

Issue: Compliance/third step compliance with grievance procedure (did not address the issues or the relief sought, or notify her of procedural options); Qualification/age and gender discrimination; Ruling Date: January 14, 2004; Ruling #2003-174, 2003-415; Agency: Department of Corrections; Outcome: compliance/agency in compliance; document request to be handled by hearing officer; qualification issue qualified



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

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ Nos. 2003-174, 2003-415  
January 14, 2004

The grievant has requested a ruling on whether her August 11, 2003 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that the agency misapplied hiring policy and discriminated against her on the basis of age and gender. Additionally, the grievant requests a compliance ruling from this Department. The grievant claims that (1) the agency has not provided relevant documents that have been requested and (2) the Third Step Response to her grievance does not comply with the grievance procedure because it did not address the issues or relief sought, or notify her of her procedural options.<sup>1</sup>

FACTS

The grievant has been a Probation and Parole officer with DOC for approximately 18 years. In May 2003, the grievant obtained a Master's Degree in Counseling from a state university.<sup>2</sup> In July 2003, the grievant applied for five Psychologist I positions with DOC at facilities A (two positions), B, C, and D.<sup>3</sup> The recruitment postings for all five positions noted that a "Master's degree in clinical or counseling psychology from a regionally accredited university or college preferred. Master's degree in related human services field may be considered." The grievant interviewed for the Facility B position on July 16. Moreover, the grievant learned that the Facility C position was being re-advertised due to a low number of applications.

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<sup>1</sup> Memorandum from Grievant to Director of EDR, "Request for EDR to Rule on Noncompliance," dated September 20, 2003.

<sup>2</sup> The grievant states that her graduate program prepares students to become Licensed Professional Counselors (LPC). She further notes that her program is very similar to a Counseling Psychology program at another state university.

<sup>3</sup> According to the Department of Human Resource Management (DHRM), the "Psychologist I role provides career tracks for psychologists that are primarily devoted to conducting psychological assessments, administering, scoring and interpreting a variety of psychological tests and providing treatment to clients using didactic, psychotherapeutic and behavioral techniques and principles." See <http://www.dhrm.state.va.us/compensation/careergroups/health/Psychologica49210.htm> <last visited December 5, 2003.>

On July 18, the grievant found a Psychologist I vacancy posted for Facility E. This advertisement stated, however, that a Master's Degree in Psychology was required and did not state that comparable degrees would be considered. The grievant checked the re-advertisement for the Facility C position and noted that this position, too, now required a Master's Degree in Psychology. On July 25, the grievant received an email message from DOC management stating that a Master's Degree in Psychology was now a requirement for the Psychologist I position, and because the grievant's degree was not in psychology, she did "not meet the minimal educational requirements that have been set."<sup>4</sup>

On August 7, 2003, the grievant was called to interview for the Psychologist I position at Facility C. DOC asked the grievant to bring to her interview copies of her transcript and a work sample demonstrating a psychological evaluation with scoring, interpretation, and results. The grievant claims that this request was an attempt to hold her to a higher standard than other applicants and a misapplication of hiring policy. As a result, the grievant withdrew her application for the position at Facility C.

The grievant claims that DOC's actions with respect to these recruitment postings constituted a misapplication of DHRM's Policy 2.10, *Hiring*. Moreover, she claims that agency management engages in age and gender discrimination in its recruitment and hiring practices for Psychologist I positions. Specifically, she claims that most individuals hired are under the age of forty, and the majority of those hired over the age of forty are male. The grievant is a fifty year old female.

Shortly after filing her grievance, the grievant requested information and documents which she claims are relevant. On September 11, 2003, the grievant notified the agency head in writing of her belief that the agency was out of compliance with the grievance procedure by failing to provide the requested material. The grievant advanced her grievance on September 19, 2003, requesting qualification of her grievance for hearing. The agency head denied qualification on October 2.

By letter dated October 6, 2003, the agency provided responses to the grievant's requests. The following is a list of the information and documents requested, DOC's response to each item, and the basis for the grievant's objections to DOC's responses as incomplete:

1. Information in regards to the applicant pool for the two [Facility A] positions [grievant] applied for, delineating what factors were utilized in the screening process, as well as the date this process was completed.

(The agency stated that the factors considered in the screening process included a Master's Degree in Psychology. DOC further noted that there were 8 applicants, 6 of whom were selected for interviews. The two applicants not

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<sup>4</sup> See Email from DOC Management to Grievant, dated July 24, 2003.

selected for interviews had degrees in Counseling. One of the positions at Facility A has been filled, while the other has not.)

(The grievant states that the agency failed to provide copies of the applications submitted for the two positions at Facility A, and failed to provide the date the process was completed.)

2. Information on the factors that were utilized to select the individual for the position at [Facility B] that [grievant] interviewed for on July 16, 2003 with the reasons why the other applicant was more qualified for that position.

(The agency stated that the factors considered were a Master's Degree in Psychology, professional experience in assessment, testing, and report writing, and experience in Corrections. The position has not been filled.)

(The grievant states that the agency failed to provide copies of the questions asked by the interviewers for the position at Facility B, as well as copies of the comments and notes made during the interviews and the reason for the selection.)

3. Copies of the work samples that were required of the candidates for the interview at [Facility C].

(The agency will not provide the work samples, on the basis that the grievant has no authority to review them.)

(The grievant states that the agency's failure to provide these samples denies her access to documents containing information that relates to the claims in her grievance).

4. Demographical and statistical information in regards to the individuals who have been hired into Psychologist I and Senior Psychologist positions, specifically, the age at the time they were hired, a breakdown of age and gender of the individuals currently in these positions (including the date of hire), and educational degrees held at the time of hiring into these positions.

(The agency provided the ages and genders of individuals hired, promoted, and transferred into these positions within the last two years. The agency further provided the current ages and genders of individuals in Psychologist I and Senior Psychologist positions. The degrees of those employees were not provided, as they are not computerized).

(The grievant objects to this response on the basis that she needs statistical data for the past five years (not two), the ages at time of initial hire (not including promotions and transfers), ages of employees in Psychologist I and

Senior Psychologist roles at the time of hire, and the degrees held at the time of hire.)

## DISCUSSION

### *Qualification*

The grievance procedure recognizes management's exclusive right to manage the operations of state government, including the hiring or promotion of employees within an agency.<sup>5</sup> Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the "best-suited" person for a particular position based on the knowledge, skills, and abilities required. Grievances relating solely to the contents of personnel policies and the hiring of employees within an agency "shall not proceed to a hearing."<sup>6</sup> Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.<sup>7</sup> In this case, the grievant claims that DOC misapplied policy and discriminated against her.

### Misapplication of Policy

For an allegation of misapplication of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

The applicable policy in this case is DHRM Policy 2.10, *Hiring* which states that it is the Commonwealth's policy to provide "an efficient and consistent competitive hiring process that promotes equal employment opportunity."<sup>8</sup> To that end, DHRM Policy 2.10 includes job announcement requirements for state positions, stating that all announcements "must include an Equal Employment Opportunity statement and should state the scope of the position and KSA qualification requirements."<sup>9</sup> The policy further states that "[a]nnouncements *must not* specify a certain number of years of experience *nor a specific educational requirement* unless sanctioned by law."<sup>10</sup> Moreover, announcements may indicate "any educational *preferences* not required by law, stated with a provision for substitution of equivalent applicable experience or training."<sup>11</sup> In this case, there is no evidence that a Master's Degree in Psychology is required by law

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<sup>5</sup> See Va. Code § 2.2-3004(B).

<sup>6</sup> Va. Code § 2.2-3004(C).

<sup>7</sup> *Grievance Procedure Manual* § 4.1(c), page 10.

<sup>8</sup> DHRM Policy 2.10, *Hiring*, page 1 of 21.

<sup>9</sup> *Id.* at page 5 of 21.

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *Id.* at page 6 of 21 (emphasis added).

for the Psychologist I position. Thus, it appears that DOC may have misapplied policy by requiring a Master's Degree in Psychology as a prerequisite (rather than a preference) for the Psychologist I position. Accordingly, the issue of misapplication of hiring policy warrants further review by a hearing officer.

### Alternative Theories

The grievant has advanced alternative theories related to the agency's hiring practices for the Psychologist I positions, including allegations of gender and age discrimination. Because the issue of misapplication of policy qualifies for a hearing, this Department deems it appropriate to send these alternative claims for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and issues.

### *Compliance*

### Document Requests

The grievance statute provides that "[a]bsent just cause, *all documents*, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party."<sup>12</sup> Thus, absent just cause,<sup>13</sup> all relevant grievance related documents *must* be provided.

The grievance 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>14</sup> Documents, as defined by the Rules of the Supreme Court of Virginia, include "writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."<sup>15</sup> However, a party is not required to create a document if the requested document does not exist.<sup>16</sup>

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<sup>12</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21 (emphasis added.)

<sup>13</sup> "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9, page 24. Examples of "just cause" include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.

<sup>14</sup> *Id.*

<sup>15</sup> See Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).

<sup>16</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21. It must be noted that while the discovery rules of civil litigation require litigants in a court case to respond in writing to written questions (interrogatories) posed by the opposing party, the grievance procedure does not require interrogatories, and its document production provision was not intended to serve as the equivalent of civil litigation's interrogatory provision. The grievance procedure does, however, allow parties to a grievance to seek additional information relating to the grievance through discussion at the second resolution step fact-finding meeting, a meeting which is not to be conducted in an adversarial manner.

To summarize, absent just cause, a party must provide the other party with all existing relevant documents upon request, in a manner that preserves the privacy of other individuals. A party has a duty to conduct a reasonable search to determine whether the requested documentation is available and to provide the documents, as well as any related “just cause” objections for not providing any documents, to the other party in a timely manner.

Under the grievance procedure “[a] challenge to EDR will normally stop the grievance process temporarily.”<sup>17</sup> However, in a case such as this where the grievance has now qualified for hearing, it makes little sense to halt the grievance process so that EDR can sort out the document production dispute. At this late stage in the grievance process, the *only* purpose for which the newly requested documents have any bearing is the grievance hearing. Moreover, the hearing officer who will preside over the hearing will be called upon to make relevancy determinations on *all* evidence presented at hearing. For both the hearing officer and this Department to rule on the document issues at this stage in the grievance process would be redundant and an inefficient use of state resources. Thus, allowing the hearing officer to make the determination of whether a particular document should be produced, once the grievance has been qualified, is simply a matter of administrative efficiency.<sup>18</sup>

Accordingly, all remaining disputes relating to the production of documents should be presented to the hearing officer for his determination. If either party to this grievance later believes that the hearing officer exceeded or abused his authority, or failed to comply with the grievance procedure by ordering or failing to order the production of specific documents, that party may then request a compliance ruling from this Department.

#### Adequacy of Third Step Response

The grievant further alleges that the Third Step Response to her grievance failed to comply with the grievance procedure because it “did not address the issues or relief sought, [and] did not notify [grievant] of procedural options.” The grievance procedure

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<sup>17</sup> *Grievance Procedure Manual* § 6.1, page 16.

<sup>18</sup> If the grievance were still at the resolution steps stage of the grievance process or even at the agency head’s qualification stage, the grievance process would have halted as the requested documents may have had some bearing on an agency respondent’s response or the agency head’s determination. Because this grievance has proceeded through all resolution steps and has been qualified for hearing by EDR, the requested documents could have no bearing on any agency management action. Therefore, there was no reason to stop the grievance process. We note also that § 8.2 of the *Grievance Procedure Manual* states that if documents are denied prior to the appointment of a hearing officer, the requesting party *may* seek relief from this Department. This provision is intended to provide general guidance to parties as to whom they should direct their request for relief. This provision does *not* divest from this Department the discretion to pass to the hearing officer the *initial* determination of document relevancy *when, as in this case, the grievance has passed through each of the resolution steps and has been qualified for hearing.*

requires that all claims of noncompliance be raised immediately.<sup>19</sup> Thus, if a party proceeds with the grievance after becoming aware of the other party's alleged procedural violation, the party may waive the right to challenge the noncompliance at a later time.<sup>20</sup>

In this case, the grievant became aware of the alleged noncompliance when she received her Third Step Response on September 15, 2003. On September 19, the grievant requested qualification of her grievance for hearing. On September 20, the grievant requested a compliance ruling from this Department. Therefore, by advancing her grievance to the qualification phase of the grievance procedure, the grievant waived her right to challenge the alleged noncompliance of the third step respondent.

### CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's August 11, 2003 grievance for a hearing. This qualification decision in no way determines that the agency misapplied hiring policy or discriminated against the grievant on the basis of age or gender, only that further exploration of the facts by a hearing officer is appropriate. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

Document requests should be made with the hearing officer prior to hearing. This Department's rulings on matters of compliance are final and nonappealable.<sup>21</sup>

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<sup>19</sup> Grievance Procedure Manual § 6.3, page 17.

<sup>20</sup> *Id.* See also EDR Ruling No. 2002-036.

<sup>21</sup> Va. Code § 2.2-3003(G).