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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5781
December 4, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) in relation to the alleged failure of Virginia Department of Behavioral Health and Developmental Services (the “agency”) to produce requested documents.

FACTS

On or about September 29, 2024, the grievant initiated a grievance challenging her exclusion from a salary increase awarded to clinical staff. As part of her grievance, the grievant sought certain information and, subsequently, further requested salary information and Employee Work Profiles (EWPs) for two specific employees: a Licensed Physical Therapy Assistant and the Allied Health Manager. On October 25, the grievant asked EDR to issue a compliance ruling due to alleged noncompliance in failing to produce the requested documentation under the grievance procedure. Shortly after requesting this ruling, the grievant received a production of information from the agency. The agency did not respond to or produce the requested EWPs or salary information for the specific employees. Based on communication from the grievant, the only information she asserts that she is still seeking and not yet received is the salary and EWP information.

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 EDR’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, or (3) the documents are

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

² *Grievance Procedure Manual* § 9.

protected by a legal privilege.³ 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,⁴ EDR 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.⁵ The grievance statutes further provide 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

EDR 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. All such documents must be provided within five workdays of receipt of the request. If it is not possible to provide the requested documents within the five-workday period, the party must, within five workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than ten workdays from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or "just cause," the withholding party must provide the requesting party with a written explanation of each claim, no later than ten workdays from receipt of the document request.⁷

In determining whether documents must be produced during the management resolution steps, EDR weighs the relevance—that is, the possible probative value—and materiality of the requested documents against possible competing interests, such as the privacy of other employees not involved in the grievance. Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue.⁸

EDR interprets the grievant's request for the salary and EWP information for the specified employees as an attempt to show disparate treatment, i.e., that other employees who are similarly situated received the salary increase that she did not. We have reviewed the EWPs for the grievant, the Allied Health Manager, and the Licensed Physical Therapy Assistant. At this stage, we cannot find that any information about the Licensed Physical Therapy Assistant would be material to the grievant's claims. Comparing the duties of the grievant and the Licensed Physical Therapy Assistant, EDR cannot find these positions to be similarly situated such that this employee's receipt of the raise would demonstrate that the grievant was treated improperly differently. Accordingly,

³ See, e.g., EDR Ruling Nos. 2008-1935, 2008-1936.

⁴ 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).

⁵ See, e.g., EDR Ruling No. 2010-2372.

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

⁷ *Grievance Procedure Manual* § 8.2.

⁸ See *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue.'" (citation and internal quotation marks omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citation and internal quotation marks omitted)).

the agency does not need to produce information requested about the Licensed Physical Therapy Assistant.⁹

However, as it relates to the Allied Health Manager, we reach the conclusion that this information is potentially relevant. Both the grievant and the Allied Health Manager appear to provide some direct services, but the positions are primarily involved in managing programs, in certain respects, that provide clinical services. Although there are admittedly differences between these two positions¹⁰ such that they might not be considered similarly situated as to the raise at issue in the grievance, for purposes of this documentation request, we cannot find the potential relevance of this information so small that it should be withheld. As such, the agency should provide the grievant with the information requested about the Allied Health Manager (salary and EWP information). The agency must produce the information in a manner as to preserve the privacy of the individuals not personally involved in the grievance.¹¹

CONCLUSION

For the foregoing reasons, EDR directs the agency to produce the information identified above **within five workdays of the date of this ruling**. EDR's rulings on matters of compliance are final and nonappealable.¹²

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⁹ This determination is made only as a matter of the grievance procedure. Whether the agency would be required to produce salary information under FOIA, for example, about this employee is a different matter and not one that is within EDR's purview to enforce. *See* Va. Code § 2.2-3705.1.

¹⁰ For instance, the grievant's position could be construed as more administrative in nature than that of the Allied Health Manager.

¹¹ Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2. As the grievant obviously knows who this person is, redacting names and other personally-identifying information does little to protect any privacy interests here. However, given that salary information is generally public information, this is less of a concern in this instance. In producing the EWP information, the agency should only produce the portions of the EWP that would allow consideration of whether the grievant is similarly situated, i.e., primarily the duties of the position.

¹² Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).