

Issues: Qualification and Compliance – Management Actions (recruitment/ selection), Retaliation (grievance activity participation and other protected right), and Grievance Procedure (documents); Ruling Date: November 28, 2007; Ruling #2007-1649, 2007-1689, 2007-1726; Agency: Department of Agriculture and Consumer Services; Outcome: Qualified (all issues); Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Agriculture and Consumer Services
Ruling Nos. 2007-1649, 1689, 1726
November 28, 2007

The grievant has requested a ruling on whether his March 27, 2007 and April 23, 2007 grievances, (Grievance 1 and 2, respectively) with the Department of Agriculture and Consumer Services (the agency) qualify for a hearing. For the following reasons, these grievances are qualified for hearing.

In addition, the grievant contends that the agency has not provided him with requested documents. This compliance issue is addressed in detail below.

FACTS

Grievance 1

The agency advertised a vacancy for a Compliance Manager 1 position (position 00350) with a closing date for application of September 15, 2006. The grievant applied for the position. The agency did not select a candidate from the original pool of applicants, but instead elected to re-advertise the position “to increase the applicant pool.” The agency asserts 29 applications were received during the initial recruitment period and an additional 18 were received during the second recruitment period.¹ The grievant asserts that the decision to re-advertise the position was a misapplication of policy and that he was denied the position for reporting violations of policy and law.²

¹ As to the re-advertisement of position 00350, the third-step respondent clarified in his third step response that “It is not the number of applicants for a position that is important; it is the quality of the applicants.”

² The alleged retaliation to which the grievant references stems from an incident in which the grievant asserts that he was threatened by another agency employee. The grievant asserts that he reported the incident to the agency’s Human Resource department, who allegedly told him not to initiate a grievance regarding the matter. He asserts that he was subjected to retaliation for complaining about the agency’s response to his report of the purportedly violent actions of the coworker. (This Department notes that

In support of his grievance, the grievant cites to an e-mail from a co-worker (Mr. T.) who alleges that Mr. S., the ultimately successful candidate for position 00350, made the following statements on December 1, 2006:

1. [The Division Director] had said to [Mr. S.] that he, ([the Division Director]), did not want any of the people that had applied previously to get this position [00350].
2. [The Division Director] asked [Mr. S.] personally to apply once it was re-advertised and intimated that was why it was reopened.
3. [Mr. S.] had stated to [the Division Director] that he didn't have the qualifications or the technical knowledge for this position.
4. [Mr. S.] stated [the Division Director] told him not to worry about knowledge, that there were people that could help him. [The Division Director] also told him that they would work out the commute so that it was on State time and in State vehicle.
5. [The Division Director] told [Mr. S.] that he really wanted him "up here" and that the job was his.

Another employee corroborated Mr. T.'s recounting of the Division Director's December 1st statement. Yet another employee, Mr. M., purportedly reported that he asked the Division Director about the above statement allegedly made on December 1st. Mr. M. reported that:

[The Division Director] became visibly upset and stated that he was actively recruiting for the position, that he would deny promotional opportunities to anyone who has made his job more difficult. [The Division Director] went on to say that he will not promote or afford anyone here a promotional opportunity who makes his job here more difficult.

The agency denies that there was any impropriety associated with the recruitment for position 00350 and that the interview panel indicated that the grievant was not as strong a candidate as were several others who were interviewed.

The grievant challenged the agency's hiring decision in a March 27, 2007 grievance (Grievance 1) asserting that it constituted a misapplication of state hiring policy and was retaliatory.

contrary to the alleged directive by the Human Resource department to not grieve the purported threatening actions of the co-worker, the Human Resource Department expressly suggested in an email correspondence to the grievant to consider using the grievance procedure to challenge the selection process for position 00350, one week before he initiated Grievance 1.

Grievance 2

The April 23, 2007 grievance (Grievance 2) arises from a purported incident in which the grievant was initially denied access to an agency building while attempting to deliver Grievance 1 to the Deputy Commissioner. The grievant asserts the initial denial of access was retaliatory in nature and stemmed from his prior grievance activity.

DISCUSSION

Qualification

Grievance 1

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.³ In this case, the grievant claims that the agency misapplied policy during the selection process by pre-selecting a candidate and retaliating against him.

For an allegation of misapplication of policy or unfair application 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁴ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁵ An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁶ Adverse employment actions include any agency actions

³ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷ By not being selected for the position, it would appear that the grievant suffered an adverse employment action.

The state's hiring policy, Department of Human Resource Management (DHRM) Policy 2.10, is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.⁸ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁹ As such, an agency may not pre-select the successful candidate for a position, without regard to the candidate's merit or suitability, and then merely go through the motions of the selection process.

The grievant has presented sufficient evidence in this case to warrant sending this grievance to hearing for a fuller exploration of the facts and issues surrounding the selection process. Here, the grievant has presented a statement by a co-worker, which was corroborated by another, that essentially states that position 00350 would be awarded to Mr. S. if he applied. While the agency asserts that the position selection was determined solely through an unbiased process and the decision of the interview panel was unanimous, there remains disputed fact regarding the selection process best examined by a hearing officer who is better suited to resolve such differences. This qualification ruling in no way determines that the agency's actions in fact violated the hiring policy, only that further exploration of the circumstances surrounding the recruitment by a hearing officer is appropriate.

Alternative Theories and Claims

The grievant has also asserted additional claims, principally retaliation arguments over the way he was been treated and his employment affected. Because the grievant's claim of misapplication qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. Again, qualification in no way determines that the agency's actions were retaliatory, only that further development of the facts is warranted.

⁷ Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

⁸ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁹ Va. Code § 2.2-2901 (stating, in part, that "[i]n accordance with the provisions of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities") (emphasis added).

Grievance 2

Because Grievance 1 has been qualified for hearing, this Department deems it appropriate to qualify Grievance 2, in full, as well. Both grievances allege a common theme of agency retaliation for protected activities: Grievance 1 for reporting violations of policy and law to management and elected officials, and Grievance 2 for filing Grievance 1. Again, qualification of Grievance 2 in no way determines that the agency's actions constituted any sort of retaliation, policy violation, or other misdeed, only that further exploration of the facts by a hearing officer is appropriate.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party 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

Because the grievances both share the common thread of alleged agency retaliation and are related (Grievance 2 alleges retaliation for initiating Grievance 1), this Department finds it appropriate to send both grievances to a common hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

Compliance

The grievant asserts that he has requested various documents in conjunction with his grievance. He asserts that he has not been provided with all the documents that he requested.

The grievance statute provides 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.”¹² This Department's interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided.

This Department 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

¹⁰ *Grievance Procedure Manual* § 8.5.

¹¹ *Id.*

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

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. Where a party fails to comply with the grievance procedure, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its non-compliance. However, rendering such a decision is reserved for the most egregious of circumstances.

Furthermore, the grievance statute 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.”¹³ 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.”¹⁴ While a party is not required to create a document if the document does not exist,¹⁵ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents.

In addition, in grievances challenging recruitment, this Department has long held that an employee grieving his non-selection for a position is entitled to documentation reflecting the qualifications and interview performance of the successful applicant.¹⁶ While it is true that documents relating to other applicants generally cannot be released under DHRM Policy 6.05, which states that applications for employment and results of pre-employment tests “may not be disclosed to third parties without the written consent of the subject employee,” as this Department has previously explained with regard to DHRM Policy 2.10 (Hiring), to the extent materials otherwise protected by a DHRM policy are sought by a grievant in conjunction with the grievance process, DHRM policy is overridden by the statutory mandate requiring parties to a grievance proceeding to produce relevant documents.¹⁷ Thus, where documents relating to a selection decision are relevant to a grievance, the provisions of DHRM Policy 6.05 do not constitute just cause to deny access to documents. Such information must be presented in manner that preserves the privacy of the successful applicant, however. That is, the agency may redact any personally identifying information (such as the candidate’s social security number, telephone number, and address), provided that information relevant to the grievance is not redacted.

¹³ *Id.*

¹⁴ See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

¹⁵ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹⁶ See EDR Ruling Nos. 2007-1402 and 2004-704.

¹⁷ See EDR Ruling No. 2004-683.

Here, the grievant requested on March 27, 2007, and again on March 29, 2007, “any and all records, documentation, notes, meeting minutes and correspondence between agency management, agency human resources and agency personnel related to hiring and hiring process for VDACS position #00350 Compliance Manager I.” In response to the grievant’s request, the agency sought clarification from the grievant. On April 2, 2007, a member of the Human Resource Office e-mailed the grievant seeking clarification of his request:

Your letter states you are requesting copies of any and all records, documentation, notes, meeting minutes and correspondence between agency management, agency human resources and agency personnel related to the hiring and hiring process for VDACS position #00350 Compliance Manager I.

Can you please clarify the records you are seeking? I previously forwarded you copies of the interview notes from your interview relating to this recruitment. Please advise if you need another copy. Additionally, you have sent and received responses to numerous e-mails regarding this recruitment. Are you requesting copies of those documents?

On April 3, 2007 the grievant responded back that “[t]he records I have requested are not limited to the minor items you have previously provided,” and that he was entitled to “any and all documentation related to this grievance and hiring to include any and all personal correspondences between agency personnel or management in relation to this hiring.” **[id]** Later that day, the same Human Resource Staff member sent e-mails to several members of management querying them as to whether they had any documentation relevant to the grievant’s request. Again, that same day, the grievant was provided with copies of:

1. The request to fill Position 00350
2. The EWP for Position 00350
3. The Hiring Announcement for Position 00350
4. The grievant’s application for Position 00350
5. Interviewer Notes regarding the grievant’s responses to questions posed during interview for Position 00350

On April 9, 2007, the grievant challenged the agency’s response to his document request as inadequate, asserting that the documentation provided related only to him and not for other applicants and interviewees.¹⁸ The grievant asserts that he was not provided any additional documents.

¹⁸ April 9, 2007 Notice of Noncompliance from grievant to Agency Head.

Here, the grievant broadly requested documents relating to his grievance challenging to the selection process for Position 00350. Furthermore, he specifically noted in his April 9, 2007 Notice of Noncompliance that he had been provided with documentation related only to him and not the other applicants and interviewees. Accordingly, the grievant should have, at minimum, been provided with copies of interview notes for the successful applicant as well as his job application for Position 00350. The agency is therefore ordered to produce the successful applicant's job application and the interview notes for the successful applicant to the grievant within 10 work days of its receipt of this ruling. The agency may redact any personally identifying information (such as the candidate's social security number, telephone number, and address). Furthermore, the agency may charge the grievant its actual cost to retrieve and reproduce documents. To the extent that other relevant documents exist, they too shall be provided to the grievant within 10 work days of its receipt of this ruling.

Where the grievance has now qualified for hearing, 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. Accordingly, as a matter of administrative efficiency, 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 set forth above, Grievance 1 and Grievance 2 are qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

Claudia Farr
Director

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.