



EMILY S. ELLIOTT  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219

Tel: (804) 225-2131  
(TTY) 711

## QUALIFICATION RULING

In the matter of the Department of Forensic Science  
Ruling Number 2021-5266  
June 3, 2021

This ruling addresses the partial qualification of the grievant's April 29, 2021 grievance with the Department of Forensic Science (the "agency"). The grievant asserts, in part, that she was improperly issued a Group II Written Notice. The agency head qualified the grievant's challenge to the Group II Written Notice and two other issues for a hearing, but declined to qualify one issue presented in the grievance. The grievant has appealed the agency head's partial qualification of her grievance to the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM"). For the reasons discussed below, the additional issue presented in the grievance does not qualify for a hearing.

### FACTS

On April 29, 2021, the grievant initiated a grievance challenging four issues:

1. A Group II Written Notice with a two-workday suspension issued on April 16, 2021;
2. An allegedly "Unprofessional/Improper/Biased Grievance Process";
3. Alleged violation of DHRM Policy 2.35, *Civility in the Workplace*; and
4. Alleged violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")<sup>1</sup> in October 2020 when the grievant's name was disclosed in connection with a notification to employees that she had tested positive for COVID-19.

As relief, the grievant requested removal of the Group II Written Notice and restoration of the pay and benefits she lost because of the unpaid suspension.

Following the management resolution steps, the agency head qualified the grievant's challenge to the Written Notice, as well as her claims regarding the grievance process and DHRM Policy 2.35, reasoning that all three issues ultimately related to her receipt of the disciplinary action. The agency head declined to qualify the alleged HIPAA violation because it occurred in October 2020, more than 30 calendar days before the initiation of the grievance, and thus it was

---

<sup>1</sup> Pub. L. No. 104-191, 110 Stat. 1936.

untimely. The grievant now appeals the agency head's partial qualification decision to EDR, seeking to qualify the alleged HIPAA violation for hearing.

### DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.<sup>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state or agency policy may have been misapplied or unfairly applied.<sup>4</sup>

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."<sup>5</sup> Typically, then, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>6</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>7</sup>

From a review of the evidence before EDR, it appears that the grievant reported to agency management in October 2020 that she had received a positive test result for COVID-19. The director of the grievant's office sent a text message to supervisors at the office explaining that the grievant had tested positive for COVID-19. The director's text message identified the grievant by name "because of her very social nature with staff members and the importance of identifying who came in direct contact with her." The grievant alleges that the director did not share the name of another employee who also reported a positive COVID-19 test result at approximately the same time.

On or about March 25, 2021, before the agency began the disciplinary process that led to issuance of the Group II Written Notice, the grievant filed a complaint with the agency alleging "non-discriminatory workplace harassment [and] bullying" that she claimed was a violation of DHRM Policy 2.35. Among other things, the grievant described concerns with the director's behavior, including the October 2020 disclosure of her name to supervisors at her office in connection with her COVID-19 test result. In her complaint, the grievant explained that several supervisors at the office told her about the director's text message and alleged that the disclosure was a HIPAA violation. On April 16, the same day the grievant received the Written Notice, the agency responded to her complaint. The response stated that the agency had investigated the grievant's complaint and determined that the alleged harassing conduct described by the grievant

---

<sup>2</sup> See *Grievance Procedural Manual* § 4.1.

<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

did not violate DHRM Policy 2.35, but was instead performance management intended to address issues with the grievant's behavior. The agency further concluded that the disclosure of the grievant's name in connection with her COVID-19 test result was not a HIPAA violation.

In her qualification appeal to EDR, the grievant argues that her challenge to the alleged HIPAA violation in October 2020 is timely. The grievant claims that, although she was aware of the issue earlier, she did not receive confirmation of the disclosure (via a screenshot of the text message) until March 29, 2021. More significantly, the grievant describes the disclosure of her name as "additional documentation of the [director's] bias" that she offered "to provide additional support for my other claims in the grievance," apparently referring to the alleged violation of DHRM Policy 2.35 that has been qualified for hearing.

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date they knew or should have known of the event or action that is the basis of the grievance.<sup>8</sup> When an employee initiates a grievance beyond the 30-calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed.

In this case, it is unclear precisely when the grievant learned about the disclosure of her name to other employees in connection with her COVID-19 test result. The grievant appears to acknowledge that she was aware of the issue soon after it occurred, though she claims she did not receive documentary evidence confirming the disclosure until March 29, 2021. However, the grievant filed a complaint with the agency on March 25 alleging non-discriminatory harassment by the director. In her complaint, the grievant specifically described the disclosure of her name as an alleged HIPAA violation. Under these circumstances, EDR finds it appropriate to consider the grievant as having known of this issue no later than March 25, the date she reported the director's alleged conduct to the agency. As a result, the grievant should have initiated a grievance challenging the alleged HIPAA violation within 30 calendar days of March 25.<sup>9</sup> Her grievance initiated on April 29 is therefore untimely to challenge the director's disclosure of her name in connection with her COVID-19 test result. In addition, the grievant has not provided any information to justify her late filing,<sup>10</sup> and thus she has not demonstrated just cause for the delay.

### CONCLUSION

The issues that have been qualified by the agency head will proceed to hearing. For the reasons expressed above, the alleged HIPAA violation issue presented in the grievance is untimely and may not proceed further.

---

<sup>8</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

<sup>9</sup> The 30th calendar day from March 25, 2021 was Saturday, April 24. Section 2.2 of the *Grievance Procedure Manual* provides that, when the 30th calendar day "falls on a Saturday, Sunday, or legal holiday or on any day or part of a day on which the state office where the grievance is to be filed is closed during normal business hours, the grievance may be filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state office is closed." In this case, therefore, the filing deadline was extended to Monday, April 26.

<sup>10</sup> EDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure. *See, e.g.*, EDR Ruling Nos. 2006-1349, 2006-1350; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

As noted above, however, the grievant has also described the disclosure of her name in connection with her COVID-19 test result as part of the pattern of conduct that she alleges is a violation of DHRM Policy 2.35. The agency head qualified the grievant's claims regarding DHRM Policy 2.35 for hearing. Although the alleged HIPAA violation is untimely as an independent issue, the facts presented in relation to that issue may be relevant to the grievant's arguments regarding the Written Notice, the alleged violation of DHRM Policy 2.35, and other matters that will be addressed at the hearing. The grievant may present evidence related to the alleged HIPAA violation cited in the grievance at the hearing as background information about the qualified issues, if the hearing officer determines that such evidence is relevant. The hearing officer will have the authority to order relief consistent with the grievance statutes and grievance procedure for those issues that are qualified.<sup>11</sup>

If it has not already done so, the agency is directed to submit a completed Form B for the qualified portions of the grievance to EDR within five workdays of this ruling. A hearing officer will be appointed in a forthcoming letter.

EDR's qualification rulings are final and nonappealable.<sup>12</sup>

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

---

<sup>11</sup> Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* §§ VI(B), VI(C).

<sup>12</sup> Va. Code § 2.2-1202.1(5).