

Issue: Compliance/second-step meeting/documents; Ruling Date: August 2, 2006; Ruling #’s 2006-1337, 2006-1342; Agency: Department of Social Services; Outcome: agency in compliance re: second step meeting; agency required to produce documents per instructions in this ruling.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2006-1337, 1342
August 2, 2006

By letters dated April 17 and 25, 2006, the grievant requests a compliance ruling from this Department. In her April 17th letter, the grievant asserts that the second-step respondent failed to timely schedule a second-step meeting related to her March 23, 2006 grievance. In her April 25th letter, the grievant claims that the Department of Social Services (DSS or the agency) has failed to provide her with requested documents related to her February 21, 2006 grievance.

FACTS

The grievant is employed by the agency as a Program Specialist II. The grievant asserts that on January 28 and 30, 2006, she obtained salary data for Licensing Inspectors through a Freedom of Information Act (FOIA) request. As a result, the grievant was purportedly able to confirm 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." Accordingly, on February 21, 2006, the grievant initiated a grievance (Grievance 1) alleging "[o]ngoing discrimination in hiring practices which include age, gender, education and experience factors."

On February 25, 2006, the grievant requested information from the agency on 13 named employees. The requested information included: (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.

On March 3, 2006, the agency's Employee Relations Manager responded to the grievant's information request via e-mail asserting that FOIA "prohibits" the agency from providing the information that she requested. The e-mail was copied to one of the grievant's co-workers.

On March 6, 2006 the grievant notified the agency head informing him of the agency's failure to produce the requested information and failure to schedule the second-step meeting.

On March 10, 2006, the grievant clarified to the Employee Relations Manager that she was not requesting the information under FOIA, but rather under the grievance procedure. The Employee Relations Manager e-mailed her later that day, stating that: "Ms. [grievant], because you have filed a grievance, that does not entitle you to information from personnel records of identifiable individuals. Further, establishment or revision of wages, salaries, position classifications, or general benefits do not qualify for a hearing under the grievance procedure."

On March 14, 2006, the grievant requested a compliance ruling from this Department regarding the agency's failure to provide her with the requested documents.

On March 23, 2006, the grievant initiated a second grievance regarding the Employee Relations Manager's decision to provide one of the grievant's co-worker with a copy of his March 3rd response to the grievant's document request (Grievance 2).

In an April 6, 2006 ruling, this Department ordered the agency "to produce the requested information to the grievant within 10-workdays of its receipt of this ruling." The ruling further instructed that:

The agency shall redact any personally identifying information (such as names, social security numbers, telephone numbers, and addresses), provided that information relevant to the grievance is not redacted. Because redaction of the names will make the determination of gender difficult, if not impossible, the agency must identify the gender of the employee with each document produced.

On April 7, 2006, the grievant wrote the agency head to inform him of the second-step respondent's alleged failure to schedule a second-step meeting

As stated above, on April 17, 2006, the grievant sought a compliance ruling from the Director of this Department asserting that the second-step respondent failed to timely schedule a second-step meeting related to Grievance 2.

On April 25, 2006, the grievant requested that this Department issue a compliance ruling regarding her claim that the agency had failed to provide her with requested documents related to Grievance 1. On that same day, the agency mailed to the grievant a response to her document request, which the grievant received on April 28th.

DISCUSSION

Failure to Schedule the Second-Step Meeting for Grievance 2

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.² If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for its delay in conforming to EDR's order.³

Here, the grievant contacted the agency head on April 7, 2006, to inform him of the second-step respondent's failure to timely schedule the second-step meeting for Grievance 2. On April 13, 2006, the agency head responded with the following:

This is in response to your letter of April 7 notifying me of non-compliance related to your employee grievance.

According to email records in our office, your supervisor provided you with an electronic copy of her first step response to your most current grievance on Friday, March 31. You contacted [the second-step respondent], as the second step respondent on the same day, and, again on the same day, [he] contacted you and offered to meet with you on the following Wednesday, Thursday, or Friday, as he was on vacation out of the country during the following week. On Monday, April 3, you emailed [the second-step respondent] and selected Friday, April 7. At that time, you asked if a meeting was necessary, or if the documentation that you provided would be sufficient. You then emailed [the second step respondent] back and indicated that you suggested Friday before looking at your calendar and that you could meet only in the afternoon. You also indicated that you would not be in the office and available to check emails

¹ *Grievance Procedure Manual*, § 6.3.

² *Id.* Where the grievant is asserting that the agency is non-compliant, the grievant must inform the agency head of the non-compliance.

³ *Grievance Procedure Manual* § 6.3(5). While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

until Thursday, April 6. On Thursday afternoon, [the second step-respondent] e-mailed you and asked if 3 pm on Friday would be convenient for you. [He] also indicated that he left a voicemail message for you on Friday, indicating that if you chose not to meet on Friday afternoon, he would not be available to meet again until the week of April 17, and would schedule a time at your convenience.

The agency head concluded that the second-step manager had “acted in good faith and in the times required.”

The agency has provided information confirming the pertinent facts of the agency head’s response. This Department therefore finds that the second-step respondent made a good faith effort to schedule and hold the second-step meeting, and accordingly was in compliance with the grievance process. Within 5 workdays of receipt of this ruling, the second-step respondent shall again contact the grievant to schedule the second-step meeting. Both parties shall make a good faith effort to attempt to hold the meeting within the 5-workday timeframe.⁴

Agency’s Failure to Provide Requested Documents

The grievant asserts that management has not provided her with the documents she requested relevant to Grievance 1. On April 27, 2006, two days after the grievant notified this Department that she had not received the documentation ordered disclosed in the April 6th EDR ruling, the agency mailed to grievant a letter dated April 25, 2006, with an attached spreadsheet containing nearly all of the requested information. The spreadsheet identified the (1) gender, (2) hire date, (3) education level at date of hire, (4) prior relevant experience at the date of hire, (5) certification and licenses held, (6) age at date of hire, and (7) starting pay at date of hire of those who performed the same work as the grievant. Not provided were the posted qualifications for their positions at the time of recruitment.

On April 30, 2006, the grievant informed the Director of this Department that she was not satisfied with the agency’s response. First, she notes that she was not provided with any of the posted qualifications. She also noted that some of the information appeared to be inaccurate, in particular, she observed that the gender of a female was incorrectly listed as male and the majority of the salary information was erroneous. She also notes that the certifications listed for two individuals were inaccurate. Finally, she noted that the agency failed to provide any information on one individual who no longer works for the agency but did provide information for another who had left the agency.

As to the agency’s failure to provide any information on one of the two employees who left the agency, the agency informed this Department that it cannot locate the

⁴ As we noted in Ruling 2006-1312, the grievant was well within her rights to insist that the second-step meeting not take place until after she has been presented with the documents that she requested pursuant to Grievance 1. However, with Grievance 2 we are not aware of any pending document requests that would warrant delay in scheduling and conducting the second-step meeting.

employee's personnel file. The agency's inability to locate the former employee's actual personnel file does not relieve it from the duty to conduct a reasonably diligent search of other potential sources that would be responsive to the grievant's request. Under the grievance procedure, the definition of "documents," which tracks the Rules of the Supreme Court of Virginia, includes "writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."⁵ Thus, the agency is instructed to make a reasonably diligent search of all other potential sources for the requested information and provide the grievant with responsive documents.

Regarding the agency's failure to provide the grievant with posted qualifications for positions at the time of recruitment, the agency responded that many of these documents no longer exist as they date back to 1999 and 2000. However, the fact that the agency is not able to provide all of the announcements does not relieve it from the duty of providing those which it does possess. At least four of the positions were filled in 2005 and 2006. Announcements for these positions should have been provided to the grievant, assuming they exist.

Finally, as to the grievant's contention that information provided was inaccurate, the agency has provided supporting information that corroborates the accuracy of salary information provided in the spreadsheet. However, the agency conceded that it erroneously identified a female as male. Also, this Department was able to confirm from two individuals that certifications listed for them were less than fully accurate—the spreadsheet showed that they had certification or licenses which they do not possess.⁶

EDR Ruling Number 2006-1312 explained that the 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. When an alternative format is used, however, care must be taken to guarantee that the requested information is accurately reflected in the alternative format. Here, the summary should have been more accurate. Accordingly, to ensure that the grievant receives the most accurate information possible, this Department orders the agency to provide to the grievant redacted copies of the documents from which the spreadsheet information was derived.

The grievant's final objection was that the agency did not provide her with information regarding whether she would be getting a pay increase as a result of the

⁵ See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

⁶ Under the spreadsheet heading of "Certification/Licenses" one individual was listed as having a "NAEYC [National Association for the Education of Young Children] guidelines" certification and/or license. This individual reported that while she is a NAEYC member, she holds no certification or license from the organization. Similarly, another individual was listed as having "CPR, OSHA, NAEYC, Licensing" certifications and/or licenses, but reports that she only has CPR/First Aid certification. She stated that she has had OSHA training and did manage an NAEYC accredited institution at one time but does not hold any sort of license or certification related to OSHA or NAEYC.

Northern Virginia Salary Study. In her original document request, the grievant had inquired after seeking information related to similarly situated co-workers: "In addition, I want to know if I am one of the employees that will benefit from a salary increase from the Northern Virginia Salary Study. If so, what is the amount of the salary adjustment?" While the grievant may have intended this inquiry as a document request, one could reasonably view it as merely a question, seeking an answer but not necessarily a document. Under the document production provision of the grievance procedure, a party is not required to produce written documents if they do not exist; thus, a party is not required to create a new document to answer a question by the other party. However, it now appears evident that the grievant seeks any existing documents that would address the question of whether she will benefit from the Northern Virginia Salary Study. Accordingly, the agency is directed to produce all such documents, in an appropriately redacted form, to the grievant within 5 workdays of the receipt of this ruling.

This Department's rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁷ Va. Code § 2.2-3003(G).