

Issues: Compliance – Grievance Procedure (30-Day Rule) and Qualification – Management Actions (Records Disclosure/Confidentiality); Ruling Date: October 31, 2008; Ruling #2009-2138; Agency: Department of Minority Business Enterprise; Outcome: Grievant In Compliance, Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Minority Business Enterprise
Ruling No. 2009-2138
October 31, 2008

The grievant has requested a ruling on whether her grievance with the Department of Minority Business Enterprise (the agency) qualifies for a hearing. In addition, the agency has raised the question of whether the grievance was timely initiated. For the following reasons, this grievance was timely but does not qualify for a hearing.

FACTS

This grievance concerns an agency Senior Manager's alleged "inappropriate" communications with the grievant's health care provider, which the grievant also claims violated health care privacy standards under the Health Insurance Portability and Accountability Act (HIPAA). On November 13, 2007, the grievant contacted her health care provider regarding an injury. The health care provider recommended taking the grievant out of work for several weeks. A note to this effect was faxed to the agency. However, the grievant was not in the office when the fax arrived on November 14, 2007, and she did not return until November 16, 2007. According to the grievant, the Senior Manager, unbeknownst to the grievant, had contacted the grievant's medical care provider about the note. The agency states that it was a member of the human resources staff that contacted the health care provider.¹ On January 16, 2008, the grievant found out about the communications between the agency and her health care provider that had occurred over the past few weeks.

The grievant initiated this grievance to challenge these alleged events. She claims that the Senior Manager 1) "read a correspondence sent to me by my physician without my permission or knowledge;" 2) "responded to my physician's note and requested that the doctor revise his recommendation of 'no work' to restricted duty, again without out [sic] my knowledge;" 3) "failed to communicate with me responsibly about her concerns and actions related to my medical condition and/or restrictions;" and 4) continued to correspond with my physician without my knowledge and shared my information not only with her assistant but with [another member of management], again without out [sic] my knowledge." The agency has provided its reasoning for and the nature of the

¹ For purposes of this ruling, it is not determinative who from the agency communicated with the health care provider. Therefore, in this ruling, the contacts with the health care provider will be discussed consistently with the grievant's allegations that the Senior Manager made the contacts.

communications with the grievant's health care provider, which largely disputes the grievant's allegations. Because the agency head did not qualify the grievance for a hearing, the grievant now requests a qualification ruling.

DISCUSSION

Compliance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.² 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.

As the agency argues, the grievant first became aware of the events giving rise to the grievance on January 16, 2008. Consequently, the 30-calendar-day timeframe began on January 16, and the grievant should have initiated her grievance by February 15, 2008. The *Grievance Procedure Manual* provides that "for purposes of establishing when a mailed grievance was initiated, the postmark date is considered the initiation date."³ Here, the grievant mailed the Grievance Form A to the agency by certified mail. Post office records indicate that this mailing was sent on February 15, 2008, which was timely.

This Department's rulings on matters of compliance are final and nonappealable.⁴

Qualification

The grievant's allegations about the Senior Manager's "inappropriate" contact with the grievant's health care provider raises a claim of a misapplication or unfair application of policy.⁵ For a claim 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.

This Department has not found any state policy provision specifically prohibiting agency management from engaging in the conduct described by the grievant. State policy, however, does incorporate certain federal laws, such as the Americans with

² Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

³ *Grievance Procedure Manual* § 2.4.

⁴ See Va. Code § 2.2-1001(5), 2.2-3003(G).

⁵ The grievant has also asserted a violation of HIPAA. Generally speaking, the grievance procedure is not a proper forum to address a cause of action the grievant might have under HIPAA, if any. As such, the grievant's HIPAA claim in this case does not qualify for a hearing.

Disabilities Act (ADA).⁶ Under the ADA, an employer may inquire into the ability of an employee to perform job-related functions⁷ (which appears to be the primary purpose of the agency's inquiries in this case⁸) but related ADA guidance also suggests that communication with an employee's medical care provider should be with the employee's consent.⁹ Whether the Senior Manager's conduct in this case violated the ADA or another law is unclear, but, for the reasons discussed below, is not necessary to address as part of this ruling.

In some cases, 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, even if the conduct alleged by the grievant constituted a misapplication of policy or an unfair application of policy, effectual relief is unavailable to this grievant through the grievance procedure. For misapplications of policy, a hearing officer could order the agency to reapply policy correctly, which, as a practical matter would have little effect on any past contacts with an employee's health care provider. Further, the grievant is on long-term disability, not to return to employment with the agency without competing in a new job selection. Consequently, any order from a hearing officer (such as ordering the agency not to engage in similar conduct regarding the grievant in the future) could not benefit the grievant as she is no longer actively employed with the agency.¹⁰ Additionally, to the extent the Senior Manager engaged in misconduct, if at all, hearing officers cannot order agencies to take corrective action

⁶ See, e.g., Department of Human Resource Management (DHRM) Policy 2.05, *Equal Employment Opportunity*.

⁷ 29 C.F.R. § 1630.14(c); see also Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), available at <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.

⁸ Indeed, contacting the grievant's health care provider is understandable from the agency's perspective. It appears that, having seen the note, reasonable inquiry by the Senior Manager was necessary to clarify the meaning of that correspondence to determine the extent of the grievant's work restrictions, if any. Thus, the contacts with the health care provider appear to have been of a limited nature, according to the agency's description. However, a better practice might have been to involve the grievant in the process and get her consent before contacting the health care provider.

⁹ Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), July 27, 2000, at No. 11, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>; Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, at No. 7 & n.34, available at <http://www.eeoc.gov/policy/docs/accommodation.html>. It should be noted that there may be other laws that are more restrictive, depending on the circumstances of each case. See, e.g., 29 C.F.R. § 825.307 ("If an employee submits a complete certification signed by the health care provider [under the FMLA], the employer may not request additional information from the employee's health care provider.").

¹⁰ See DHRM Policy 4.57, *Virginia Sickness and Disability Program* ("Employees in LTD are considered to be inactive employees of the Commonwealth.").

against employees.¹¹ A hearing officer similarly has no authority to award compensatory damages, if there was any injury to compensate.¹² Therefore, because a hearing officer could not provide the grievant with any meaningful relief, this grievance is not qualified for 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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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

¹¹ *Grievance Procedure Manual* § 5.9(b).

¹² *Id.*