

Issue: Compliance/Compensation/other; Discrimination/sex harassment; Grievance procedure/5 day rule; Ruling Date: October 13, 2006; Ruling #2007-1420; Agency: Department of Social Services; Outcome: qualified, agency not in compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services  
Ruling Number 2007-1420  
October 13, 2006

By letter dated August 14, 2006, the grievant has requested a compliance ruling from this Department. The grievant asserts that the Department of Social Services (DSS or the agency) has failed to comply with EDR Ruling No. 2006-1337, 1342.

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. Subsequently, in EDR Ruling No. 2006-1312, this Department advised the agency that, as noted in prior EDR rulings and the *Frequently Asked Questions* section of our website, FOIA cannot be used as a basis for refusing to provide documents. This Department also criticized the Employee Relations Manager’s March 10, 2006 response to the grievant as being “irrelevant, at best,” because “whether or not a grievance can be qualified for hearing makes no difference as to an agency’s obligation to produce documents.” The agency was ordered “to produce the requested information to the grievant within 10-workdays of its receipt of this ruling.”<sup>1</sup>

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-workers with a copy of his March 3<sup>rd</sup> response to the grievant’s document request (Grievance 2). 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 asked this Department to 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 28<sup>th</sup>. Subsequently, on August 2, 2006, this Department ruled that while the agency had not failed to comply with the grievance procedure with respect to the second-step meeting for Grievance 2, the agency was, for a second time, in non-compliance with respect to the grievant’s request for documents.<sup>2</sup>

On August 14, 2006, the grievant sought a third compliance ruling from this Department, noting that the agency had not yet complied with this Department’s August 2, 2006 compliance ruling. By letter dated August 16, 2006, the agency provided the grievant with documentation in response to the August 2<sup>nd</sup> compliance ruling. The grievant asserts that the agency is still in non-compliance, as it has failed to provide her with information from DSS’s Northern Virginia Salary Study. She also seeks copies of the position descriptions for the 13 named employees, to the extent such documents exist.

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<sup>1</sup> The grievant also asserted that the agency had failed to schedule the second-step meeting. This Department found that, in accordance with the grievance procedure, the grievant had insisted that the second-step meeting not occur until after production of the requested documents, and directed the agency to schedule a second-step meeting within 5 workdays of providing the requested documents. EDR Ruling No. 2006-1312, at 5.

<sup>2</sup> EDR Ruling No. 2006-1337, 1342.

## DISCUSSION

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.”<sup>3</sup> 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 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.

The grievant asserts that the agency has failed to provide her with information from DSS’s Northern Virginia Salary Study. She also seeks copies of the position descriptions for the 13 named employees, to the extent such documents exist. Each of these issues is addressed below.

### *Northern Virginia Salary Study*

In EDR Ruling 2006-1337, 1342, issued on August 2, 2006, this Department directed the agency to produce to the grievant any existing documents that would address the question of whether she would benefit from the agency’s Northern Virginia Salary Study, which was mandated by the 2005 General Assembly. It appears to be undisputed that the agency has not provided the grievant with any documents in response to this directive.

In its August 16<sup>th</sup> letter to the grievant, the agency stated that “information from the Northern Virginia Salary Study is not provided because that information is not available for dissemination.” The agency did not provide the grievant with any further explanation.

In the course of our investigation, this Department asked the agency’s Employee Relations Manager why the study was not available for dissemination. He responded that the study was “not available for dissemination because it is incomplete at this time” and

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<sup>3</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

“[c]onsequently, there is no way we could inform [the grievant] if she would benefit from this study.”

The Employee Relations Manager’s assertion that the Northern Virginia Salary Study is incomplete appears to be incorrect. This Department has reviewed an August 11, 2006 letter from the Secretary of Health and Human Services to the grievant, which indicates that the study has been completed. In addition, the Department of Human Resources Management has confirmed that the study was completed in late summer 2005.

On September 22, 2006, this Department advised the agency’s Employee Relations Manager by e-mail that we understood that the study had in fact been completed in 2005 and asked for clarification of the agency’s reason for failing to provide the grievant with information from that study. The Employee Relations Manager responded that he could only repeat his previous statements, as he did not have any additional information.

The agency’s failure to provide the grievant with information relating to the Northern Virginia Salary Study is the most recent act in a course of conduct illustrating, at best, a gross disregard for the grievance procedure. As described in Ruling 2006-1312, when the grievant first attempted to obtain information on 13 co-workers in connection with Grievance 1, the agency refused to provide her with the requested information on unquestionably spurious grounds. After being directed by this Department to provide the requested information, the agency instead provided the grievant with incomplete and incorrect documentation, as set forth in Ruling No. 2006-1337,1342. Now the agency has yet again failed to provide information in accordance with this Department’s directives, on the ground that the Northern Virginia Salary Study is incomplete, when, in fact, the study has apparently been completed for approximately one year.<sup>4</sup>

The agency’s actions demonstrate, at a very minimum, a carelessness and indifference to the grievant’s rights under the grievance procedure that cannot and will not be tolerated. Accordingly, this Department deems it appropriate to qualify Grievance 1 for hearing, in its entirety. The grievant may elect either to progress immediately to a hearing on Grievance 1 or to continue through the management resolution steps, at the conclusion of which the agency is directed to qualify the grievance for hearing and request the appointment of a hearing officer (provided the grievance is not resolved by the parties prior to qualification). The grievant must advise the agency’s Employee Relations Manager of her choice within 10 workdays of the date of this ruling.

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<sup>4</sup> We note that because the recommendations of the study have apparently not yet been implemented, it is possible that the agency has not yet determined whether the grievant will in fact benefit from that study. The agency did not raise this argument as a basis for failing to produce information from the study, however—even when this Department advised the Employee Relations Manager that we understood the study to have been completed and asked him to clarify the basis for the agency’s failure to provide the grievant with any information from the study. As this argument has not been raised by the agency, it will not be considered by this Department in this ruling.

The agency is further directed to provide the grievant with those portions of the existing Northern Virginia Salary Study which relate to her position and/or the positions of the 13 individuals about whom she has requested information, as well as any existing documents which address whether the grievant will benefit from the study. The agency must produce this documentation to the grievant no more than 10 workdays from the date of this ruling.

*Position Descriptions*

The grievant also challenges the agency's failure to provide her with position descriptions for the 13 named employees, to the extent such documents exist. Although the agency has not previously been directed to produce the requested position descriptions, the information appears to be relevant to the grievant's claims and falls within the general scope of her previous document requests. Accordingly, the agency is directed to produce all such documents, in an appropriately redacted form, to the grievant within 10 workdays of the date of this ruling.

In the event the agency fails to comply in whole or in part with the directives set forth in this ruling, the grievant may seek a compliance ruling from this Department, even after a hearing officer has been appointed in this matter (so long as the hearing has not been conducted). The agency is strongly cautioned that any failure to produce documents in accordance with this ruling may result in a decision being rendered in favor of the grievant. This Department's rulings on matters of compliance are final and nonappealable.<sup>5</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> Va. Code § 2.2-3003(G).