

Issue: Compliance – Grievance Procedure (documents); Ruling Date: October 1, 2009; Ruling #2010-2378; Agency: Department of Behavioral Health & Developmental Services; Outcome: Agency in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Behavioral Health and Developmental Services  
Ruling No. 2010-2378  
October 1, 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**

In her February 13, 2008 grievance, the grievant requested various documents from the agency.<sup>1</sup> The grievant's document requests and the agency's alleged related noncompliance have been the subject of at least three previous EDR Rulings.<sup>2</sup> Following the last of those rulings, the grievant engaged in a meeting at the second step of her grievance. During that meeting, there was allegedly reference to the "normal" investigative policy/procedure/protocol ... with regards to complaints." The grievant now alleges that the agency has been noncompliant with the grievance procedure and this Department's past rulings in not providing this purported policy, procedure, or protocol. However, according to the agency, there is no such *written* policy.

**DISCUSSION**

If a party engages in substantial noncompliance without just cause, this Department has the authority to render a decision against the noncompliant party on any qualifiable issue.<sup>3</sup> However, this Department will generally only make such an extreme order on the merits of a grievance when a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure.<sup>4</sup>

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

<sup>2</sup> See EDR Ruling No. 2009-2227; EDR Ruling Nos. 2008-2044, 2009-2076; EDR Ruling No. 2008-1992.

<sup>3</sup> See Va. Code § 2.2-3003(G).

<sup>4</sup> For an example of the type of noncompliant conduct that would be required before such an order is made, see EDR Ruling No. 2007-1470.

Based on this Department's investigation, the "normal" policy/procedure/protocol discussed during the meeting may have described an agency or facility practice, but there is no written document recording such a policy, procedure, or practice. Because a party "shall not be required to create a document if the document does not exist,"<sup>5</sup> the agency has not failed to comply with the grievance procedure in not providing a written policy/procedure/protocol that does not exist. Consequently, the grievant's request for relief is denied. Automatic award of relief on the merits is not warranted.

This Department's rulings on matters of compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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

<sup>6</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).