

Issue: Compliance – Grievance Procedure (Documents); Ruling Date: November 2, 2010; Ruling #2011-2815; Agency: Department of Corrections; 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 Corrections
Ruling Number 2011-2815
November 2, 2010

The grievant has requested a ruling regarding the Department of Corrections' (the agency's) alleged noncompliance with the grievance procedure in allegedly failing to produce requested documents. This ruling finds that the agency has both complied and not complied with the document discovery provisions of the grievance procedure.

FACTS

On or about September 1, 2010, the grievant received a Written Notice listing three separate charges: one each of Group I, Group II, and Group III offenses. The Group I charge involves the grievant's alleged abuse of state time. According to documentation attached to the Written Notice, the agency determined that there was a discrepancy of 2.5 hours in total between the time the grievant states she worked and the time reported from an alarm system¹ during the period February 15, 2010 to March 14, 2010. The Group II charge involves the grievant's alleged failure to follow a supervisor's instructions in not counting controlled medications with a second nurse at the same time. The Group III charge concerns the grievant's alleged falsification of a document indicating that she had counted controlled medications with a second nurse at the same time. These issues involve an allegation that the grievant counted and signed the appropriate documentation earlier in the evening by herself, while the second nurse did so later in the shift. The alleged counting issues may have occurred between the evening of February 21, 2010 to the early morning hours of February 22, 2010. Pursuant to her grievance challenging the disciplinary action, the grievant submitted a document request for seven items. The agency has reportedly provided two of the items, but has declined to provide the others.²

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

¹ The "alarm system" involves a security device that is carried by an employee while on the job. The employee must check-out and check-in a device at the beginning and end of his/her shift.

² Additional facts and descriptions as to each of the document requests are included below in the Discussion section.

upon request from a party to the grievance, by the opposing party.”³ 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.”⁴ 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.⁵ 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.”⁶

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.

Document 1

The grievant sought “[alarm system] documents for the entire nursing staff, including management for the period between February 15, 2010 and March 14, 2010.” The grievant has sought these documents to show the practices of other employees during this period. She alleges that “everyone” leaves early, which is apparently one of the offenses for which she was disciplined. The agency has refused to provide the documents because they “are seen as not relevant to your personal issue” due to the fact the grievant volunteered she “left early the night in question.”

First, the disciplinary documentation indicates that the agency believes that the grievant left approximately 30 to 45 minutes early on the night of February 21, 2010 (the assumed “night in question”). However, she was disciplined for 2.5 hours of time discrepancies over the period between February 15, 2010 and March 14, 2010. Consequently, the agency’s argument ignores the fact that the one day the grievant admitted to being late was not the only relevant period of time for which she allegedly abused state time.

The requested documents are potentially relevant to the issue of the consistency with which the agency has handled issues of discipline for discrepancies in time or leaving early. Therefore, at this early stage, we cannot find that these documents are not subject to disclosure based on relevance. The agency’s argument does not support the position that the documents are not relevant. As such, the agency is ordered to provide the grievant the requested alarm system materials that reflect the check-in/check-out times of the relevant set of employees.

³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁴ *Grievance Procedure Manual* § 9.

⁵ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

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

The documents provided under this request should be produced in such a way to protect the privacy of individuals not personally involved in the grievance.⁷ The agency could do so by redacting non-relevant personal information from the documents (such as names, social security numbers, telephone numbers, and addresses). Further, because the documents are relevant to the question of how other employees who may have arrived late or left early (i.e., abused state time) were treated, the only information that would be relevant is anything showing such late-arriving or early-departing employees. Therefore, it may be possible to provide a much smaller portion of the entire alarm system report for the specified dates. Indeed, the agency could develop, with the grievant's consent, a table or other document that would contain the relevant information without producing copies of the actual alarm system documents.

Document 2

The grievant has sought “[c]ontrolled medication logs for the 48 hour period from February 21, 2010 to February 22, 2010.” The grievant seeks to show that she signed the controlled medication book before the second nurse signed. The agency has stated that the documents are protected by HIPAA because they contain the personal information of inmates.

Not having seen the documents, we are unsure how they will demonstrate who signed first unless there are date/time stamps evident. However, given that it is the signing of this log that apparently subjected the grievant to discipline, it is highly relevant to this grievance. Therefore, the grievant should receive a copy of the relevant portion of the log for the requested time period. All personal information of nonparties must be redacted, which should alleviate any HIPAA, confidentiality, and/or other privacy concerns. Further, the grievant is entitled to review only the portion of the log that relates to the disciplinary action at issue, including, at a minimum, her signature and the signature of the second nurse and any indication as to the date and/or time of those signatures.

Document 4

The grievant has sought an “original letter ... containing harassing comments toward me from [a] former staff nurse ... and the action taken.” The grievant states that she needs this document to show that management took no action on the matter and that management was not “doing their job.” The agency has taken the position that this document is not relevant. This Department reviewed the materials submitted and finds insufficient support for an argument that the issues discussed in the requested letter are related to the actions grieved. As such, the document need not be provided.

Document 5

The grievant has sought a “[c]opy of the signed statements by myself and [the second nurse] and the actions taken by [supervisor] in Spring 2009, concerning the alleged sexual harassing comments made to me by [the second nurse].” The grievant states that she needs these

⁷ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

documents to show that no disciplinary action was taken against the second nurse. This Department again finds no relevance to this grievance of the issues of alleged sexually harassing comments by the second nurse. Therefore, that information need not be provided.

However, the grievant also states that these documents include allegations of the second nurse's continued rule violations of taking breaks outside without disciplinary action. The issue of the second nurse's breaks could be relevant to this grievance. One allegation appears to be that when the grievant counted the medications and signed the forms, the second nurse was on a break outside. While the facts regarding the second nurse's breaks may not be dispositive in this case, there appears to be some relatedness to the actions grieved. As such, to the extent the documents requested under "Document 5" include information related to the second nurse's breaks and management's actions or inactions regarding the breaks, that information must be provided.

Document 6

The grievant has sought a "[c]opy of the dated nurses staffing policy and or policies which date back to my date of hire December 3, 2007 until September 1, 2010." The agency has stated that the request is too broad to determine what the grievant is seeking. We agree that this original request is not specific enough. However, the grievant has clarified that she is seeking the policies or other documents that require two nurses to be working at the facility at all times. The grievant asserts that despite a policy requiring that two nurses work at all times, she continually worked alone which made it impossible to complete all her duties. Thus, documents that detail the number of required on-duty nurses could be relevant to the grievant's case. Therefore, the agency is ordered to provide the grievant with the policies or other documents that required (at least) two nurses to be working at the facility at all times, if such documents exist.

CONCLUSION

For the reasons set forth above, the agency is ordered to produce the documents as identified above **within five workdays of receipt of this ruling**. This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

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