

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: September 17, 2010; Ruling #2011-2751; Agency: Department of Veterans Services; Outcome: Agency in Compliance (in part), Agency Not in Compliance (in part).



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Veterans Services  
Ruling Number 2011-2751  
September 17, 2010

The grievant has requested a ruling regarding the Department of Veterans Services (the agency's) alleged noncompliance with the grievance procedure in allegedly failing to produce requested documents. This ruling finds that the agency's document production has in part complied with the information gathering provisions of the grievance procedure, and has in part not complied.

FACTS

On or about April 22, 2010, the grievant received a Group I Written Notice for unsatisfactory attendance. Under the agency's policy, an employee with three "occurrences" within a 90-day period is subject to disciplinary action. It appears that under the agency's policy, "occurrences" can be accumulated by late arrivals and unscheduled absences. According to the Written Notice, the grievant had five occurrences in a 90-day period. The grievant has challenged the Written Notice in her grievance, dated May 21, 2010, alleging such issues as harassment, retaliation, and inconsistent treatment. To support her claims, the grievant requested that the agency provide the time cards for all RNs, LPNs, and CNAs who work her shift during the period January 1, 2009 to July 15, 2010. The grievant also requested copies of any disciplinary actions, including informal counseling, received by all such employees for the same time period and same shift.

In response, the agency has provided the grievant some redacted time cards and disciplinary actions for the period November 2009 to July 15, 2010. The agency alleges that documents prior to November 2009 are not relevant to the grievance. Further, in gathering the requested documents, the agency reviewed the electronic timekeeping system for staff on the relevant shift who record time in the system.<sup>1</sup> Time cards and any related disciplinary actions for employees who had at least three occurrences within a 90-day period were produced. If there were employees whose time cards did not reflect three occurrences within a 90-day period, their materials were not produced. The grievant seeks a compliance ruling on these matters, asserting that she has not received all the documents she requested.

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<sup>1</sup> According to the agency, RNs do not use this system and there are no such time cards for these employees. As such, this ruling only addresses the agency's duty to provide documents related to LPNs and CNAs. It does not appear that documents regarding RNs would be material in this case because those employees are apparently not subject to the same timekeeping standards.

## DISCUSSION

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.”<sup>2</sup> 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. “Just cause” is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</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.

The agency asserts that documents regarding other employees’ attendance prior to November 2009 are not relevant because the grievant was disciplined or counseled for her attendance only going back to November 2009. However, such documents are relevant to the consistency with which the agency has handled issues of discipline for attendance problems, which could be material to many of the grievant’s claims, even if the documents relate to disciplinary practices prior to the grievant’s disciplinary action. The agency’s explanation does not support a finding that occurrences prior to November 2009 are clearly irrelevant. Therefore, we cannot find that these documents are not subject to disclosure. As such, the agency is ordered to provide the grievant the requested documents for the rest of the time period (January 2009 through November 2009).

In providing these documents, the agency need only provide documents regarding employees whose attendance history reflects conduct that amounts to at least three occurrences within a 90-day period (to include unscheduled absences and/or tardiness that would be occurrences under the language of the applicable policy), as it appears to have done for the November 2009 to July 2010 time period. We see no reason for the agency to provide documents about employees who have had no attendance or tardiness issues that ran afoul of the agency’s policy and, therefore, would not be subject to disciplinary action anyway. Such documents would not present any probative evidence in this case. Time cards and any disciplinary actions (including counseling) related to employees whose attendance history

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

<sup>3</sup> *Grievance Procedure Manual* § 9.

<sup>4</sup> See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

reflects conduct that amounts to three or more occurrences in a 90-day period are the only documents that need to be provided. Therefore, the agency has complied with the grievance procedure in providing requested documents for the November 2009 to July 2010 time period.

### CONCLUSION

For the reasons set forth above, the agency is ordered to produce the requested documents for the January 2009 to November 2009 time period as identified above **within ten workdays of receipt of this ruling**, which should give the agency sufficient time to gather the relevant documents. In addition, because the documents requested by the grievant relate to non-parties, as the agency has already done, when providing copies of the documents, any non-relevant personal information may be redacted, which could include, for example, names, social security numbers, telephone numbers, or home addresses.<sup>6</sup> Further, the parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents.

Further, the agency head has already “partially qualified” this grievance for a hearing and submitted a Form B requesting the appointment of a hearing officer. Although the grievance process should have been stayed while this compliance ruling was pending,<sup>7</sup> this does not present any unworkable procedural complications. Once the grievant receives the documents ordered by this ruling, the grievant will have **five workdays** to notify the agency and this Department that she is ready to proceed to hearing. In addition, if the grievant wishes to challenge the agency’s apparent “partial” qualification of this grievance for hearing by requesting qualification on any portion of the grievance not already qualified by the agency head,<sup>8</sup> the grievant must notify this Department **within five workdays of receiving the document production**. The appointment of a hearing officer in this grievance, as requested by the agency on the Form B, will be stayed until these steps are complete.

This Department’s rulings on matters of compliance are final and nonappealable.<sup>9</sup>

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Claudia T. Farr  
Director

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<sup>6</sup> See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>7</sup> See *Grievance Procedure Manual* § 6.1.

<sup>8</sup> It should be noted that the grievant’s assertions of harassment and retaliation appear to be *theories* advanced in support of her challenge to the Written Notice, and if that is the case, cannot be severed from her qualified challenge to the Written Notice itself. See EDR Ruling Nos. 2009-2127, 2009-2129, 2009-2130. As this Department has ruled, the “claims” or “issues” raised by a grievance are the management actions being challenged, not the theories advanced by a grievant to challenge the management actions. See, e.g., EDR Ruling Nos. 2007-1561 & 2007-1587; EDR Ruling No. 2007-1457; EDR Ruling No. 2007-1444.

<sup>9</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).