Issue: Compliance – Grievance Procedure (Documents); Ruling Date: October 19, 2010; Ruling #2011-2772; 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 Department of Behavioral Health & Developmental Services
Ruling No. 2011-2772
October 19, 2010

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

FACTS

In his grievances challenging the two Written Notices he received, the grievant has requested documents. The misconduct alleged in the Written Notices generally arises out of the grievant's personal relationship and contacts with an individual, another agency employee. This individual has filed a complaint with the federal Equal Employment Opportunity Commission (EEOC) because of the alleged conduct of the grievant and others at the agency. One of the Written Notices references the grievant's continued personal contacts with the individual after he was allegedly told by the agency and the individual to discontinue all personal contacts. This latter Written Notice references the EEOC Complaint and the agency's exposure to "potential liability" by the grievant's actions. He has identified two documents that the agency has allegedly failed to provide: 1) the EEOC complaint submitted by the individual, and 2) the agency's response to the EEOC complaint.

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."[1] 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."[2] 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,

[1] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[2] *Grievance Procedure Manual* § 9.

or (3) the documents are protected by a legal privilege.[3] 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."[4]

EEOC Complaint

Whether the EEOC Complaint is something the agency was under a duty to provide is largely a moot point because the agency has provided the grievant with a redacted copy of the Complaint. The agency redacted allegations from the Complaint that do not appear to be related to the issues for which the grievant was disciplined and provided the rest. According to the agency, the grievant was not disciplined for the issues that were contained in the redactions from the EEOC Complaint. Based solely on a plain reading of the Written Notices and the redacted contents, we would agree. Consequently, the only remaining undisclosed portions of the EEOC Complaint do not appear to be related to the actions grieved and need not be provided. However, if the agency intends to use any of the facts redacted from the EEOC Complaint to support either of its disciplinary actions against the grievant, the agency should provide the grievant notice of these facts so he can understand the charges against him. There is no requirement that the grievant receive a full copy of the EEOC Complaint, only the factual allegations contained therein that are relevant to the grievance. Indeed, if both parties agree, the facts could be restated to the grievant in another form, rather than providing the specific language of the Complaint.

Response to EEOC Complaint

The agency's Response to the EEOC Complaint appears to have two components: the first, a response to the EEOC's request for information, and the second, the agency's position statement. The Response cannot be considered wholly irrelevant because portions of these documents detail certain facts and the agency's related findings, which overlap with the alleged misconduct that led to the disciplinary actions at issue. However, it must be determined whether just cause[5] exists for nondisclosure of this document, or portions thereof.

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,[6] 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.

[3] *See, e.g.,* EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.
[4] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[5] *See* Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[6] 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).

The grievant states that he is seeking this Response because the EEOC Complaint was cited in at least one of his disciplinary actions and he was disciplined, in part, for exposing the agency to liability. He argues that he needs to review the documents to be able to assess the arguable extent of this liability. In addition, the grievant argues that the documents will demonstrate "pretext," by which the grievant means he will be able to show that the agency, in arguing that his conduct did not rise to the level of sexual harassment, really did not find his behavior to be that serious. These arguments are not particularly strong for seeking disclosure of this Response. For instance, any additional indication that the Response might provide about the extent or amount of liability the agency has been arguably exposed to because of the grievant is not particularly relevant here. The potential for such matters to arise can be adequately assessed and demonstrated by the facts that have already been disclosed by the agency and that are discussed in the Written Notices. The grievant's case does not appear to be materially impacted by facts about the arguable extent of any legal exposure here.

Furthermore, the fact that an agency may seek to argue that unwelcome and harassing actions by an employee have not quite crossed the threshold to a level of illegal behavior, should not serve as a bar prohibiting the agency from acting on conduct that may fall short of illegal. The elements and proof of disciplinary claims and sexual harassment claims are often different, thus not truly related. This appears to be such a case, given the charges for which the grievant was disciplined.

Additionally, the agency's reasons for seeking to protect this Response from disclosure are understandable. The Response relates to a federal administrative investigation, which has no bearing on this grievance. Indeed, this appears to be the type of document that the grievant would not otherwise be able to obtain from the EEOC.[7] As such, we must exercise caution so that the federal administrative process is not unknowingly impacted by the disclosure of such a document. Further, according to the agency, the grievant has identified himself as a "hostile witness," presumably for any such federal process and/or eventual litigation. The agency does not want to compromise its own defenses in such matters by providing its positions to such an individual.

Based on the above factors, the grievant's need for the Response, including his "pretext" argument, is outweighed by the reasons for nondisclosure. Indeed, even the arguably relevant portions of the Response describe facts and the agency's position for purposes of the federal discrimination complaint. Consequently, the Response addresses entirely different questions from this case. The grievant was not disciplined for engaging in Title VII-actionable sexual harassment, which is what is at issue in the EEOC Complaint. Consequently, the materiality of the Response to this case appears to be relatively small and the potential for confusion of the facts, in that the Response addresses different allegations, questions, and standards, is a concern. In balancing the totality of these interests, the Response need not be provided.

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[7] *See* 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (prohibiting disclosure by the EEOC of the charges or information obtained in relation thereto).

This Department's rulings on matters of compliance are final and nonappealable.[8]

Claudia T. Farr
Director

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[8] *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).