

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date; April 2, 2008; Ruling #2007-1535, 2007-1677, 2008-1756; Agency: Department of Social Services; Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Numbers 2007-1535, 2007-1677 and 2008-1756
April 2, 2008

By letter dated January 12, 2007, the grievant has requested a compliance ruling from this Department (EDR). The grievant asserts that the Department of Social Services (DSS or the agency) has failed to comply with EDR Ruling No. 2007-1470. In addition, by letter dated April 26, 2007, the grievant has requested that this Department reconsider Ruling No. 2007-1470. For the reasons set forth below, this Department will not alter its decision in Ruling No. 2007-1470. Additionally, while this Department finds that the agency did not initially respond to Ruling No. 2007-1470 in a timely manner, it has nevertheless taken steps to comply with that ruling. More importantly, this Department has no independent enforcement power to compel the agency to take further action.

FACTS

A detailed recounting of the facts in this case is set forth in Ruling No. 2007-1470 which can be found at EDR's website.¹ In sum, the grievant asserted in a February 21, 2006 grievance that she was being paid less than "multiple individuals that are of the male gender, or are younger, or have significantly less/no education and/or experience." In conjunction with her grievance, the grievant requested information regarding co-workers including: (1) date of hire, (2) level of education at date of hire, (3) professional experience at date of hire, (4) any professional certifications/licenses at the date of hire, (5) age at the date of hire, (6) the posted position qualifications for their recruitment, (7) and their salary at the date of hire.

As a result of the agency's repeated noncompliance, this Department was required to issue four compliance rulings regarding the grievant's document request and in the fourth ruling (EDR Ruling No. 2007-1470) we held that "the agency's most recent action of not providing to the grievant a document (or documents) that it knew to be improperly withheld, at minimum, constitutes continued indifference to the grievant's rights under the grievance process." Concluding that "the agency has left this Department with truly no other recourse," we held that it was appropriate to issue a decision against the agency on the qualified issue of the grievant's pay. Specifically, we ordered as a sanction that:

¹ EDR Ruling No. 2007-1470 is found at: <http://www.edr.virginia.gov/searchedr/re2007-1470.pdf>.

[T]he agency is ordered to increase the grievant's pay, at minimum, to whichever is the higher amount: (1) the average of the pay of all male Program Specialist IIs in the Northern Virginia Licensing Division who (i) are currently being paid more than the grievant, and (ii) have comparable or less education and experience than the grievant; *or* (2) the average pay of all persons younger than the grievant who are Program Specialist IIs who work in Northern Virginia and (i) are currently being paid more than the grievant, and (ii) have comparable or less education and experience than the grievant.

We concluded by recognizing that our action was an "an extraordinary measure," not taken lightly but fully warranted under the particular facts of this case.

On January 12, 2007, the grievant wrote this Department seeking "relief and implementation of this ruling [No. 2007-1470] through a circuit court order," due to the agency's alleged failure to comply with EDR Ruling No. 2007-1470.

On March 23, 2007, the agency offered to increase the grievants pay from \$48,770.00 to \$49,552.33.² The grievant challenged the offered amount as inconsistent with Ruling No. 2007-1470. In an effort to effectuate EDR Ruling No. 2007-1470 and resolve the ongoing conflict between the grievant and the agency, this Department offered to attempt to intervene by facilitating communications between the parties.

Following several teleconferences and e-mail correspondences between the parties, the agency revised the grievant's proposed salary to \$52,628.48. The grievant, who was not provided with documentation showing how the agency calculated the \$52,628.48 figure, asked for supporting documentation. The agency initially refused to provide the supporting documentation, citing privacy concerns, but subsequently relented and agreed to mail the supporting data to the grievant.

The grievant continues to assert that she has not been able to determine whether the proposed \$52,628.48 is in accord with EDR Ruling No. 2007-1470 and has demanded that she be paid \$75,000.00.³ The grievant recently renewed her request for rulings in this matter.

DISCUSSION

Reconsideration of EDR Ruling No. 2007-1470

As an initial point, in EDR Ruling No. 2007-1470, we noted that the relief ordered was essentially a sanction and not based on any finding that unlawful discrimination had

² The agency asserted that there were no males that had the same or less experience than the grievant who were being paid more, and that while there were seven employees younger than the grievant who were being paid more than she, one has more education and three have more experience. The average pay of the remaining three was \$49,552.33.

³ Ruling request dated July 25, 2007.

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actually occurred. While information subsequently provided by the agency appears to indicate that the grievant was paid less than several other employees with the same or less education and/or experience, because the relief awarded was a sanction, this Department was not required to determine whether the pay discrepancies were based on age (or gender), or potentially explained by other factors. Moreover, we believe that the relief ordered in EDR Ruling No. 2007-1470 was equitable and has provided the grievant with appropriate relief under the particular facts of this case.⁴ Thus, we find no reason in this circumstance to disturb our earlier decision.

Failure to Comply with EDR Ruling 2007-1470

As to the grievant's assertion that the agency has failed to comply with EDR Ruling No. 2007-1470, and in response to her request for an implementation order from the circuit court, we note that we have no authority to compel the circuit court to issue such an order, nor do we have independent enforcement power to compel the agency to take further action. Moreover, while this Department recognizes that the agency initially appeared to again disregard this Department's directives, it eventually agreed to increase the grievant's salary from \$48,770 to \$52,628.48. In addition, it has provided additional documentation to the grievant for the purpose of allowing her to consider the veracity of the \$52,628.48 salary proposal. Thus, while communications were strained and the exchange of documents protracted, we cannot conclude that the agency has failed to comply with EDR Ruling No. 2007-1470. For all the above reasons, this Department will not take any further action in this matter.

Claudia T. Farr
Director

⁴ Using an average of salaries as we did in this case is one approach that courts use in discrimination cases in awarding damages where an employee has met his or her burden of proving that unlawful discrimination actually occurred. *See* EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1077 (4th Cir. 1982). Here, the grievant was never required to establish that the source of any salary disparity was caused by any sort of illegal discriminatory practice. While it is true that the grievant was never provided with the opportunity to make such a showing, it is uncertain whether the grievant could have established her claim under either (1) a "disparate treatment" theory in which the grievant would have been required to prove that the agency intentionally discriminated against her because of her age (*see* Ledbetter v. Goodyear Tire and Rubber Co., Inc., 127 S.Ct. 2162 (2007), or (2) a "disparate impact" theory in which the grievant is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities" in pay that are not attributable to reasonable factors other than age (e.g., seniority). (*See* Smith v. City of Jackson, 544 U.S. 228, 241-243 (2005)). Notwithstanding the questions of whether the grievant could have prevailed with her grievance claim of discrimination, this Department awarded her relief not inconsistent with that which might have been awarded in this type of claim had she been successful.