Issue: Group II Written Notice with Suspension (allowing unauthorized person access to confidential files); Hearing Date: April 18, 2001; Decision Date: April 19, 2001; AHO: David J. Latham, Esquire; Case Number 5172

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**
**DIVISION OF HEARINGS**

# DECISION OF HEARING OFFICER

In the matter of Department of Social Services Case Number 5172

Hearing Date: April 18, 2001
Decision Issued: April 19, 2001

## APPEARANCES

Grievant

One witness for Grievant

Representative for Agency

Two witnesses for Agency

## ISSUES

Did the grievant's actions on December 21, 2000 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on December 27, 2000 because she allowed an unauthorized person access to confidential agency files. The grievant was also suspended for a five-day period from January 4 through January 10, 2001. The agency offered on two occasions during the grievance process to reduce the length of the suspension but the grievant did not accept either offer. The agency head subsequently qualified the grievance for a hearing.

The Department of Social Services (hereinafter referred to as agency) has employed the grievant as an eligibility worker for five years. She has worked for the agency a total of seven years.

The grievant is fully aware of the need for protecting the confidentiality of agency files. Agency files contain confidential information on social service clients including, addresses, social security numbers, dates of birth and a variety of other private information. One of the grievant's responsibilities is to disseminate to clients a brochure that explains the agency's policy on confidentiality. In addition, the grievant provides a verbal explanation of the agency's confidentiality policy to clients. The grievant has also received training on the need for confidentiality. A portion of the training information states, in pertinent part:

> At the same time, the client has a right to expect that information given to the agency will be kept confidential and made use of only as needed in the administration of the public assistance programs.[1]

On Thursday, December 21, 2000, the grievant's 16-year-old daughter came to the grievant's office approximately 30 minutes prior to the end of the grievant's workday. She initially spent about 10-15 minutes speaking with one or more of the grievant's coworkers in their offices. Then she returned to the cubicle in which her mother worked. The grievant's desk faces the entrance to the cubicle. A multiple-drawer file cabinet is located to the immediate right of the grievant's desk and there are two chairs to the front and right of the grievant's desk. The grievant was busy working on last minute tasks that had to be completed before the end of the workday.

The grievant's daughter initially sat in one of the chairs while her mother worked but then noticed a stack of client information documents (CID) on top of the file cabinet. She also noticed that the cabinet drawers were prominently labeled with the alphabetic indicators for the files in each drawer. She assumed that the CID forms were to be filed in the case files located in the file cabinet and began to file them. She did not ask permission to file nor did she ask for any instructions on how to file. The grievant did not ask her daughter to file and was engrossed in her own work. While the daughter was filing, she was approximately 3-4 feet away from the grievant. After filing for two or three minutes, the daughter noticed an eligibility supervisor walk past the entrance to the cubicle.

The supervisor went to the chief eligibility supervisor's office and reported that the grievant's daughter was filing CID forms. The chief eligibility supervisor told the supervisor to direct the grievant's daughter to cease filing and to inquire whether the daughter had signed a confidentiality statement required of those who perform volunteer work for the agency. The supervisor followed these instructions and, when it was learned that a volunteer confidentiality statement had not been signed, she brought both the grievant and her daughter to the chief eligibility supervisor's office. Following a discussion about the importance of confidentiality, the grievant's daughter agreed to become a volunteer and signed the required confidentiality statement.

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[1] Volume II, Part I, Chapter D, page 1, Virginia Department of Social Services *Safeguarding of Information*.

The office was closed for the Christmas holidays. On the following Wednesday, December 27, 2000, the grievant was given the Group II Written Notice. Her suspension was arranged for the first week of January so as to minimize any disruption to client services.

## APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[2] The following procedural due process is required before disciplinary action:

> Prior to . . . any disciplinary suspension, employees must be given
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> 1. an oral or written notice of the offense,
> 2. an explanation of the agency's evidence in support of the charge, and
> 3. a reasonable opportunity to respond.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[3] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

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[2] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*.
[3] Now known as the Department of Human Resource Management (DHRM).

The Department of Social Services has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section E.4 of the Department's Standards of Conduct addresses those offenses that include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal (from employment). One example of a Group II offense is "failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy."[4]

The underlying facts in this case are undisputed. The grievant acknowledges that her daughter did file CID forms without permission before she had signed a confidentiality form required of volunteers. Grievant further acknowledges that it was inappropriate for her daughter to have been filing such forms before she had been officially signed up as a volunteer for the agency. In her defense, the grievant maintains that she was unaware that her daughter was filing the forms. Grievant avers that she was concentrating on her own work so intently that she did not realize that her daughter was filing CID forms in the file cabinet located immediately to the right of her desk.

Given the relatively small size of the cubicle in which the grievant works, the grievant could not have been unaware for 6-10 minutes of papers being shuffled, file cabinet drawers opening and closing and her daughter standing at the file cabinet directly to the grievant's right. The hearing officer will take administrative notice of the fact that there is, in most mother-daughter relationships, such an implicit bond of trust that the grievant may have made a subconscious assumption that her daughter would not be doing anything wrong. Nonetheless, it is incumbent upon the grievant to assure that the confidentiality of agency files is protected from all unauthorized persons, including even one's own child. Thus, the grievant knew, or reasonably should have known, that her daughter was accessing agency documents for which she had no authorization. The grievant has implicitly acknowledged that she bears some responsibility in this situation because she agreed during the hearing that she should have been counseled about the incident.

The grievant does not dispute her own culpability in this situation; her disagreement is with the corrective action taken by the agency. She argues that a Written Notice with suspension was too harsh and that the most appropriate level of corrective action would be verbal counseling. Grievant contends that 1) her daughter does not know how to read the information on the form, 2) her daughter believed she was being helpful and, 3) her daughter was not seeking confidential information. In the absence of any evidence to the contrary, the hearing officer finds from the credible testimony of both the grievant and her daughter that the daughter was, indeed, performing the filing due to a genuine desire to be helpful and that she was not seeking confidential information. However, while grievant's daughter may not have understood certain coded information on the CID forms, she certainly is capable of reading names, addresses, dates of birth, social security numbers and other similar confidential information. Thus, she did gain access to confidential information for which she had no authorization.

[4] Section E.4.a, Chapter F, Virginia Department of Social Services *Administrative Manual for Local DSS*.

Grievant also believes she is being singled out for this disciplinary action. However, the unrebutted testimony of the agency representative is that another employee who had violated confidentiality rules received the same level of disciplinary action given to the grievant. Thus, there is no evidence of disparate treatment of the grievant (subject to the caveat discussed below).

Grievant also finds suspicious the fact that she had been requested to take an alcohol screen on December 20, 2000. The grievant had been taking cough medicine and another employee suspected that the grievant had been drinking because she/he had smelled alcohol on the grievant's breath. The screening test was negative. Grievant contends that taking such a screening test constituted a disciplinary action. Alcohol screening tests do not constitute disciplinary actions when administered pursuant to an agency policy. If, as in this case, agency policy requires administration of a screening test when there is a reasonable suspicion of alcohol consumption, the test is merely a precaution that the agency has no choice but to follow. If the test had been positive, the agency then may well have taken some corrective or disciplinary action.

Grievant also requested that she not be held liable for any work deadlines that may have been missed due to suspension from work. However, during the hearing, the grievant acknowledged that she does not believe any deadlines were missed. She has not been held accountable for any missed deadlines due to the suspension. The grievant stated, therefore, that this issue is now moot.

Although the agency had one other instance of an employee violating confidentiality rules, a distinction must be drawn between that case and the instant case. In the other case, an employee deliberately violated agency rules by disseminating to several other employees very private and confidential information discovered in the course of work. Such a deliberate and knowing disclosure of confidential information was an egregious violation of the confidentiality rules. The level of discipline meted out in that case was entirely warranted. However, in this case, the disclosure of confidential information was unintentional, inadvertent and apparently harmless. Although both cases involved the violation of the confidentiality rules, the instant case is significantly less severe than the prior case. Thus, it appears reasonable that the level of discipline in the instant case should also be less severe.

The agency recognized during the grievance process that the discipline was too severe because it twice offered to reduce the number of days of suspension. The normal disciplinary action for a Group II offense is issuance of a Written Notice only, or a Written Notice and up to ten days of suspension without pay.[5] In this case, the Group II Written Notice alone will serve to give the grievant a sufficiently strong warning of how seriously the agency views the issue of

The disciplinary action of the agency is modified.

The Group II Written Notice issued to the grievant on December 27, 2000 for allowing an unauthorized person to view confidential files is AFFIRMED. This Written Notice shall be retained in the grievant's personnel file for the period specified in Section G.2.b of the Social Services Standards of Conduct.

The suspension of five days is REVERSED. The agency shall take such steps as are necessary to restore to the grievant any pay, annual leave and sick leave that was taken away as a consequence of the suspension.

## APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the

issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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David J. Latham, Esq.
Hearing Officer