Issue: Qualification/misapplication of policy – record disclosure, confidentiality; Ruling Date: August 13, 2004; Ruling #2004-827; Agency: Department of Corrections; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-827
August 13, 2004

The grievant has requested a ruling on whether his March 15, 2004 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. The grievant alleges that the agency misapplied and/or unfairly applied agency policies by disclosing false information about the grievant's health. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed with DOC as a Corrections Officer. He alleges that on February 16, 2004, a co-worker told him of a rumor that the grievant had cancer. At the time, the grievant dismissed the rumor as a "distasteful joke." The grievant began to regard the rumor more seriously, however, when a few days later, another co-worker reported that she had been told by a captain that the grievant was "eaten up with cancer and [didn't] have long to live." Although, in both instances, the grievant apparently denied that he was ill, approximately two-and-a-half weeks later, on March 9, 2004, a different co-worker reported to the grievant that another officer had expressed her sympathy for the grievant, whom she had heard was dying of cancer.

The grievant alleges that while the rumors regarding his health are false, they nevertheless have resulted in his being "very disgusted and disgruntled, feeling anguish and stress." Although the grievant heard the rumors from several co-workers, he asserts that the rumors were initiated by the same captain who had told one co-worker that he was "eaten up" with cancer. The grievant claims that the captain's discussion of his purported health status violated his "rights of confidentiality." As relief, the grievant requests a written apology from the captain, to be posted in the window of the Master Control room for a two-week period; a written promise from the captain not to involve the grievant in any gossip or rumor; an order that the captain not spread any information that he does not know to be correct and of a non-confidential nature; and disciplinary action against the captain for any breach of these mandates. The agency denied the grievant's request for qualification on the basis that there was insufficient evidence to support the grievant's allegations against the captain.

DISCUSSION

The grievant apparently contends that the captain's alleged dissemination of false health information constitutes a misapplication or unfair application of policies prohibiting the disclosure of confidential medical information. In this case, the applicable policy is Department of Human Resource Management (DHRM) Policy No. 6.05, *Personnel Records Disclosure*, which prohibits the disclosure of an employee's medical records without the written consent of the employee.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. A mere misapplication of policy in itself, however, is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[1] The threshold question, therefore, is whether or not the grievant has suffered an adverse employment action.

An adverse employment action is defined as a "tangible employment act constituting 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."[2] A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in a significant adverse effect on the terms, conditions, or benefits of one's employment.[3]

In this case, the conduct alleged by the grievant does not rise to the level of an adverse employment action. The grievant does not allege that the rumors regarding his health resulted in a significant adverse effect on the terms, conditions, or benefits of his employment, or that the rumors were part of a broader campaign of harassment due to a protected status (for example, his race, gender, or disability status) or in retaliation for any previous protected activity.[4]

Moreover, although the agency did not award the grievant the specific relief requested, it has taken significant steps to address the concerns raised by the grievant. Shortly after the grievance was filed, the facility's warden discussed the confidentiality of employee medical information at a staff meeting. During this discussion, the warden specifically cautioned staff that supervisors and employees were not to discuss employee

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[1] Va. Code § 2.2-3004(A).
[2] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[3] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[4] *See* Abeja-Ortiz v. Cisneros, 882 F. Supp. 124, 127 (N.D. Ill. 1995) (finding that where an employee had not been fired, demoted, or transferred, workplace rumors did not constitute an adverse employment action).

medical issues or spread rumors. In addition, the facility has held mandatory supervisory training on the confidentiality of employee records.

Under these circumstances, while there can be little doubt that the grievant was, as he claims, "disgusted and disgruntled" by the rumors, they cannot be considered an adverse employment action for which relief may be granted by a hearing officer, because they have had no materially detrimental effect on the grievant's employment status.[5] For this reason, this issue does not qualify for a hearing.

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 the 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

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[5] We note, however, that had the grievant experienced an adverse employment action, the fact that the medical information disclosed was false would not necessarily preclude the grievance from qualification. To conclude otherwise would allow an agency's responsibility to safeguard employee medical information to turn on the accuracy of the information disclosed, rather than on the intent of the agency in making the disclosure and the impact of the disclosure on the affected employee.