

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: August 27, 2009; Ruling #2009-2322; Agency: Department of Behavioral Health and Developmental Services; Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Behavioral Health
and Developmental Services
Ruling Number 2009-2322
August 27, 2009

The grievant has requested a ruling regarding the alleged noncompliance of the Department of Behavioral Health and Developmental Services (the agency) in not providing requested documents.

FACTS

The grievant is employed by the agency as a Registered Nurse in a mental health facility. On March 30, 2009, the grievant initiated a grievance challenging the agency's March 10, 2009 issuance to her of an EAP Formal Referral Form.¹ In particular, the grievant asserts that the EAP Formal Referral Form contains "libelous statements," that the agency failed to follow policy and procedure, that a hostile work environment has been created, that she has been emotionally harassed and intimidated in the work environment, that her confidentiality has been violated by management, and that management has used coercive techniques to obtain documentation regarding her conduct. As relief, the grievant requested, in part, "access to written information [supporting the EAP Referral], including letters of concerns and behaviors," as well as "an opportunity to respond to accusations."²

The agency denied the grievant's request for documents, on the grounds that the grievant had repeatedly expressed an intention to confront her co-workers about their statements. In particular, the agency noted:

Allowing [the grievant] to either confront those employees who have raised legitimate concerns regarding [her] behavior or to attempt to determine their identity by questioning [her] co-workers using copies of redacted statements can only serve to further disrupt the workplace, raise additional concerns among [her] co-workers regarding [her] demeanor and behavior on the job, reduce the

¹ The EAP Referral form cited behavioral/mood changes as the reason for the referral. Appended to the Referral Form was a specific "[d]escription of [b]ehaviors that indicate a need for referral and evaluation." These listed behaviors include, for example, allegedly "[s]lamming doors," "[s]lamming charts," "[y]elling at staff members," "[t]elling other staff that shift administrator 'is out to get me,'" and "[i]ncreased crying spells."

² Although the grievant seeks the requested documents as an item of "relief" in her grievance, for purposes of this ruling, we will treat her request as one for documents under § 8.2 of the *Grievance Procedure Manual*.

effectiveness of the unit and create a threat to the therapeutic environment in the living areas that has the real potential for significant risk of substantial harm to the safety or health of employees and the patients.

After the agency advised the grievant that it would not provide her with the requested documents, she gave the agency head written notice of noncompliance in accordance with § 6.3 of the *Grievance Procedure Manual*. In response, the agency head's designee explained,

Essentially, [the facility] management was concerned by your statements that implied you may inappropriately confront the staff in the workplace which could further escalate the situation and be non-therapeutic for patients to witness. Based upon my review of the information presented, [the facility]'s denial of your document request appears to be appropriate under the circumstances.

The grievant has asked this Department for a compliance ruling on the agency's failure to provide the requested documents.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (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.⁴ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. 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 its delay in conforming to EDR's order.⁵

With respect to document requests, 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.”⁶ This Department's interpretation of the mandatory language “shall be made

³ *Grievance Procedure Manual* § 6.3.

⁴ *Id.*

⁵ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party.

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

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.”⁷ 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.⁸ 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.”⁹

In this case, the agency does not appear to challenge the relevancy of the requested documents, and, indeed, it would be difficult to argue that the documents are not directly related to the agency action being grieved, the EAP referral. The issue, then, is whether the agency’s concerns about what the grievant might do with the information constitute just cause for not producing the documents.

In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well-established and applicable legal privilege,¹⁰ this Department will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party’s particular interests in obtaining the document, as well as the general presumption under the grievance statutes in favor of disclosure. Relevant documents must be provided unless the opposing party can demonstrate compelling reasons for nondisclosure that outweigh the general presumption of disclosure and any competing interests in favor of disclosure. As discussed further below, a weighing of the interests in this particular case supports a finding of just cause for nondisclosure of the documents at issue.

The primary argument raised by the agency is a concern that the grievant would use the requested materials to confront her co-workers regarding their alleged observations regarding her behavior. The grievant asserts that while she does want to address with her co-workers the allegations they have apparently made, she only seeks to do so in the presence of management. She also argues that allowing her to confront her co-workers is in keeping with the agency’s stated policy of having staff resolve conflicts between themselves. The grievant states that she is unable to respond to the general allegations of problem conduct and behavior contained in the EAP referral without knowing more specific information.

In weighing these competing interests, we must conclude that the grievant is not entitled to the requested documents under the grievance procedure. Significantly, we note the level of detail the grievant has already been provided by management about the alleged behaviors leading to the EAP referral. Although the grievant has not been provided with the names of the individuals reporting the behaviors or the time and dates the alleged incidents occurred, she

⁷ *Grievance Procedure Manual* § 9.

⁸ *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁹ Va. Code § 2.2-3003(E); *see also* *Grievance Procedure Manual* § 8.2.

¹⁰ Certain well established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. *See, e.g.*, EDR Ruling No. 2002-215 (discussing attorney-client privilege).

nevertheless has enough information to communicate *with management* about the allegations, in a meaningful way, throughout the management steps of her grievance.¹¹ For example, the list of alleged behavioral and mood changes provided to the grievant includes an incident where the grievant allegedly showed “male and female peers split pants,” as well as an incident where the grievant allegedly yelled out while on a patient care unit, “God why are you punishing me, they are all against me.”

The nature of the grieved management action also weighs in the agency’s favor. If the grievant were challenging a Written Notice or other materially adverse action, she would almost certainly be entitled to sufficient access to the requested documents in order to respond fully to the allegations underlying the adverse management action, including, perhaps, the production of unredacted co-worker complaints. In this case, however, the grievant is not challenging an adverse management action. Instead, she is challenging a voluntary referral to the EAP. Such a referral has, in itself, no adverse impact on the grievant’s employment. For these reasons, we find the grievant’s interest in the information apparently provided by her co-workers less compelling than the agency’s interest in preventing disruption in the workplace.

We note, however, that if the allegations underlying the EAP referral result in an adverse action in the future, the grievant can grieve the adverse action and seek related documents through the grievance procedure.

This Department’s rulings on matters of compliance are final and nonappealable.¹²

Claudia T. Farr
Director

¹¹ The grievance procedure is a process by which a nonprobationary employee may formally address with agency management his or her concerns. *See, e.g.*, Va. Code § 2.2-3000(A) and § 2.2-3003. It is not a means by which an employee is entitled to address with other employees, such as co-workers, his or her concerns.

¹² *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).