Issue: Qualification – Management Actions (record disclosure/confidentiality); Ruling Date: January 3, 2008; Ruling #2008-1872; 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 2008-1872
January 3, 2008

The grievant has requested a ruling on whether her July 16, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for hearing.

FACTS

This grievance alleges that a supervisor disclosed the grievant's personal and medical information to an inmate at the agency's facility. The grievant states that the inmate in question approached her and explained that the supervisor had told him certain things about her personally, some of which related to her medical history and employment. The supervisor has denied that she told the inmate any personal information about the grievant. The agency undertook an investigation and found that it was not proved that the supervisor shared the personal information allegedly known by the inmate. However, the inmate also provided a written statement corroborating the grievant's allegations that the supervisor disclosed personal information about the grievant.

DISCUSSION

The grievant's claims allege a misapplication or unfair application of policy. 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[1] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[2] 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

[1] *See Grievance Procedure Manual* § 4.1(b).
[2] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

benefits."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4]

Claims based upon a purported improper disclosure of confidential information may advance to hearing as a misapplication of policy claim if there are supporting facts. Department of Human Resource Management (DHRM) Policy No. 6.05, Personnel Records Disclosure, prohibits the disclosure of employee medical information and certain other employment related information to unauthorized third parties without the employee's consent. In addition, DOC Operation Procedure 130.1 prohibits fraternization by an employee with an inmate.[5] As defined under that policy, fraternization includes "discussing employee personal matters (marriage, children, work, etc.) with offenders."[6] Thus, the grievant's claim regarding the improper disclosure of personal information asserts a possible violation of DHRM Policy No. 6.05 and DOC Operating Procedure 130.1.

Whether the supervisor disclosed personal information about the grievant is a disputed fact. The supervisor denies discussing such matters with the inmate. The agency appears to believe the supervisor's story because it determined that the grievant's complaint was unfounded. However, documentation also appears to indicate that the agency made such a determination because it was not proven that it was the supervisor who disclosed the information. The question left unanswered is how the inmate was aware of the grievant's personal information in the first place. Given that the inmate's statement corroborates the grievant's allegations, neither viewpoint appears clearly untrue. Such a disputed question of fact is not proper to be assessed at the qualification stage and is a determination that should be made by a hearing officer. Therefore, the grievant has raised a sufficient question that the agency misapplied policy by disclosing her personal information to an inmate.

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) "payment for invision of my HIPPA [sic]"; and (2) for the supervisor to be removed from the agency "completely." These are not actions that are within the authority of a hearing officer to grant. Moreover, even though a hearing officer is not limited to the specific relief requested by the grievant,[7] this is a case where further effectual relief is unavailable. When there has

[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] 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)).
[5] Department of Corrections Operating Procedure 130.1 § V.
[6] *Id.* § III.
[7] *Rules for Conducting Grievance Hearings* § VI(A).

been a misapplication of policy, a hearing officer could order the agency to reapply policy correctly, which, as a practical matter, would have little effect on a prior disclosure of personal information. Moreover, the agency verbally counseled the parties involved and separated the grievant from the supervisor and the inmate to prevent any further problems. No portion of this ruling is meant to diminish the seriousness of the allegations in this case, nor condone the alleged conduct of the supervisor, if it indeed occurred. However, because a hearing officer could not provide the grievant with any further meaningful relief, this grievance is not qualified for hearing.

CONCLUSION

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.

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Claudia Farr
Director