

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: June 12, 2009;
Ruling #2009-2338; Agency: George Mason University; Outcome: Agency In
Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of George Mason University
Ruling No. 2009-2338
June 12, 2009

In EDR Ruling Number 2008-1870, this Department ordered George Mason University (the University) to produce threat assessment documents requested by the grievant without redactions. That order was modified in EDR Ruling Number 2008-2030, in response to the University's request for reconsideration, to require again the University to produce the requested documents, but allowing for the redaction of names in the relevant documents. Because it does not appear that the University has complied with this order, the grievant has since requested a compliance ruling on that basis and other issues of alleged noncompliance. Those matters will be addressed in a forthcoming Ruling Number 2009-2320.

The University has also now sought a second reconsideration of EDR Ruling Numbers 2008-1870 and 2008-2030 based on additional information from the Affected Employees as described in its request dated June 2, 2009. The grievant has objected to the University's request for a second reconsideration. He further objects to this Department considering the additional information from the Affected Employees.

A second reconsideration of a "final and nonappealable" compliance ruling is an extremely rare occurrence. Further, it is highly unusual to allow for consideration of such a request based on additional information, which could have been provided at an earlier opportunity. Nevertheless, given the sensitive nature of this case, this Department will consider the University's request for a second reconsideration. That ruling will be forthcoming as Ruling Number 2009-2332. Unless compelling new evidence that has not been available before is presented in the future, this Department will not reconsider its compliance rulings on this matter again.

However, the manner by which the University proposes to convey the additional information from the Affected Employees bears further discussion. Receipt of such information by phone is acceptable. However, each Affected Employee must convey his or her information individually, outside the presence of any of the other Affected Employees. Further, as with any EDR investigation, the EDR Consultant(s) who will interview the Affected Employees must take

notes to record the content of the discussions. Such records must be kept in the ruling file to document evidence gathered in the investigation.

As an agency of the Commonwealth, EDR is subject to statutes such as the Freedom of Information Act (FOIA) regarding the mandatory disclosure of certain public records. Courts can also subpoena witnesses and documents in litigated matters. While there are certainly exceptions provided in FOIA and other similar statutory schemes, EDR is unable to guarantee that information conveyed during this investigation and the related records could be kept confidential without question. If a request for the information were made, EDR would seek to withhold the relevant records to the extent possible under the law. However, if there were no legal arguments to resist disclosure, or if a court were to order EDR to provide the information, we would have little choice but to comply with the law and disclose the records.

In addition, depending on what is found in this investigation, certain generalized statements about the facts gathered may need to be included in the resulting compliance ruling. Virginia Code § 2.2-3003(G) requires that compliance rulings include the reasons for the EDR Director's determinations. If EDR were to reconsider and alter its prior determination that the evidence does not indicate that the grievant would pose an actual safety threat, such a departure would require explanation, including the factual foundation for the changed determination.

Further, it is important to note that EDR must consider the information that the Affected Employees may convey under an objective standard. Subjective fear alone will not be sufficient to establish a threat. To find that the grievant poses an actual safety threat such that the redacted documents may be withheld, EDR must review and assess the objective facts. Further, we are not mental health professionals, thus any evidence indicating a potential threat would need to be clearly recognizable to a reasonable layperson, or supported by the conclusions or opinions of a mental health professional.

These issues must be explained at the outset because this Department understands and respects the strong concerns among the Affected Employees about the confidentiality of the information. EDR will receive and consider any relevant information the University wishes to provide in support of the ruling request. However, it would not be appropriate to make any claims that the Affected Employees' statements will be kept confidential if that could not be guaranteed. If some or all of the Affected Employees still wish to convey their information given these realities, the assigned EDR Consultant(s) can arrange for the calls. **Within ten days of receipt of this ruling**, the University is directed to provide any additional information it wishes this Department to consider in support of its second reconsideration request, and to indicate whether interviews with any or all of the Affected Employees will commence.

While this Department recognizes the grievant's objections to the University's second reconsideration request and understands particularly his concern regarding the University's failure to provide evidence that it presumably could have during the initial reconsideration, due

June 12, 2009
Ruling # 2009-2338
Page 4

to the sensitive nature of the issues here, we must deny his objections. This Department's rulings on matters of compliance with the grievance procedure are final and nonappealable.¹

Claudia T. Farr
Director

¹ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).