

Issue: Compliance/request to reopen based on newly discovered evidence; Ruling Date: April 7, 2004; Ruling #2003-447; Agency: Virginia Polytechnic Institute and State University; Outcome: grievance remains closed



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2003-447
April 7, 2004

The grievant has requested that this Department reopen his November 22, 2002 grievance with the Virginia Polytechnic Institute and State University (Virginia Tech or the agency) based on newly discovered evidence. For the reasons set forth below, this Department declines to reopen the grievance.

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 to 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.

The grievance moved through the management resolution steps and was not qualified for hearing by the agency. The grievant then sought qualification from this Department. On October 1, 2003, this Department ruled that the November 22nd grievance did not qualify for hearing. In Ruling #2003-078, this Department concluded that:

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 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.

On November 12, 2003 the grievant informed this Department that the e-mail that had supposedly been deleted had resurfaced on a Virginia Tech notebook computer. Based on the reappearance of the purportedly deleted e-mail, the grievant requests that this Department reopen his grievance.

DISCUSSION

At the request of this Department, Virginia Tech provided an explanation of how the supposedly deleted e-mail resurfaced. As explained above, after the grievant's supervisor forwarded the e-mail to her husband, the agency recognized the impropriety of the supervisor's actions and took remedial measures to ensure that such a disclosure would not again occur. However, management has explained that when the grievant's supervisor's husband responded to her e-mail, the e-mail response had the original e-mail from his wife embedded in his response. Management explains that the e-mail response continued to reside on the grievant's supervisor's computer without her knowledge. Management further explains that on October 2, 2003, the grievant's supervisor's computer "crashed", which necessitated the transfer of information on her computer to a notebook computer. Included in the transferred information were all original e-mails, including the e-mail response from her husband, complete with the embedded original e-mail. According to management, during the course of previewing the transfer of information, the technician apparently opened several e-mails, including the one containing the embedded e-mail, thus triggering the read/notify tracking mechanism that alerted the grievant that the original e-mail continued to exist. Management asserts that all offending e-mails have now been deleted, including the one on the notebook computer.

Many of the reasons cited in Ruling #2003-078 as justification for not qualifying this grievance for hearing remain valid reasons for not reopening the grievance. For instance, while Ruling #2003-078 recognized that the agency had misapplied policy when the grievant's supervisor sent the e-mail to her husband, the Ruling also recognizes that the hearing officer could provide little if nothing in terms of relief to the grievant not already granted. By ordering that the agency correctly apply policy, the hearing officer obviously would not be able to undo or reverse the original improper disclosure of the e-

mail. In addition, the agency has taken the additional measures to help assure that such a disclosure would not occur again the future including: (1) directing the grievant's supervisor to issue a formal written apology; (2) reprimanding the grievant's supervisor regarding her behavior; and (3) directing the supervisor to meet with agency management to review Virginia Tech policy with respect to the confidentiality of personnel-related information. Most importantly, however, the subsequent disclosure of the embedded e-mail on October 2, 2003 appears to have been completely inadvertent, unlike the original deliberate disclosure. Moreover, this Department has been presented with no evidence that, apart from the original disclosure, there have been any other improper, intentional disclosures. Finally, the Department Director at Virginia Tech has now personally overseen the elimination of the offending e-mail message on the notebook computer.

Accordingly, for all the reasons set forth above, this Department declines to reopen the grievance. This Department's rulings on matters of compliance are final and not subject to further review.¹

Claudia Farr
Director

¹ Va. Code 2.2-1001(5).