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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5902
July 22, 2025

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) in relation to the grievant's May 20, 2025 grievance with the Department of Behavioral Health and Developmental Services (the "agency"). As described below, EDR finds that the agency has corrected its noncompliance.

FACTS

On or about May 21, 2025,[1] the grievant submitted a grievance that primarily challenges his receipt of a Group III Written Notice and a 30-day suspension resulting from a drug screening that showed marijuana use**.** Pursuant to his grievance, on May 22, the grievant requested certain records from the agency**.** The grievant followed up on his grievance on May 29 after no records and no first step response were received**.** The agency responded on June 2 requesting that the grievant grant an extension to the five-workday response period. The grievant declined this request.

On June 10, 2025, having received no documentation from the agency nor a first step response, the grievant requested a compliance ruling from EDR. After requesting this ruling, the agency appears to have issued the first step response to the grievance on June 12 and produced requested documentation on June 17.

DISCUSSION

First-Step Response

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[2] That process assures that the parties first communicate with each other

[1] While it appears that the grievance was submitted on or about May 21, 2025, the Form A itself is dated May 20, 2025. As such, EDR will refer to this grievance as the "May 20, 2025 grievance." The precise date of initiation does not impact the analysis of this ruling.
[2] *Grievance Procedure Manual* § 6.3.

about the noncompliance, and resolve any problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.[3] If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When EDR finds that either party to a grievance is in noncompliance, its ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.[4]

A step respondent's response to a grievance following the initiation of the grievance must generally be provided within five workdays.[5] As the grievant had not received a written response from the agency within this time period following the initial filing of the grievance, the grievant was correct to request this ruling. Nonetheless, it is clear that the grievant has now received the agency's first step response, as required by the grievance procedure**.** We therefore find that the grievant's claim of agency noncompliance in issuing its first step response is moot because it has been corrected by the agency. Accordingly, we will take no further action on this issue.

Document Production

On May 22, the grievant requested a variety of documents, including:

1. Audio and visual presentation with audio transcripts of the training of DHRM Policy 1.05
2. EWP (presumably of the grievant)
3. Proof of training and acknowledgement of receipt and training for DI 502
4. Official job posting for CPRT at the facility
5. DHRM role description for Security Officer IV
6. Training record (presumably of the grievant)
7. All written and email correspondence from all persons regarding investigation of DI 201, DI 502, DHRM Policy 1.60, and DHRM Policy 1.05
8. All written or emailed statements regarding specifics of policy violation (presumably by the grievant)
9. Findings of DI 201 investigation initiated 4/17/24
10. Prior DI 201 investigations and findings

[3] *See id*.
[4] Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with procedural rules, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.
[5] *See Grievance Procedure Manual* § 3.1.

11. Form 201(A) filed for current and past DI 201 investigations
12. Drug screen documentation (presumably for the drug screen of the grievant)
13. Documentation showing two or more managers, supervisors, or persons authorized had reasonable suspicion that the grievant was impaired or under the influence of alcohol or drugs while at the workplace and on duty, including the exact date, time, and his actions leading them to believe he was and why the drug test was ordered
14. Documentation showing that the grievant was impaired at the workplace and while on duty, showing the exact date and time and what his actions were that lead the agency to believe he was impaired
15. DHRM Policy 1.60
16. DHRM Policy 1.05
17. DI 201

On June 10, having not yet received the requested documents, the grievant requested a compliance ruling from EDR. On June 13, the agency provided the grievant with policies DI 502, DI 201, and DHRM Policy 1.05. The agency followed up again on June 17, providing much of the requested documents but claiming some documents were either irrelevant or did not exist. The documents that were not provided appear to be the audio and visual presentation of the Policy 1.05 training; the written correspondence regarding investigations pursuant to DI 201, DI 502, DHRM Policies 1.60, and 1.05; documentation showing two or more agency personnel having reasonable suspicion that the grievant was impaired at the workplace and on duty; and documentation showing that the grievant was impaired at the workplace and on duty. The grievant now requests that these outstanding documents be produced, asserting that there is further correspondence between his supervisor, the Director, and other parties relating to DI 502 that has yet to be provided. He also asserts that the EWP sent is out-of-date.

The agency has explained its position as to why each of the identified documents were not provided. The agency claims that it was unable to obtain a copy of the audio and visual presentation of the Policy 1.05 training, but that the grievant could access it on the Commonwealth of Virginia Learning Center (COVLC). The agency further claims that it has no knowledge of any correspondence referencing the grievant and an investigation pursuant to DI 201, DI 502, DHRM Policy 1.60, and Policy 1.05. This statement is somewhat confusing in that the agency has already produced certain documentation related to an investigation pursuant to certain policies. As to the requests for documentation supporting the claim that the grievant was impaired while at the workplace, the agency asserts that such documents do not exist "as [they] are not relevant." The agency appears to assert that the grievant was not drug tested based on reasonable suspicion of impairment at work. Finally, the agency adds that DI 201 and DI 502 direct drug testing for all staff for which a DI 201 investigation has been initiated and leads to the employee under investigation being placed on leave.

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."[6] 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."[7] 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.[8] 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,[9] 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.[10] 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."[11]

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.[12]

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.[13]

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[6] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[7] *Grievance Procedure Manual* § 9.
[8] *See, e.g.,* EDR Ruling Nos. 2008-1935, 2008-1936.
[9] 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).
[10] *See, e.g.,* EDR Ruling No. 2010-2372.
[11] Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.
[12] *Grievance Procedure Manual* § 8.2.
[13] *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,

EWP

The grievant asserts that the EWP that was provided to him is out-of-date and requests an up-to-date version rather than the 2023 version that was provided. EDR has corresponded with the agency and they have confirmed that the 2023 EWP provided is the most up-to-date EWP available, and EDR has not reviewed any evidence to suggest otherwise. Accordingly, the agency does not need to produce a different version of the grievant's EWP.

Audio and visual recordings

The agency has asserted that the audio and visual presentation of Policy 1.05 training is inaccessible to them but that the grievant can access the information himself. To this point, the grievant asserts that it is against agency policy to audio or video record a training such as the one mentioned. EDR is unsure of how this assertion speaks to the agency's proffered reason for not being able to provide the documents and it does not appear to dispute the fact that the information is available to the grievant via COVLC. The agency also provided personnel that the grievant could contact should he have issues accessing the information. Accordingly, the agency does not need to produce information requested about the audio and visual training recordings.

"Reasonable suspicion" documentation

Regarding the remaining documents that were not provided, the agency essentially states that they do not exist. Specifically, this includes any written correspondence regarding investigation of certain policies, the documentation showing two or more agency personnel had reasonable suspicion that the grievant was impaired at the workplace and on duty, or documentation showing that the grievant was impaired at the workplace and on duty. While the agency has provided some correspondence related to investigations pursuant to DI 201 and DI 502, the grievant argues that there is additional correspondence relating to DI 502 that has not been provided, referring to an email chain that suggests certain agency personnel are unaware of DI 502-related investigations and that they requested additional guidance. He adds that he requests all correspondence specifically involving his supervisor and "any other parties who were tasked with locating such policy."

After a review of the documents provided by the agency, it does appear that there is an email chain that discusses DI 502 and certain management personnel questions about the policy. Specifically, the correspondence addresses questions about why the grievant was drug tested. The response to these questions states that DI 502 and DI 201 "direct testing when [the agency] place[s] an employee on pre-disciplinary leave . . . following an allegation of abuse or neglect within 8 hours" and that "this section of DI502 is separate from the reasonable suspicion section." As the agency states in this correspondence, drug testing pursuant to DI 502 is premised on an employee being put on pre-disciplinary leave – not on the incident itself, though pre-disciplinary leave can

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)).

result from an allegation of abuse or neglect.[14] In other words, the agency's policy does not require a substantiated allegation of abuse or neglect, or reasonable suspicion, to perform a drug test under DI 502; when an employee is placed on pre-disciplinary leave following an allegation of abuse or neglect requiring the filing of an Abuse/Neglect Allegation Form 201A, the policy states that a drug test can be directed.[15]

While the grievant seeks additional correspondence, EDR's review of the correspondence that has been produced does not indicate that more documentation relating to DI 502 exists as to the grievant in this case. While the agency has not provided EDR with any definitive explanation as to whether such additional correspondence exists, the agency has indicated that it produced to the grievant the requested documentation in its possession. Accordingly, based on our consideration of the totality of the circumstances, EDR finds that the agency need not produce any additional information about correspondence relating to DI 502.[16]

The agency similarly asserts that documentation pertaining to DHRM Policy 1.05 that shows agency personnel's reasonable suspicion of the grievant being impaired at work, or simply documentation showing that the grievant was impaired at work, does not exist as it is irrelevant. The agency argues that the documentation is not relevant because this specific portion of Policy 1.05 was not used as a determination towards requiring a drug test. As was discussed, reasonable suspicion was not a factor relied upon for drug testing in this case; the grievant being put on pre-disciplinary leave is the determining factor. Nevertheless, Accordingly, the agency does not need to produce the information requested about any additional "reasonable suspicion" documentation or documentation showing the grievant's alleged impairment at work.

CONCLUSION

For the reasons set forth above, EDR finds that the agency has corrected its noncompliance with respect to issuing its first-step response and for producing the requested documents. Accordingly, as a first step response has been issued, the grievant must notify the agency **within five workdays of the date of this ruling** whether he wishes to proceed to the second step or conclude his grievance.[17] EDR's rulings on matters of compliance are final and nonappealable.[18]

Christopher M. Grab

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[14] *See* Agency Departmental Instruction No. 502 (DI 502), *Alcohol and Drug Program*, at 10 ("When an employee in a safety sensitive position is placed on pre-disciplinary leave . . . following an allegation of abuse or neglect . . . he shall be tested for alcohol and drugs within eight hours of the filing of the [Abuse/Neglect Allegation] form.").
[15] *Id.*
[16] This determination is made only as a matter of the grievance procedure. Whether the agency would be required to produce such documentation under FOIA, for example, is a different matter and not one that is within EDR's purview to enforce. *See* Va. Code § 2.2-3705.1. Similarly, this ruling does not prevent the grievant from submitting additional document requests, including those related to DI 502-related correspondence, so long as the requests are specific and practicable enough for the agency to provide.
[17] *See Grievance Procedure Manual* § 3.1.
[18] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

Director
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