

Issue: Compliance/agency claims grievance is duplicative, grievant asks for consolidation of two grievances; Ruling Date: January 29, 2004; Ruling #2003-539; Agency: Department of Corrections; Outcome: retaliation issue not duplicate and will move forward; consolidation not granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2003-539
January 29, 2004

The grievant has requested a ruling from this Department on whether she was compliant with the grievance procedure when she initiated her grievance on October 21, 2003 (Grievance #2). The Department of Corrections (DOC) administratively closed the grievance, claiming that the grievance duplicates an earlier grievance, filed August 11, 2003, challenging the same action and arising out of the same facts (Grievance #1). The grievant further requests that Grievance #2 be consolidated with Grievance #1. For the reasons discussed below, this Department concludes that two of the issues raised Grievance #2 are duplicative and were properly administratively closed. However, the remaining issue (retaliation) is not duplicative and may continue through the management resolution steps. Moreover, Grievance #1 and Grievance #2 are not consolidated for hearing.

FACTS

The grievant has been a Probation and Parole officer with DOC for approximately 18 years. In July 2003, the grievant applied for five Psychologist I positions with DOC at facilities A (two positions), B, C, and D.¹ The grievant interviewed but was not selected for the position at Facility B. She was not interviewed for any of the other positions. The grievant claimed in Grievance #1 that DOC's actions connected to these recruitment postings constitute a misapplication of DHRM's Policy 2.10, *Hiring*. Moreover, in that grievance she claimed that agency management engages in age and gender discrimination in its recruitment and hiring practices for Psychologist I positions.

In connection with Grievance #1, the grievant requested information relevant to the recruiting practices. Two of her requests and DOC responses were:

¹ 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.>

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

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 claims that the agency's responses clearly demonstrate that DOC misapplied hiring policy. She filed a second grievance on October 21, 2003, based on the information provided during Grievance #1. She raised again the issues of misapplication of policy and gender/age discrimination. She also alleged that DOC retaliated against her for participating in the grievance process when it failed to grant her an interview for the positions at Facility A. During the third resolution step, the agency administratively closed the grievance, claiming that it was duplicative of the first grievance and therefore did not comply with the grievance procedure. The grievant claims that her grievances are not duplicative because Grievance #2 is more "fine-tuned," while Grievance #1 was broad in nature. She further states that with the newly discovered information, her misapplication of policy and discrimination allegations are more evident. On January 14, 2004, this Department qualified Grievance #1 for a hearing.

DISCUSSION

An employee's grievance must not duplicate another grievance challenging the same action or arising out of the same facts.² If there is duplication, management may notify the employee that the grievance will be administratively closed due to noncompliance.³

Misapplication of Policy/Age and Gender Discrimination

In Grievance #1, the grievant challenged management's recruitment practices, specifically with respect to the posting requirements. Grievance #2 challenges

² See *Grievance Procedure Manual* § 2.4, page 7.

³ *Id.*

management's screening process, based on information she received from DOC during Grievance #1. The grievant, however, is not challenging a new management action. Rather, in Grievance #2 she is simply enumerating more *specific* allegations of misapplications of policy, based on the newly discovered evidence. In both grievances, the grievant alleges that the agency misapplied state and agency hiring policy and engaged in gender/age discrimination. When examined, these grievances challenge the same management action (management's actions during the hiring process for the five Psychologist I positions) and raise the same issues (misapplication of policy and gender/age discrimination). Therefore, these issues in Grievance #2 are duplicative of Grievance #1, thus out of compliance with the grievance process and were properly closed by the agency. However, the grievant's new evidence, and any related misapplication of policy and/or gender/age discrimination claims, however, may be presented at hearing as support for her claims in Grievance #1.

Retaliation

In addition to her misapplication of policy and discrimination claims, the grievant raises the issue of retaliation in Grievance #2. Specifically, she claims that agency management refused to consider her application for the positions at Facility A in retaliation for having filed Grievance #1. This issue obviously could not have been raised upon the initiation of Grievance #1 and thus is not duplicative. Accordingly, this issue is reopened and may continue through the management resolution steps.

Consolidation

Written approval by the Director of this Department in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.⁴ For example, if consolidation for hearing would be impracticable, the EDR Director may direct that the grievances proceed separately. This Department concludes that given the facts of this case, consolidation of Grievances #1 and #2 (issue of retaliation only) is impracticable and not appropriate. First, Grievance #1 is currently ready to proceed to hearing, whereas Grievance #2 is still in the management resolution steps, and its remaining issue, retaliation, will still need a separate qualification determination. Accordingly, this Department concludes that there are persuasive reasons to deny consolidation of Grievance #1 and Grievance #2.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's misapplication of policy and discrimination claims in Grievance #2 are duplicative and are therefore out of compliance with the grievance procedure. Her retaliation claim is not

⁴ See *Grievance Procedure Manual* § 8.5, page 22.

duplicative and may proceed to the qualification stage of the management resolution steps. Further, because Grievance #1 is ready to proceed to hearing and Grievance #2 has not yet completed the management resolution steps, consolidation of Grievances #1 and #2 is not appropriate. This Department's rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

Leigh A. Brabrand
EDR Consultant

⁵ Va. Code § 2.2-3003(G).