furthermore, even in cases where production of all requested documents might rise to the level of a genuine undue burden, that does not excuse an agency from making a good faith effort to reach a potential compromise, for example, by agreeing to produce relevant documents of a more limited scope.<sup>13</sup> In sum, the documents requested here appear to be relevant and the agency has not shown just cause for not providing them. Accordingly, to the extent that they exist, the agency is ordered to provide the grievant with copies of

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<sup>13</sup> For example, in EDR Ruling No. 2009-2087, a grievant asked for documents relating to how all other agency employees had been dealt with when having committed the same offense as he. The agency objected to the request as being overly broad. We noted that “[i]n most cases involving a claim of inconsistent treatment of employees, a grievant can obtain related documents addressing the treatment of employees in the grievant’s reporting line, division/department, and/or at the same facility.” Finding “an absence of any indication why a broader request should be granted” and “[i]n weighing the minimal relevance of agency-wide documents in this case (beyond the normal scope described above),” we concluded that there was just cause to limit discovery because of the burden to the agency. As such, we narrowed the scope of the documents to be provided from all agency employees to only those in the unit/division and those who worked at the same facility as the grievant.

responsive documents outlining policies regarding meetings within 5 workdays of receipt of this ruling.

#### *Investigation Policies*

In requests 8-14 the grievant essentially seeks agency, facility, and division policies that relate to investigations of agency employees. In requests 15-21 the grievant more specifically requests documents describing agency, facility, and division policies that relate to investigations of agency employees regarding complaints by other employees. In her grievance, the grievant asserts that she has been the victim of false accusations. The Human Resource Department allegedly received at least one complaint regarding the grievant. In addition, the MAS Director apparently conducted an investigation into accusations regarding the grievant, her job performance, and interactions with others. The grievant asserts that if she is accused of misconduct or poor performance, she should be provided proof and have a right to rebut accusations. Thus, documents outlining how employee investigations should be conducted, particularly those involving complaints by co-workers, would appear to be relevant. Again, except for the general claims of undue burden and so on, the agency has presented no specific basis to support its position that providing the grievant with policies responsive to this request would be unduly burdensome or significantly impede efficiencies. Thus, within 5 workdays of receipt of this ruling, the agency is ordered to provide the grievant with any such policies and procedures, or if no such policies exist, so inform the grievant.

#### *Minutes, Coversheets, and Listings*

In requests 22-24 the grievant requests certain meeting minutes, coversheets, and listings that she asserts will show that delinquencies of other employees, which, in turn, impacted her ability to do her work. It would appear that these documents may be relevant to the grievant's general assertion that she has been the victim of unfounded accusations regarding her work performance and her claim that she has become a "scapegoat." Accordingly, within 5 workdays of receipt of this ruling, the agency is ordered to provide the grievant with the requested documents, or, if no such documents exist, so inform the grievant.

#### *Purchase Orders and Requisitions for Supplies*

In request 25, the grievant has requested copies of all orders and requisitions for supplies and equipment by the facility's Psychology Services Department for office supplies from January 1, 2007 through February 13, 2008. The grievant asserts that sufficient supplies have not been purchased for the Department.<sup>14</sup> The requested documents would appear to be relevant to the grievant's apparent concern that she and other employees within the Department did not have adequate supplies. Therefore,

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<sup>14</sup> Attachment 1 to Grievance Form A, page 3.

within 5 workdays of receipt of this ruling, the agency is ordered to provide the grievant with the requested documents.

*Timekeeping Policies*

The grievant has requested Department and Division timekeeping policies. According to the grievant, she is no longer assigned the duty of verifying leave usage. She claims that she was falsely accused with “interference and creating too many problems, when in fact, due to [her supervisor’s] lack of policy determination and support, [she has] yet to be able to actually perform those duties as assigned.”

To the extent that the grievant’s supervisor’s actions did not comport with policy or interfered with the grievant’s ability to carry out her timekeeping functions, the content of timekeeping policies could be relevant to this grievance. Therefore, within 5 workdays of receipt of this ruling, the agency is ordered to provide the grievant with the requested documents, if they exist.

*Documents Supporting the Written Notice*

The grievant has requested all documents supporting the Written Notice that she was issued for failure to follow her supervisor’s instructions. Any such documents would appear to be highly relevant to this grievance and must be provided to the grievant within 5 workdays of receipt of this ruling.

*Documents Outlining Supervisory Authority*

The remaining seven requests (28-34) seek policies “regarding the establishment of and/or what constitutes the designation of an employee’s supervisor and/or, if any, subsequent designation of reporting responsibilities or subordination of the employee, and to what parties, thereto while employed.” The grievant has explained that she is concerned that the person who issued the Written Notice against her was not her immediate supervisor. To the extent that such documents exist they would appear relevant to the grievant’s concerns. Accordingly, within 5 workdays of receipt of this ruling, the agency is ordered to provide the grievant with the requested documents, or, if no such documents exist, so inform the grievant.

CONCLUSION

Based on the foregoing, the agency is ordered to produce the documents requested by the grievant consistent with this ruling. If it is not possible to provide the requested documents within the 5 workday period, the agency must, within 5 workdays of receiving this ruling, explain to the grievant in writing why such a response is not possible, and produce the documents no later than 10 work days from the receipt of the ruling. The parties are reminded that when an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its

noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.<sup>15</sup> This Department's rulings on matters of compliance are final and nonappealable.<sup>16</sup>

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Claudia T. Farr  
Director

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<sup>15</sup> See Va. Code 2.2-3003(G), and Grievance Procedure Manual §6.3. See also EDR Ruling No. 2007-1470 in which this Department awarded relief to a grievant because of agency's continued failure to provide requested documents.

<sup>16</sup> See Va. Code 2.2-1001(5); 2.2-3003(G).