Issue: Group II Written Notice (failure to comply with supervisor's instructions); Hearing Date: 07/31/03; Decision Issued: 08/04/03; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 5759**; Administrative Review: Hearing Officer Reconsideration Request received 08/14/03; Reconsideration Decision issued 08/21/04; Outcome: No basis to reopen hearing or change original decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5759

Hearing Date: July 31, 2003
Decision Issued: August 4, 2003

PROCEDURAL ISSUES

The grievant and co-grievant in this case have both requested that their individual grievances be consolidated for a single hearing. The Director of the Department of Employment Dispute Resolution (EDR) has reviewed the request and agreed to consolidate the cases for hearing.[1] However, a separate decision will be issued for each grievant.

Grievant requested as part of the relief he seeks, alteration of an agency form. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.[2] However, hearing officers do not have authority to require an agency to alter its forms.[3] Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management

[1] EDR *Compliance Ruling of Director*, Numbers 2003-115 and 2003-116, June 23, 2003.
[2] § 5.9(a) EDR *Grievance Procedure Manual*, effective July 1, 2001.
[3] § 5.9(b)4. *Ibid.*

reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Co-Grievant
Representative for Grievants
Two witnesses for Grievants
Employee Relations Manager
Representative for Agency
Four witnesses for Agency

ISSUES

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

FINDINGS OF FACT

The grievant timely filed a grievance from a Group II Written Notice issued for failure to comply with a supervisor's instructions. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) (Hereinafter referred to as "agency") has employed the grievant for 21 years as a food service technician.

In 1996, Congress passed the Health Insurance Portability and Accountability Act (HIPAA). Subsequently, the United States Department of Health and Human Services (HHS) promulgated regulations to implement the privacy requirements of the Administrative Simplification subtitle of HIPAA. HHS adopted a HIPAA-mandated Privacy Rule on August 14, 2002.[5] As a provider of health care services, DMHMRSAS is subject to HIPAA requirements and is therefore required to implement the Privacy Rule as it applies to the agency. The facility then developed a hospital instruction regarding disclosures of protected health information.[6] The instruction states, among other things, that all

[4] Exhibit 4. Grievance Form A, filed May 16, 2003.
[5] HIPAA Privacy Rule, 45 C.F.R. Part 160 and Subparts A and E of Part 164.
[6] Exhibit 7. Hospital Instruction No. 21, *Confidentiality and Uses/Disclosures of Protected Health Information*, February 14, 2003.

employees are responsible for ensuring the confidentiality of patient information.[7] The agency then published a comprehensive policy and procedure manual regarding disclosure of protected health information (PHI). The policy's general rule requires every employee to sign a privacy protection/confidentiality statement.[8] Shortly thereafter, the agency promulgated a departmental instruction to guide implementation of the Privacy Rule.[9]

The policy further requires all supervisors to determine the appropriate employee access level to protected health information. Each supervisor must review the role, function and duties of each employee, and the category of PHI (if any) needed by the employee to perform his job. The supervisor is then required to designate the appropriate level of access for each employee. There are four access levels – from Level One (complete access to all PHI) to Level Four (no access to PHI).[10] Grievant's supervisor conducted the required review and determined that food service technicians do not require the use of specific patient information to perform their duties.[11] Accordingly, grievant and his coworkers were designated Level Four for purposes of HIPAA compliance.

Grievant's supervisor conducted training with grievant and his coworkers on March 13, 2003. He explained the HIPAA requirements and advised food service employees that they had been designated Level Four for access purposes. He then requested all employees to sign an addendum to their Employee Work Profile (EWP). The form provides a block to be checked to designate the appropriate Access Level and a Confidentiality Statement.[12] Grievant and three other employees refused to sign the form because they contend that the second sentence of the confidentiality statement is inconsistent with a Level Four designation. To wit, Level Four states "No Access," while the confidentiality statement states, "… I may have access…," in the first and second sentences.[13] The supervisor notified his superior and the two of them met with grievant to explain the meaning of the language, the necessity to sign the form,

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[7] Exhibit 7. *Ibid*.

[8] Exhibit 8. p. 20. *Privacy Policies and Procedures for Use and Disclosure of Protected Health Information* Manual, March 1, 2003. "Each member of the Department's workforce shall be required to confirm his or her understanding of the Department's privacy policies and procedures by signing a privacy protection/confidentiality statement. Employees who violate these policies and procedures are subject to sanction under the Standards of Conduct."

[9] Exhibit 6. Departmental Instruction No. 1001(PHI)03, *Privacy Policies and Procedures for the Use and Disclosure of Protected Health Information*, April 14, 2003.

[10] Exhibit 8, p. 22. *Ibid*.

[11] Exhibit 1. Memorandum to department heads from HIPAA team, January 8, 2003, established the criterion for Level Four access.

[12] Exhibit 5. *HIPAA EWP Addendum* form.

[13] Exhibit 5. *Ibid*. "I acknowledge and understand that *I may have access* to confidential information, including Protected Health Information. In addition, I acknowledge and understand that *I may have access* to proprietary or other confidential information or business information belonging to [facility name] and the Department of Mental Health Mental Retardation and Substance Abuse Services." (Italics added)

and the possible consequence (discipline) for not signing. Grievant continued to refuse to sign the form.

Subsequently, grievant and all food service technicians attended training conducted by human resources on HIPAA. The training took approximately one hour and consisted primarily of lecture and a videotape presentation. Following human resource training, grievant was tested on his knowledge of the HIPAA requirements and obtained a passing score on the test.[14] Grievant still refused to sign the statement following this training. Thereafter, the facility administrator met with grievant and the other three employees. After his explanation, two of the four employees signed the form; grievant and the co-grievant in this case are the only two in the agency who have not signed the form. The facility administrator then contacted central office to ascertain whether any change of wording could be made in the form so as to allay grievant's concerns. Central office concluded that no change would be made. Subsequently, discipline was administered to both grievant and the co-grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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 § 2.2-3000 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 § 2.2-3001.

[14] Exhibit 17. Grievant's test and passing score.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management 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. Section V.B.2 of the Standards of Conduct policy provides that Group II offenses include acts and behavior that 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.[16]

Grievant succinctly stated the basis for his grievance in the relief section of his grievance form wherein he states that the language in the confidentiality pledge is "contradictory to my assigned access level." When one reads the entire document and considers the language in context, the meaning and intent of the form are clear. In simplest terms, the statement certifies that the signer will not access any data unrelated to his job, and will not disclose any information he might inadvertently obtain. However, grievant read the phrase "I may have access" in the permissive sense. He interpreted the words to mean that he was being given permission to access confidential information – and he found this to contradict his designation as Level Four (no access).

It is understandable that one who looks only at those four words could interpret them to mean that he was being given permission. However, many words in the English language have more than one meaning. When one evaluates the meaning of words, they must be considered in context with the words surrounding them, both in the same sentence and in adjoining sentences. For example, the statement "I feel cool" can mean that one is chilled or, that one feels very good, because the word "cool" has many meanings – depending upon the context in which it is used. When one reads that statement, he must know the surrounding context in order to understand its meaning. Thus, to completely understand the statement "I feel cool," it would be helpful to know whether the person was in a refrigerated room, or whether he was in a nightclub.

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[15] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.

[16] DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993. *See also* Exhibit 9, Chapter 13, *Employee Handbook*, October 2002.

In this case, the words and sentences surrounding the phrase "I may have access" make it abundantly clear that the meaning is that the signer might inadvertently have access to information. The training given by human resources made this apparent because there was discussion of incidental access to information (viewing a file left open on a desk). However, even if grievant did not understand this, he met on at least four other occasions with the facility administrator, assistant administrator, or food service manager. During these meetings, all of these management people clearly explained the intent and meaning of the language to grievant.

Grievant contends that he did not have adequate training on HIPAA. In fact, grievant has had more training and explanations about the confidentiality statement than any other food service employee. He participated in in-service training by his supervisor, attended training conducted by human resources, and met separately with management people on at least four occasions. In each case, the statement's language and purpose were explained to him.

Grievant has a history of refusing to sign documents. He refused to sign his 2001 performance evaluation even though he was rated a contributor.[17] He also refused to sign the Written Notice issued in this case. However, grievant fails to recognize an important distinction between these documents and the confidentiality statement. Performance evaluations and written notices are agency determinations relating to employee performance. While signatures are preferred, they are not absolutely necessary on evaluations and disciplinary notices because the signature only acknowledges receipt of the document – it does not necessarily mean that an employee agrees with the evaluation or the disciplinary action. Thus, when an employee refuses to sign either an evaluation or a written notice, supervisors may note the refusal and initial the form to attest to the fact that the employee read the form and had an opportunity to sign.

However, a confidentiality statement is an entirely different type of document. A confidentiality statement must be signed by the employee to prove that he knowingly agrees to the conditions of the statement. In the event of legal action relating to an improper disclosure of PHI, a signed statement is the best proof that the employee agreed to its conditions. Accordingly, the confidentiality statement is a condition of employment. If an applicant for a job were to refuse to sign the confidentiality statement, the applicant would not be hired.

A suggestion was made that retaliation by grievant's supervisor may have been the basis for discipline. However, the supervisor has denied this allegation and grievant has not demonstrated that the discipline was retaliatory. Moreover, the testimony in this case revealed that the decision to issue discipline was made at levels well above the supervisory level. The facility director, human resources, and central office employee relations personnel all concluded both that discipline was necessary and that Group II was the appropriate level of discipline.

[17] Exhibit 14. Grievant's Performance Evaluation, November 8, 2001.

Subsequent to the docketing of this hearing, grievant offered to sign the confidentiality statement if the agency would add a reservation of rights sentence to the statement.[18] Grievant proffered a photocopy of a confidentiality statement containing the reservation of rights language purportedly signed by an employee at a different agency facility.[19] However, this document could not be authenticated because the signer did not testify, and no one from the other facility testified as to whether the form had been accepted or rejected. Therefore, no evidentiary weight could be given to this document. Moreover, the reservation of rights language neither changes the "I may have access" language, nor is such a reservation of rights necessary. There is no logical relationship between grievant's eleventh-hour request and his grievance.

In summary, the agency has demonstrated, by a preponderance of evidence, that grievant has failed to comply with both established written policy and a supervisory instruction to sign a confidentiality statement. The confidentiality statement is not only legal and proper, but the law also mandates it for all employees of the agency. Grievant's request to alter the statement is unnecessary. Grievant has not offered any circumstances that justify his refusal to sign the form.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for failure to follow a supervisor's instructions issued on April 25, 2003 is hereby UPHELD. The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

[18] The language grievant requested is, "I reserve and do not waive any of my State and/or Federal constitutional rights."
[19] Exhibit 18. Photocopy of confidentiality statement from another facility.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[20] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[21]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[20] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[21] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5759

Hearing Date:	July 31, 2003
Decision Issued:	August 4, 2003
Reconsideration Received:	August 14, 2003
Reconsideration Response:	August 21, 2003

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution (EDR). The 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.[22]

[22] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

OPINION

Grievant submitted with his request for reconsideration a copy of the confidentiality statement that he had previously refused to sign. Grievant has handwritten an addendum on the form stating, "I reserve and do not wave (sic) any of my state and Federal rights," and signed the form on August 13, 2003.

The agency has previously stated that employees must sign the form as it was prepared by the agency, and that employees may not customize the form by adding language to it. The agency will have to decide whether the amended form complies with its requirement that employees sign the confidentiality statement. The hearing officer has no authority to make this decision on behalf of the agency.

However, even if the agency should now elect to accept grievant's amended form, the decision in this case must remain unchanged. The agency disciplined grievant based on his refusal to sign the form prior to April 25, 2003. For the reasons stated in the decision, the disciplinary action for refusing to sign the form must be upheld.

Grievant argues that forcing employees to sign the confidentiality statement violates his First Amendment right to freedom of speech. However, the Courts have held that employers, as a condition of employment, may place certain limitations on employee speech. "If a public employee's speech does not touch upon a matter of public concern, the Commonwealth, as employer, may regulate it without infringing any First Amendment protection."[23]

An employee is not required to remain employed if he disagrees with the employer's policies and procedures. However, as long as the employee decides to retain his employment, he must abide by the employer's policies if they are not illegal or immoral. In this case, the agency's requirement that each employee sign a confidentiality agreement is not only legal but also is required by the law.[24]

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis either to reopen the hearing, or to change the Decision issued on August 4, 2003.

[23] See *Holland v. Rimmer*, 25 F. 3d 1251, 1255 n. 11 (4th Cir. 1994).
[24] See *Decision of Hearing Officer*, footnotes 9 & 10.

APPEAL RIGHTS

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.[25]

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David J. Latham, Esq.
Hearing Officer

[25] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton,* 39 Va. App. 439, 573 S.E.2d 319 (2002).