Issue: Compliance/consolidation; Qualification/violations of State and Federal Law; Ruling Date: October 1, 2003; Ruling #2003-078; Agency: Virginia Polytechnic Institute and State University; Outcome: not qualified, no consolidation ruling necessary.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION
RULING OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2003-078
October 1, 2003

The grievant has requested a ruling on whether his November 22, 2002 grievance with the Virginia Polytechnic Institute and State University (Virginia Tech or the agency) qualifies for a hearing. The grievant claims that management violated federal and state law and state and agency policy by intentionally forwarding confidential information relative to his medical disability to an uninvolved third party without his permission. Additionally, the grievant claims that Virginia Tech is out of compliance with the grievance procedure by (1) failing to address all issues contained in his November 22, 2002 grievance; and (2) failing to conclude that his grievance "falls within permissible qualifications based on the facts."[1] Finally, the grievant requests that his November 22, 2002 and his December 8, 2002 grievances be consolidated.

FACTS

Virginia Tech employed the grievant until his layoff on January 31, 2003. On November 12, 2002, the grievant's spouse sent an electronic message to the grievant's supervisor, as well as several other members of agency management and personnel services. The message contained information regarding the grievant's medical condition and disability. The message was sent through certified e-mail thus allowing the grievant to ascertain when the message was opened, whether the information was forwarded to any other recipients and if so, when those recipients viewed the message. Accordingly, the grievant was able to determine that his supervisor forwarded the e-mail message to her husband, who subsequently opened the e-mail and presumably read the contents thereof.

On November 13, 2002, the grievant's spouse sent another certified e-mail to the grievant's supervisor and members of management and personnel services regarding the supervisor's alleged breach of the grievant's privacy rights. Thereafter, in response to his supervisor's alleged illegal and inappropriate behavior, the grievant initiated his November 22, 2002 grievance.

[1] While it is unclear from the grievant's April 10, 2003 correspondence with this Department whether the grievant seeks compliance rulings on these two issues, this Department will view it as such and respond accordingly.

DISCUSSION

Compliance Issues

The grievance procedure requires that parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's involvement. Specifically, a party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency fails to correct the alleged noncompliance, the grievant may request a compliance ruling from this Department.[2] Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.[3]

In the instant case, it appears that the grievant raised his noncompliance issues with this Department and the agency head simultaneously. Generally, under the grievance procedure, the grievant's request to this Department would be deemed premature because the agency head was not afforded the requisite five workdays to correct the noncompliance before the grievant sought a compliance ruling. However, in the interest of efficiency and because more than five workdays have passed without a response from the agency head to the noncompliance allegations, this Department will address the grievant's noncompliance issues.

Failure to Address All Issues

The grievant asserts that the step-respondents and the agency head are out of compliance with the grievance procedure by failing to address his claim that federal law was violated. The grievance statutes provide that "upon receipt of a timely written complaint, management shall review the grievance and respond to the merits thereof."[4] Each respondent must provide a written response on the grievance Form A or attachment. The response must address the issues and the relief requested and should notify the employee of his procedural options.[5] The grievance procedure does not require that a respondent's written reply specifically address each point or factual assertion advanced by the grievant. The respondent's reply need only address the issues and relief identified by the grievant on the Form A. In addition, the grievance procedure provides that an "agency head *may* address the issues and the relief requested" in making his qualification determination.[6]

The grievance procedure further requires that all claims of noncompliance be raised immediately.[7] Thus, if Party A proceeds with the grievance after becoming aware

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[2] *See Grievance Procedure Manual* § 6.3, page 17.
[3] *Id.*
[4] Va. Code § 2.2-3003(D).
[5] *See Grievance Procedure Manual* § 3.1-3.3, pages 8 and 9.
[6] *See Grievance Procedure Manual* § 4.2, page 11 (emphasis added).
[7] *See Grievance Procedure Manual* § 6.3, page 17.

of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.[8] In this case, the grievant was aware of a possible procedural violation with regard to the second and third step-respondents' responses upon his receipt of those responses; however, he waited until the grievance had progressed through all management resolution steps and the qualification stage before raising an issue of noncompliance. As such, the grievant has waived his right to challenge the second and third step-respondents' alleged failure to address all issues in his grievance.[9]

Because the November 22, 2002 grievance has not progressed past the qualification stage of the grievance process, the grievant has not waived his right to challenge the agency head's alleged failure to address all the issues contained in his grievance. However, the grievance procedure does not *require* an agency head to address the issues on Form A in making a qualification determination. As such, this Department concludes that the agency head complied with the grievance procedure in rendering his qualification decision. This Department's rulings on matters of compliance are final and nonappealable.[10]

Failure to Qualify Based on the Facts

The grievant claims that the agency head is out of compliance with the grievance procedure by failing to conclude that his grievance "falls within permissible qualifications based on the facts." In essence, the grievant's claim disputes the agency head's denial of qualification, which is not an issue to be addressed through a noncompliance ruling, but rather through a request for qualification from this Department. The grievant's request for qualification of his November 22, 2002 grievance will be discussed in detail below.

Qualification

Violations of State and Federal Law

The grievant claims that his supervisor's disclosure of his medical disability to a third party violates the Virginia Government Data Collection and Dissemination Practices Act and the Americans with Disabilities Act (ADA). Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set

[8] *Id*.
[9] We note that even if the grievant had not waived his right to challenge the alleged noncompliance of the second and third step-respondent, it appears that both step-respondents adequately addressed all issues contained on his Form A. The issue contained in the November 22, 2002 grievance is management's alleged violation of the grievant's medical and disability privacy rights. While the grievant has advanced several laws and policies that may have been violated as a result of his supervisor's behavior, such information is merely supporting authority for his overall claim that his privacy rights have been breached. Each step-respondents' written response addressed the grievant's claim that his supervisor violated his rights by divulging his medical and disability information to a third party and appropriately responded with regard to relief. A specific response with regard to each individual law or policy cited is unnecessary. As such, it appears that the second and third step-respondents did address both the issues and relief requested as required by the grievance procedure.
[10] *See* Va. Code § 2.2-3003(G).

forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, the General Assembly has limited the issues that may be qualified for a hearing and the relief that may be awarded under the grievance procedure.[11] Violations of the Virginia Government Data Collection and Dissemination Practices Act and the confidentiality provisions of the ADA are not among the issues identified by the General Assembly that may qualify for a grievance hearing.[12] However, claims based upon a purported improper disclosure of medical information may advance to hearing as a misapplication of policy claim if there are supporting facts. Both the Department of Human Resource Management (DHRM) Policy No. 6.05, *Personnel Records Disclosure* and Virginia Tech Policy No. 4080, *Guidelines for the Release of Personnel Services Department Records*, prohibit the disclosure of employee medical information to unauthorized third parties without the employee's consent. Thus, the grievant's claim regarding the improper disclosure of information related to his medical disability not only asserts a violation of the Virginia Government Data Collection and Dissemination Practices Act and the ADA but also violations of DHRM Policy No. 6.05 and Virginia Tech Policy 4080. Because a misapplication of policy claim is expressly listed by the General Assembly as one that could qualify for a hearing, we address that issue below.

Misapplication or Unfair Application of Policy

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy. If a claim of unfair application of policy or policy misapplication is qualified and proven at a hearing, the relief that a hearing officer can order is limited and may include directing the agency to comply with applicable policy.[13]

The grievant claims that his supervisor's disclosure of his medical information to a third party without his permission was an unfair application or misapplication of DHRM Policy No. 6.05 and Virginia Tech Policy 4080. DHRM Policy No. 6.05 provides that "personal information may not be disclosed to third parties without the written consent of the subject employee."[14] "Personal information" expressly includes

[11] *See* Va. Code § 2.2-3004(A) and Grievance Procedure Manual §4.1, pp. 10-11.
[12] *Id.*
[13] *See Grievance Procedure Manual* § 5.9(a)(5), page 15.
[14] DHRM Policy No. 6.05 § III (B). However, some individuals/agencies may have access to employee records without the consent of the subject employee. These individuals/agencies include: (1) "[t]he employee's supervisor and, with justification, higher level managers in the employee's supervisory chain."; (2) "[t]he employee's agency head or designee and agency human resource employees, as necessary."; and (3) "[s]pecific private entities which provide services to state agencies through contractual agreements (such as health benefits, life insurance, Workers' Compensation, etc.) in order to provide such services." DHRM Policy 6.05, § III (C).

mental and medical records.[15] Virginia Tech Policy 4080 states that the Privacy Protection Act protects the records[16] of individuals from inappropriate use.[17]

It is undisputed that the grievant's supervisor disclosed information relative to the grievant's disability to a third party without the grievant's permission. The third party did not have access to such information under DHRM Policy No. 6.05 or Virginia Tech Policy 4080. Therefore, the agency appears to have misapplied policy. However, there are some cases where qualification is inappropriate even if an agency has misapplied policy. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In the present case, the grievant seeks as relief: (1) a written apology from his supervisor; (2) formal discipline of his supervisor; (3) agency-mandated remedial training for his supervisor in Virginia Tech policy and state and federal statutes concerning privacy of medical records and disability information; and (4) for his supervisor to disclose in writing the name of the person to whom she disclosed his personal information, why she felt justified in breaching his privacy, and how she plans to ensure that the third party will not disclose the information to any other party. In response to the November 22, 2002 grievance and prior to its initiation, Virginia Tech, recognizing that the grievant's supervisor may have inappropriately disclosed confidential information regarding the grievant's disability, has taken remedial measures, to include: (1) directing the grievant's supervisor to issue a formal written apology; (2) reprimanding the grievant's supervisor regarding her behavior; (3) directing the supervisor to meet with agency management to review Virginia Tech policy with respect to the confidentiality of personnel-related information; and (4) providing a copy of the forwarded e-mail to the grievant, as well as the name of the individual to whom the information was sent. Further, confidential information was removed from the supervisor's computer system, as well as from the third party's computer system.

This is a case where much of the requested relief has been provided. Furthermore, the requested relief that has not been provided is not relief that a hearing officer could order. Thus, further effectual relief is unavailable. When there has been a misapplication of policy, a hearing officer could order that the agency reapply policy correctly, which, as a practical matter would have little effect on a prior disclosure of information. Additionally, hearing officers do not have the authority to order disciplinary actions against other employees, training for a specific employee, or the disclosure of

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[15] *See* DHRM Policy No. 6.05, §§ II (B) and III (B).

[16] "Except as otherwise specifically provided by law, Personnel Records (official records) consist of all written or printed papers, letters, documents, reports, or other materials, regardless of physical form or characteristics, prepared, owned, or in the possession of Personnel Services." Virginia Polytechnic Institute and State University Policy and Procedures No. 4080, page 2 of 3 § 4(1).

[17] *See* Virginia Polytechnic Institute and State University Policy and Procedures No. 4080, § 2.1, page 1 of 3.

information as relief to the grievant. Moreover, as stated above, Virginia Tech has recognized the supervisor's inappropriate behavior and taken numerous measures to remedy such behavior. Therefore, because a hearing officer could not provide the grievant with any further meaningful relief, this grievance is not qualified for hearing.

Consolidation

Because this Department has denied qualification of the November 22, 2002 grievance for hearing, a consolidation ruling is unnecessary.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this Department's qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he wishes to conclude the grievance.

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Claudia Farr
Director

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