

Issue: Compliance/Documents; Qualification/Retaliation for other protected right, age and gender discrimination; Ruling Date: March 26, 2004; Ruling #2004-553, 2004-558, 2004-638; Agency: Department of Corrections; Outcome: Documents issue – hearing officer to decide relevancy, Qualification issues; qualified and consolidated for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2004-553, -558, -638
March 26, 2004

The grievant has requested a ruling on whether her October 21, 2003 grievances (Grievances 2 and 3) with the Department of Corrections (DOC) qualify for a hearing. The grievant claims that the agency misapplied hiring policy, discriminated against her on the basis of age and gender, and retaliated against her. Additionally, the grievant requests a compliance ruling from this Department, claiming that the agency has not provided relevant documents that have been requested.

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 was interviewed but was not selected for the position at Facility B. She was not interviewed for any of the other positions. The grievant filed Grievance 1 on August 11, 2003, claiming that DOC's actions connected to these recruitment postings constitute a misapplication of DHRM's Policy 2.10, *Hiring*. In that grievance she also claimed that agency management engages in age and gender discrimination in its recruitment and hiring practices for Psychologist I positions.²

The grievant filed two more grievances (the subjects of this ruling), on October 21, 2003 (Grievances 2 and 3). Grievance 2 alleges that DOC retaliated against the grievant for participating in the grievance process when it failed to grant her an interview

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.>

March 26, 2004

Ruling #'s 2004-553, 2004-558, 2004-638

Page 3

for the positions at Facility A.³ Specifically, the grievant claims that she was rejected for those positions two days after notifying the agency of her intent to file Grievance 1.

In Grievance 3, the grievant claims that she was not selected to interview for Psychologist I and II positions at Facility F. The grievant again claims that DOC misapplied policy, discriminated against her on the basis of age and gender, and retaliated against her for her use of the grievance procedure. The grievant applied for the two positions in August 2003.⁴ On October 20, 2003, the grievant called the DOC Human Resources office to ask about the status of the recruitment for these two positions. A DOC employee (Employee A) informed the grievant that she had not been selected to interview for the Psychologist I position, but that she had been “screened in” for an interview for the Psychologist II position. The grievant then contacted Human Resources at Facility F and learned that interviews for the Psychologist II position had been conducted on September 23, 2003. The agency claims that Employee A merely gave the grievant incorrect information on October 20. The grievant claims, however, that the information provided by Employee A had been correct, and shows that while the grievant had initially screened in for an interview, a decision was ultimately made not to interview her because of her prior grievance activity, age/gender discrimination, and misapplication of policy.⁵ As further evidence of ongoing antagonism between the grievant and DOC during her grievances, the grievant claims that DOC has failed to comply with the grievance procedure. Based on information provided in the grievance record, it appears that the grievant has notified the agency head of alleged noncompliance on eight occasions during the course of the three grievances.

³ The grievant also raised again in Grievance 2 the issues of misapplication of policy and age/gender discrimination. During the third resolution step of Grievance 2, the agency administratively closed the grievance, claiming that it was duplicative of Grievance 1 and therefore did not comply with the grievance procedure. The grievant claimed that her grievances were not duplicative because Grievance 2 was more “fine-tuned,” while Grievance 1 was broad in nature. On January 29, 2004, this Department concluded that the misapplication of policy and discrimination claims in Grievance 2 were duplicative of Grievance 1 and were properly administratively closed by the agency. However, the issue of retaliation was not duplicative and was reopened. See EDR Ruling No. 2003-539, issued January 29, 2004. Moreover, the grievant also alleged that she was not selected for the position at Facility B because of retaliation. However, the grievant has since stated that she “no longer feel[s] there was retaliation in regards to [her] non-selection at [Facility B].” Letter to EDR Director from Grievant, dated March 1, 2004. Therefore, this ruling will only address Grievance 2’s retaliation claim with respect to Facility A.

⁴ The grievant claims that the Psychologist I position at Facility F was re-advertised three times due to the small number of applications submitted and that she applied each time the job was posted. DOC reported during this Department’s investigation that the position was re-advertised one time after receiving only two applications after the first posting.

⁵ The grievant claims that she is minimally qualified for the positions, but is not selected for interviews because she does not hold a Master’s Degree in Psychology. Department of Human Resource Management (DHRM) Policy 2.10, *Hiring* states that job advertisements must not specify “a specific educational requirement unless sanctioned by law.” See DHRM Policy 2.10, page 5 of 21. The job announcements for the Psychology positions state that a Master’s Degree in Psychology is preferred, but related educational degrees will be considered. The grievant alleges, however, that re-advertising the Psychologist I position when there were qualified applicants, such as the grievant, is tantamount to *requiring* a Master’s Degree in Psychology, which is prohibited by policy.

March 26, 2004

Ruling #'s 2004-553, 2004-558, 2004-638

Page 4

On November 25, 2003, the grievant requested information and documents, which she claims are relevant to Grievance 3. Specifically, the grievant requested (1) the Applicant Screening Forms for the Psychologist I and II positions at Facility F with the reasons for the grievant's non-selection and (2) a print-out of the database screen from which Employee A read on October 20, 2003 in advising the grievant that she had been selected for an interview. On December 29, 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. On January 15, 2004, the agency responded to the grievant's requests, providing two Applicant Screening Forms and a current print-out of the database. The grievant claims, however, that the documentation is insufficient because the Applicant Screening Forms were redacted so heavily that they did not provide any useful information and because the printed database screen was *current* and not what the screen reflected on October 20.

DISCUSSION

Retaliation - Grievance 3

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;⁶ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁷ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁸

The grievant engaged in a protected activity when she filed a grievance on August 11, 2003. Furthermore, not being selected for a position could be viewed as an adverse employment action. The agency provided a nonretaliatory business reason for the grievant's non-selection: several highly-qualified individuals applied for the positions, including the successful candidates who held doctorate level degrees in Psychology. However, based on the totality of the circumstances, including but not limited to the close proximity in time between the initiation of the August 11 grievance and the grievant's non-selection, a sufficient question remains as to whether the grievance and non-selection

⁶ See *Grievance Procedure Manual* §4.1(b)(4), page 10. Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

⁷ See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998).

⁸ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).

are causally linked.⁹ The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's nonselection for interviews for these positions. As such, this issue qualifies for hearing.

Alternative Theories/Grievance 2

The grievant has advanced alternative theories related to the agency's decision not to interview her, including allegations that the agency misapplied state and agency hiring policy and age/gender discrimination. Moreover, Grievance 2, like Grievance 3, raises the issue of retaliation in the context of DOC's hiring practices. Because the issue of retaliation in Grievance 3 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.

In addition, this Department has long held that this Department may consolidate grievances whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.¹⁰ EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.¹¹ In this case, although Grievances 2 and 3 arose from two separate circumstances, the events giving rise to the grievances are closely related: for example, both grievances allege the same management action – retaliation based on past grievance activity – and involve DOC's recruitment and hiring practices. Consolidation of these grievances should provide an effective and efficient means of resolving the related disputes at hand. As such, both Grievances 2 and 3 qualify and are consolidated for a hearing.

Compliance - Document Request

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.”¹² Thus, absent just cause,¹³ all relevant grievance related documents *must* be provided.

⁹ See *Tinsley v. First Union National Bank*, 155 F.3d 435, 443 (4th Cir. 1998) (noting that merely the closeness in time between a protected act and an adverse employment action is sufficient to make a prima facie case of causality). See also *Jaudon v. Elder Health, Inc.*, 125 F. Supp.2d 153, 165 (D. Md. 2000) (indicating that temporal proximity and ongoing antagonism can be a sufficient basis to establish a causal link).

¹⁰ *Grievance Procedure Manual* § 8.5, page 22.

¹¹ *Id.*

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

¹³ “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.

March 26, 2004

Ruling #'s 2004-553, 2004-558, 2004-638

Page 6

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.”¹⁴ 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.”¹⁵ However, a party is not required to create a document if the requested document does not exist.¹⁶

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.”¹⁷ 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.¹⁸

¹⁴ *Id.*

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

¹⁶ 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.

¹⁷ *Grievance Procedure Manual* § 6.1, page 16.

¹⁸ If the grievances 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

March 26, 2004

Ruling #'s 2004-553, 2004-558, 2004-638

Page 7

Accordingly, all remaining disputes relating to the production of documents should be presented to the hearing officer for his determination.¹⁹ 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.

CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's October 21, 2003 grievances. This qualification ruling in no way determines that the agency's hiring decisions were retaliatory or otherwise improper, 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.

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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.*

¹⁹ Should the hearing officer order the production of the requested documents, the agency's failure to provide the grievant with those documents absent just cause could result in adverse inferences drawn against the agency. For example, if documents are withheld absent just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve the factual dispute in the grievant's favor.