

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: May 21, 2009; Ruling #2009-2227; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Agency In Compliance/ 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 2009-2227
May 21, 2009

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 comply with EDR Ruling Numbers 2008-2044 and 2009-2076.

FACTS

In her February 13, 2008 grievance, the grievant raises a number of issues regarding her working conditions including “workplace violence and workplace harassment” and retaliation. 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.¹

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. 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.

¹ For a more comprehensive discussion of the basis for the grievance in this case, see EDR Ruling Numbers 2008-2044 and 2009-2076.

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, 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 5th 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 also opined 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.

As a result of the agency’s failure to produce the requested documents, the grievant sought a compliance ruling from this Department. On January 9, 2009, this Department responded to the grievant’s request in EDR Ruling Numbers 2008-2044 and 2009-2076 and ordered that various documents be produced by the agency. The agency responded to the grievant’s document requests, and this Department’s orders, on January 28, 2009.² In a letter to this Department dated February 4, 2009, the grievant alleges that

² The grievant also challenges the agency’s failure to provide the documents within the timeframe specified by this Department in EDR Ruling Numbers 2008-2044 and 2009-2076. In that ruling, this Department ordered the agency to produce the documents within 5 workdays of receipt of the ruling. However, this Department permitted the agency to provide the documents within 10 workdays of receipt of the ruling if the agency explained to the grievant why it was unable to produce the documents within 5 workdays. EDR

the agency continues to be noncompliant regarding her requests for certain documents and in particular, has failed to comply with this Department's directives in EDR Ruling Number 2008-2044 and 2009-2076.

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

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. Where a party fails to comply with the grievance procedure, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its non-compliance. However, rendering such a decision is reserved for the most egregious of circumstances.

The grievant asserts that the agency has failed to provide her with information pursuant to both her first document request and her second document request and in response to EDR Ruling Numbers 2008-2044 and 2009-2076. The issues raised by the grievant with regard to each document request will be discussed below.

First Document Request

Complaint Received by the Human Resource Office

The grievant seeks information regarding the complaint allegedly lodged against the grievant by an undisclosed individual to the Assistant Human Resource Director. In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department determined that any

Ruling Numbers 2008-2044 and 2009-2076 was mailed to the parties on January 9, 2009. According to the agency, it received the ruling on January 12, 2009. On January 15, 2009, the agency sent the grievant a letter stating, “Due to the number of documents requested, and the difficulty we may incur in obtaining some of them, we will not be able to provide the documents within 5 workdays of receiving this ruling; however we will provide the requested information on or before January 28, 2009.” The agency provided the documents to the grievant on January 28, 2009, two days beyond the deadline set forth by this Department in EDR Ruling Numbers 2008-2044 and 2009-1076. However, the agency's failure to comply with this Department's orders does not appear driven by bad faith or a gross disregard of the grievance procedure and as such, a decision on the merits in favor of the grievant is not warranted at this time.

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

such documents concerning such a complaint would certainly appear to be relevant to the grievance and ordered the agency to “provide any such complaint-related document to the grievant, or, if none exists, so inform the grievant.” In response, the agency asserts, “No written complaint exists - HR cannot recall the name of the complainant or nature of complaint.”⁴ This Department concludes that the agency has complied with this document request and this Department’s order.

Immediate Supervisor’s Phone Records

The fourth category of documents requested by the grievant in her first document request was phone records for her immediate supervisor’s phone for January 4th, 7th, and 8th, 2008. In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department ordered the agency to:

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.

The grievant asserts that the agency has failed to comply with this Department’s order regarding phone records. In its response to this document request, the agency states: “Your request for phone records for January 4th, 7th and 8th 2008 had to be submitted to VITA, who is the official custodian of these records...see attached e-mail from [VITA representative]. Local calls are not available and there were no long distance calls on the above dates.” According to the agency, VITA provides phone services for the agency and bills the agency monthly for those services. This monthly bill does not include information regarding local calls, only information regarding long distance calls. Based on the foregoing, it appears that there are no phone records responsive to the grievant’s request. Accordingly, this Department finds that the agency has complied with the document request and EDR’s order.

⁴ This is not to say that the agency is denying that a complaint was actually lodged against the grievant. On the contrary, according to the agency, a complaint was received however, it was a verbal complaint only and as noted above, the human resources officer that received the complaint does not recall the name of the complainant or the nature of the complaint. Accordingly, there are no documents responsive to this request.

Second Document Request

Investigation Policies

In requests 8-14 of her second document request, the grievant essentially seeks Commonwealth of Virginia (COV), agency, facility, and division policies that relate to investigations of agency employees. In requests 15-21 of her second document request, the grievant more specifically requests documents describing Commonwealth of Virginia, agency, facility, and division policies that relate to investigations of agency employees regarding complaints by other employees. In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department determined that documents outlining how employee investigations should be conducted, particularly those involving complaints by co-workers, would appear to be relevant to the grievant's February 13, 2008 grievance and as such, ordered the agency to provide the grievant with any agency, facility or division policies and procedures, or if no such policies exist, so inform the grievant. In response, the agency has provided Departmental Instruction (DI) 507, DI 201, DI 404, DHRM Policy 6.05, DHRM Policy 2.30, DHRM Policy 1.40 and DHRM Policy 6.10. The agency further asserts that it has provided those policies "maintained or accessed or used by [the facility] or [the agency]" and that because it is not the "custodian" of all COV policies, procedures and protocols, it cannot be held responsible for the existence of these requested documents and maintains that the grievant's request is overly broad and burdensome. The grievant asserts that the agency was "unclear and "non-assisting" in its response to this document request. More specifically, the grievant seems to be arguing that the while the agency may not have copies of the requested COV policies, its response to her document request indicates that it could have knowledge of the existence of such policies, but has failed to offer information relating to such knowledge.

This Department concludes that the agency has complied with the grievant's document request and this Department's orders with regard to producing investigation policies and procedures. In particular, this Department's order in EDR Ruling Numbers 2008-2044 and 2009-2076 related only to "agency, facility and division" policies, which the agency appears to have provided. Moreover, the agency has provided copies of all policies upon which it relies in conducting investigations, including not only agency, facility and division policies, but DHRM policies as well. As such, any other possible COV policies, even if the agency were aware of such, which it does not appear to be,⁵ would seem to be irrelevant due to the breadth of the request.⁶

Minutes, Coversheets, and Listings

⁵ During this Department's investigation, the agency informed this Department that it is unaware of any other COV policies responsive to the grievant's request.

⁶ Cf. EDR Ruling #2009-2087 ("relevancy becomes almost nonexistent, and the burden of production becomes excessive, if the scope of the review is too broad.")

In requests 22-24 of her second document request, the grievant requested (1) meeting minutes from July 24, 2007 to the date of her document request, i.e., June 4, 2008; (2) coversheets occurring from April 18, 2008 to June 4, 2008; and (3) listings for the months of April, May and June 2008. In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department found these documents relevant and ordered the documents, to the extent that they exist, to be produced. In response, the agency only provided the grievant with meeting minutes from August 2007 through January 2008.⁷ The agency maintains that any documents responsive to these requests that were generated after February 13, 2008, the date the grievance was initiated, are irrelevant. In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department ordered that the documents requested, including those generated after February 13, 2008, be produced. In making this determination, this Department did not assess the relevancy of documents responsive to this request but generated after the initiation date of the grievance.

Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue.⁸ Accordingly, this Department does not agree with the agency's blanket assertion that requested documents generated after the initiation date of the grievance are generally irrelevant. While documents generated after the grievance initiation date could certainly be irrelevant, such documents could also be relevant if they would tend to prove or disprove a fact in issue. Accordingly, the relevancy of any such documents must be determined on a case-by-case basis.

In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department found the grievant's request for meeting minutes, coversheets and listings to 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." During this Department's investigation, the grievant stated that the unfounded accusations and her being a "scapegoat" for the inadequate work performance of others continued beyond the filing of her grievance on February 13, 2008. Based on the foregoing, it appears that meeting minutes, coversheets and listings generated *after* the grievant initiated her grievance could also serve as evidence to prove or disprove the grievant's general assertion that she has been the victim of unfounded accusations regarding her work performance and become a "scapegoat." As such, the agency is ordered to produce any meeting minutes, coversheets and listings sought pursuant to the second document request and not previously provided to the grievant within 5 workdays of its receipt of this ruling.

⁷ It should be noted that the agency had previously provided the grievant with meeting minutes from May 2005 through May 2007 and coversheets from May 2007 through April 17, 2008.

⁸ See *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citations omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citations omitted)).

Purchase Orders and Requisitions for Supplies

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. In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department determined these documents to be relevant to the grievant's February 13, 2008 grievance, and in particular, her apparent concern that she and other employees within the Department did not have adequate supplies, and ordered that the requested documents be produced. In response, the agency provided the grievant with purchase orders and requisitions for two Psychology Department cost centers, which generated a significant amount of information. The grievant alleges that "[the facility] created an undue and unnecessary burden in their error, when in fact the few documents requested could have been satisfied within the [facility] Psychology Services Department records on file there" and seeks "clarification that the documents provided are correctly encompassing the [facility] Psychology Services department only, and for the period requested." During this Department's investigation, the agency informed the investigating Consultant that all documents provided in response to this request pertained to the Psychology Services Department and only for the period requested. Accordingly, this Department concludes that the agency has complied with this document request and EDR Ruling Numbers 2008-2044 and 2009-2076.

Timekeeping Policies

The grievant also requested agency and Division timekeeping policies. In EDR Ruling Numbers 2008-2044 and 2009-2076, this Department found any such policies could be relevant to the February 13th grievance and ordered the agency to provide the requested policies. The agency has provided the facility timekeeping policy relevant to this request. The grievant asserts that the agency has failed to "acknowledge the existence of" and produce all relevant documents in response to her request. During this Department's investigation, a member of human resources at the facility stated that she was unaware of an agency-wide policy, but acknowledged that the timekeeping department may have internal policies or procedures that were not sought in response to this request. Accordingly, within 5 workdays of receipt of this ruling, the agency shall attempt to identify and provide any timekeeping policies and/or other documents relevant to this request and not previously provided to the grievant, or, if none 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.

Although it appears that the agency has not completely complied with EDR Ruling Numbers 2008-2044 and 2009-2076, it appears to have made a good faith attempt to do so. Based on the available evidence, this Department cannot find that the agency has willfully attempted to avoid the requirements of the grievance procedure. As such, no award on the merits is warranted. Nevertheless, the agency is cautioned to ensure it has provided all relevant, nonprivileged documents related to the grievant's February 13, 2008 grievance.

This Department's rulings on matters of compliance are final and nonappealable.⁹

Claudia T. Farr
Director

⁹ See Va. Code 2.2-1001(5); 2.2-3003(G).