

Issue: Compliance – Grievance Procedure (Documents); Ruling Date:
February 12, 2009; Ruling #2009-2210; Agency: Department of Corrections;
Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

RECONSIDERED COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2009-2210
February 12, 2009

The grievant has asked this Department to reconsider its Ruling No. 2008-1988, 2008-1989 issued on November 3, 2008. For the reasons set forth below this Department will not disturb its earlier compliance determination.

FACTS

On January 24, 2008, the grievant initiated a grievance challenging her nonselection for a Psychology Associate II position with DOC as arbitrary and capricious and a misapplication and/or unfair application of policy. In addition, sometime on or around February 5, 2008, the grievant attached an addendum to her January 24th grievance which alleges that her nonselection was discriminatory.¹

In the relief section of her January 24th grievance, the grievant sought “copies of all information relevant to the consideration and deliberation of this selection/non-selection process including documents, emails, correspondence, memos, attachments, forms, notes, etc. as provided for under sec. 8.2 of the grievance process.” When the agency failed to provide the grievant with all the documents she sought, the grievant asked for a compliance ruling from this Department. During this Department’s investigation of her compliance ruling request, the grievant stated that she had been improperly denied and was still seeking (1) e-mail correspondence between the appointing authority, Dr. B., and his supervisor, Dr. H.; (2) any notes taken by Dr. B. about or during the interview process; (3) a document detailing what skill set she did not demonstrate for the position; and (4) applicant evaluation forms of all other applicants.²

¹ This addendum reads, in part, as follows:

Additionally, the grievant alleges that the hiring and selection process for position #00281 (11/30/07) was arbitrary and capricious resulting in no selection being made in disregard of the applicants’ stated and relative qualifications and the recommendations of the group interviewers (including the appointing authority). As such is [sic] the case and since no plausible explanation to the contrary has been given (as supported by requested documentation), it is reasonable to presume **that she has been subjected to discrimination for unknown reasons.** (emphasis in original).

² EDR Ruling No. 2008-1988, 2008-1989.

In EDR Ruling No. 2008-1988, 2008-1989, this Department ordered the agency to produce the Applicant Evaluation Forms for all other applicants because such forms are potentially relevant to the grievant's claim of discrimination.³ The agency was further ordered to identify the gender of each applicant.⁴ The agency appears to have complied with this Department's orders.

DISCUSSION

This Department reconsiders its compliance rulings as a matter of discretion, not right. When, as in this case, a compliance issue may be further clarified or this Department deems it appropriate to do so, we will respond to the concerns of the requesting party.⁵

Here, the grievant alleges that this Department "misinterpreted" her grievance in that she never indicated she was discriminated against on the basis of gender and/or sex. As a result of this Department's alleged "misinterpretation," the grievant apparently believes that there may be additional documents to which she is entitled, and as such, seeks again "all information relevant to the consideration, deliberation and decision of this non-selection process including but not limited to, all records, documents, reports, emails, notes of discussion, policy statements, and explanations of methods, criteria, and/or data pertaining [sic] the decision not to select from the position #00281 candidate pool." Additionally, the grievant requests "all other information i.e. emails, written notes, correspondence (between Dr. [B], Dr. [H] and/or HR Personnel), applications, resume's [sic], etc be produced as well since they may well support this grievance."⁶

As noted above, the grievant asserts that she did not state in her grievance or in any attachment thereto that she had been discriminated against on the basis of gender and/or sex. However, during this Department's investigation for EDR Ruling No. 2008-1988, 2008-1989, the grievant verbally indicated to the investigating EDR Consultant that Dr. B had on two prior occasions failed to hire applicants rated excellent on their Applicant Evaluation Forms. The grievant further stated that in both of these prior instances the qualified applicants were, like the grievant, female. This Department reasonably inferred from these statements that the grievant was indicating that she may have been discriminated on the basis of her gender and/or sex. It was on the basis of these statements by the grievant that this Department ordered the Applicant Evaluation

³ *Id.*

⁴ *Id.*

⁵ EDR compliance rulings are final and nonappealable; accordingly, as it seems appropriate under the grievance procedure, EDR may exercise its discretion to grant a compliance ruling reconsideration. Only in extraordinary circumstances, however, will EDR reconsider its qualification or access rulings, which are appealable to a circuit court. *Grievance Procedure Manual*, §§2.3 and 4.4.

⁶ As noted above, same or similar requests for documents were the subject of EDR Ruling No. 2008-1988, 2008-1989.

Forms to be produced to the grievant.⁷ Based on the foregoing, this Department finds no basis upon which to reconsider its decision in EDR Ruling No. 2008-1988, 2009-1989 or order the production of any additional documents.⁸

This Department's rulings on compliance are final and nonappealable.⁹

Claudia T. Farr
Director

⁷ It should be noted that without such statements from the grievant indicating a claim of gender-based discrimination, this Department may have found the Applicant Evaluation Forms of other applicants to be irrelevant to the grievant's claims. More specifically, in grievances challenging an agency's selection decision, documents such as applications for employment, interview notes and applicant evaluation forms for the successful applicant are relevant to the grievance and as such, must generally be provided to the grievant. By obtaining the applicant evaluation forms and other documents of the successful applicant, a grievant can attempt to demonstrate why the agency's selection decision was improper. By contrast, in this case, no selection was made for the Psychology Associate II position at the conclusion of the interview process. Therefore, how other applicants were rated on the applicant evaluation forms was only relevant because the grievant made an assertion that the appointing authority may have failed to select an otherwise qualified candidate because of that candidate's gender.

⁸ As part of her request for reconsideration, the grievant also seeks a written statement of just cause for each document the agency has failed to produce as well as an explanation as to why potentially relevant documents were not retained by the agency. The agency has previously provided, and this Department addressed in EDR Ruling No. 2008-1988, 2008-1989, its "just cause" reasons for not providing the grievant with documents requested and therefore, the agency is under no obligation to provide this information to the grievant yet again. Further, with regard to the grievant's request for an explanation as to why the agency did not retain documents potentially relevant to the hiring decision for Position #00281, while the agency is free to provide such a statement to the grievant, this Department has no authority to order the agency to do so.

⁹ See Va.Code §§ 2.2-1001(5), 2.2-3003(G).