

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: May 13, 2009;  
Ruling #2009-2136; 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 2009-2136  
May 13, 2009

By letter dated September 9, 2008, the grievant has requested a compliance ruling with regard to his pending grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). The grievant asserts that the agency has failed to provide him with documents requested relevant to his grievance.

FACTS

The grievant was employed by the agency as a Qualified Mental Retardation Professional (QMRP). On June 13, 2008, the agency issued the grievant a Group I Written Notice for allegedly failing to perform his assigned work in a satisfactory manner and to complete duties assigned to him as a QMRP. The grievant subsequently initiated a grievance challenging this disciplinary action.

By memorandum dated July 25, 2008, the grievant asked the agency to provide him with eight categories of documentation. The grievant made this request in conjunction with advancing his grievance to the second management resolution step. Specifically, he requested:

1. "redacted copies of all chart audit memos and any follow-up memos regarding delinquent work sent by [supervisor] to the other QMRP's assigned to [his facility] from January 2007 to July 2008"
2. "redacted copies of all supervisory notes written by [supervisor] on the other QMRP's assigned to [his facility], from January 2007 to July 2008"
3. "redacted copies of all formal written letters given by [supervisors] to other [] professional staff [at his facility] between January 2007 and July 2008, regarding unsatisfactory work performance violating the Standards of Conduct"
4. "redacted copies of all Group I Written Notices given to professional staff by [supervisors] from January 2007 to July 2008, for failure to perform assigned work"
5. "redacted copies of all chart audits and any follow-up memos regarding delinquent work sent by other [] Program Managers at [the entire facility] from January 2007 to July 2008"

6. “redacted copies of all supervisory notes written about QMRP’s by the [] other Program Managers at [the entire facility] from January 2007 to July 2008”
7. “redacted copies of all formal written letters given to assigned professional staff by the [] other Centers [at the entire facility] from January 2007 and July 2008, regarding unsatisfactory work performance violating the Standards of Conduct.”
8. “redacted copies of all Group I Written Notices given to professional staff members by the [] other centers at [the entire facility] from January 2007 and July 2008, for failure to perform assigned work”

By letter dated July 30, 2008, the agency responded to the grievant’s request for documents. The agency denied the grievant’s requests, in their entirety, on two grounds—that the requested documents were exempt from disclosure under the Virginia Freedom of Information Act (FOIA) and were not relevant to his grievance. The grievant objected to the denial of documents, noting in particular that he was requesting documents under the grievance procedure rather than FOIA. The agency responded by again denying the grievant’s request, asserting that the requested documents were not relevant to the grievance and therefore not subject to production under the grievance procedure. Following this second denial, the grievant advised the agency head in writing of the agency’s alleged noncompliance in failing to produce the requested documents. In response, the agency again asserted that the requested documents were not relevant to the grievance. On September 9, 2008, the grievant requested a non-compliance ruling from this Department.

#### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> 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.

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.”<sup>2</sup> This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause,<sup>3</sup> all

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<sup>1</sup> See *Grievance Procedure Manual* § 6.3.

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

<sup>3</sup> “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)

relevant grievance-related information *must* be provided.<sup>4</sup> 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>5</sup>

In this case, the grievant has requested documents which he believes would establish that he was treated more harshly than other employees. The agency contends that information regarding other employees’ performance is not relevant to the grievant’s claims, because, the agency asserts, only the grievant’s *own* performance is at issue—not that of other employees.

We find the documents at issue are relevant. Under the grievance procedure, a hearing officer may mitigate a disciplinary action where a grievant is able to establish that he or she was disciplined in a manner inconsistent with the manner in which the agency disciplined (or failed to discipline) similarly-situated employees.<sup>6</sup> The requested information is therefore clearly relevant to the grievant’s ability to establish mitigating circumstances at his grievance hearing.<sup>7</sup> As the agency has not asserted just cause as a basis for its decision (or established that any just cause basis exists), the agency is therefore ordered to produce the requested documents to the grievant within **ten workdays of its receipt of this ruling**. The agency may redact any personally identifying information (such as names, social security number, telephone number, and address), provided that information relevant to the grievance is not redacted.

This Department’s rulings on matters of compliance are final and nonappealable.<sup>8</sup>

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Claudia T. Farr  
Director

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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.

<sup>4</sup> 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 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.

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

<sup>6</sup> See *Rules for Conducting Grievance Hearings* at § VI.B. (noting that “mitigating circumstances” include the “[i]nconsistent [a]pplication” of discipline among similarly-situated employees).

<sup>7</sup> We also note that to the extent the agency’s denial of documents is based on FOIA, such reliance is misplaced. As we have long stated in prior rulings and have noted in the *Frequently Asked Questions* section of our website, because of a July 1, 2000 statutory change, document requests under the grievance statutes are no longer associated with the FOIA, and the FOIA alone cannot be used as the reason for refusing to produce documents. See e.g., EDR Ruling No. 2006-1312; see also <http://www.edr.virginia.gov/faqs.htm>.

<sup>8</sup> See Va. Code §§ 2.2-1001(5); 2.2-3003(G).