

Issue: Grievance procedure/documents; Discrimination/age/sex; Ruling Date: December 18, 2006; Ruling #2007-1470; Agency: Department of Social Services; Outcome: 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 2007-1470  
December 18, 2006

By letters dated October 29, 2006, and October 30, 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. 2007-1420.

FACTS

The grievant is employed by the agency as a Program Specialist II in the Northern Virginia Licensing Division. 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 within the Northern Virginia Licensing Division, 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 within the Northern Virginia Licensing Division. 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, dated April 6, 2006, his 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 described the Employee Relations Manager’s March 10, 2006 response to the grievant as “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 EDR’s April 6<sup>th</sup> ruling.

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 her February 21<sup>st</sup> grievance. 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 the agency was, for a second time, in non-compliance with respect to the grievant’s request for documents.<sup>1</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 asserted that the agency was still in non-compliance, as it failed to provide her with information from DSS’s Northern Virginia Salary Study. She also sought copies of the position descriptions for the 13 named employees, to the extent such documents exist.

In EDR Ruling 2007-1420, dated October 13, 2006, this Department found that agency had not provided any existing documents that would address the question of whether she would benefit from the agency’s Northern Virginia Salary Study. The agency had contended in its August 16<sup>th</sup> letter to the grievant, 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 the investigation for Ruling 2007-1420, 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

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<sup>1</sup> EDR Ruling No. 2006-1337, 1342.

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

This Department subsequently found that the Employee Relations Manager’s assertion that the Northern Virginia Salary Study is incomplete was incorrect. This Department has reviewed an August 11, 2006 letter from the Secretary of Health and Human Services to the grievant, which indicated that the study has been completed. In addition, the Department of Human Resources Management 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.

In Ruling 2007-1420, this Department found that “[t]he 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.” Finding that the “agency’s actions demonstrate, at a very minimum, a carelessness and indifference to the grievant’s rights under the grievance procedure,” this Department gave the grievant the option of proceeding directly to hearing and bypassing the remainder of the management resolution step phase of the grievance process.

This Department also directed the agency 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 ruling further ordered the agency to provide the grievant with position descriptions for the 13 named employees, to the extent that such documents exist. The agency was instructed to produce this documentation to the grievant no more than 10 workdays from the October 13, 2006 ruling.

Ruling 2007-1420 concluded by stating that in the event the agency fails to comply in whole or in part with its directives, the grievant could 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). Furthermore, the Ruling stated that “[t]he 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.”

In a correspondence dated October 27, 2006, the agency sent the grievant a response to Ruling 2007-1420. The agency asserted that it had provided the grievant with “the information on the Division of Licensing from the NOVA study.” It further explained that “Northern Virginia Study implementation funding was not approved by the General Assembly Monies Committee, so decisions have not been made about salary ranges,” and

that “[t]here is no way to determine if the grievant or the other 13 individuals would benefit from the study at the present time.” The agency also purportedly provided the grievant with EWP’s, “to the extent such documents exist,” for the 13 employees in question.

On October 29, the grievant wrote the Director of this Department, requesting that the EDR Director provide the grievant with the relief that she sought in her February 21, 2006 grievance. The grievant asserted that the documents that were ordered to be produced in Ruling 2007-1420 had not been provided.

On October 30, 2006, the grievant received the agency’s October 27, 2006 correspondence, along with attached documents. That same day, the grievant sent another letter to the EDR Director supplementing her October 29<sup>th</sup> ruling request. She noted that while the agency had provided documents, the documents provided were not timely delivered to her. She further asserted that the agency only provided 12 EWP’s, not 13, and that one of the EWP’s was her EWP, and that two of the 12 EWP’s were not from her Division, and were thus useless.

This Department contacted the agency’s Human Resources Director on November 30, 2006, in conjunction with this Ruling, to determine the agency’s position on the documents. The Human Resource Director conceded that they missed an EWP, which they still owed the grievant, and stated that they were attempting to ascertain which EWP they had not provided.<sup>2</sup> The HR Director further acknowledged that she should have sent the missing EWP once she became aware that it was missing. She explained that she did not because the grievant hung up the phone stating that “she was done,” and the HR Director did not feel that she could talk to her anymore, and that if she attempted to contact the grievant or did anything else, “it would just create more problems.”<sup>3</sup> She concluded by stating that she therefore “sort of left it alone, and, in the meantime, I guess it just, you know, sort of left my mind because so many other things have occurred.”

### DISCUSSION

We conclude 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. In the last ruling, Ruling No. 2007-1420, we took the extraordinary step of allowing the grievant to proceed directly to hearing without first requiring the grievant to continue through the

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<sup>2</sup> Voice message left for EDR Consultant on Thursday, November 30, 2006 at 5:32 p.m.

<sup>3</sup> It is not clear precisely how many EWP’s the grievant is owed. The agency admits that it erroneously sent the grievant two EWP’s that were totally unrelated to the grievant’s document request. The original request was for 13 EWP’s. Thus, if two of provided EWP’s were provided in error, it would appear that the agency owes the grievant three EWP’s rather than the one it concedes was not provided. The precise number of missing EWP’s is not critical. It is not disputed that the agency owed the grievant at least one EWP, knew that it did, and as of the date that this Department contacted the agency on November 30, 2006, had not corrected the oversight.

management resolution steps. In addition, after ordering the agency to provide the grievant with position descriptions for the 13 named individuals, we “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.” Despite the highly unusual step of early qualification and the clear warning regarding further noncompliance, the agency has again shown, at best, a careless disregard of the grievant’s rights. In response to our order to produce the 13 position descriptions, the agency provided only 12 EWPs, two of which were completely unresponsive, as they belonged to employees in a different division, employees for which documents had not been requested. Because the agency has left this Department with truly no other recourse, and because we find no just cause for the agency’s actions, we now exercise the authority granted in Virginia Code Section 2.2-3003(G) and render a decision against the agency on the qualified issue of the grievant’s pay.

Accordingly, the 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. This relief shall be granted in accord with the Department of Human Resource Management (DHRM) Compensation Policy.<sup>4</sup> In addition, this Ruling’s directive may not be used to deny the grievant any pay increase for which she would otherwise be entitled, absent this decision, and the grievant may not be precluded from grieving future pay disparities, should they occur.

We recognize that this is an extraordinary measure and do not take it lightly. However, the actions of the agency fully warrant this outcome under the particular facts of this case. We are careful to note that this ruling does not constitute a factual finding on the issues of age, gender, or any other type of discrimination. Therefore this ruling shall not serve as support or evidence in other employees’ grievances pertaining to these issues. The action taken here is essentially a statutory sanction, the only statutory sanction this Department has at its disposal when an agency fails to fulfill its responsibilities under the grievance process, and violates a substantial procedural requirement of the grievance procedure without just cause. This Department’s rulings on matters of compliance are final and nonappealable.<sup>5</sup>

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Claudia T. Farr

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<sup>4</sup> For example, under DHRM Policy 3.05, the grievant’s resultant salary may not exceed the salary range. Also, if the pay increase relief ordered above would result in an increase of more than 10% over her current salary, then the agency shall provide yearly in-band adjustments until the grievant’s pay reaches the level set forth above (plus any annual across the board increases awarded by the legislature.)

<sup>5</sup> Va. Code § 2.2-3003(G).

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Director