Issue: Qualification – Management Actions (Records Disclosure/Confidentiality); Ruling Date: February 25, 2010; Ruling #2010-2504; Agency: Virginia Department of Health; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
Ruling Number 2010-2504
February 25, 2010

The grievant has requested a ruling on whether her September 9, 2009 grievance with the Department of Health (the agency) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for hearing.

FACTS

The grievant alleges that the agency improperly disclosed information regarding past disciplinary actions (now inactive) issued to her, a description of which was included in a step-response to a prior grievance she had filed. That prior grievance was qualified for a hearing and consolidated with Employee A's grievance for a single hearing (Case Nos. 9145 & 9146).[1] During that hearing and at the direction of the hearing officer, the contents of each employee's grievances were shared with the other, including the description of the grievant's past disciplinary history. The grievant claims that the information about the grievant's inactive Written Notices was improperly disclosed to this Department (EDR), the hearing officer in Case Nos. 9145 & 9146, and Employee A. The grievant asserts that the agency violated Department of Human Resource Management (DHRM) Policy 6.05.

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."[2] Thus, typically, the threshold question is

[1] Decision of Hearing Officer, Case No. 9145, Aug. 13, 2009, at 1; Decision of Hearing Officer, Case No. 9146, Aug. 13, 2009, at 1.
[2] *See Grievance Procedure Manual* § 4.1(b).

whether the grievant has suffered an adverse employment action.[3] An adverse employment action is defined as a "tangible employment act 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 benefits."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5] It is not clear that an improper disclosure of personal information alone would constitute an adverse employment action without evidence of some kind of tangible detrimental impact.[6] Indeed, in this case the grievant appears to be concerned with potential future actions that might be taken by Employee A, rather than anything that has actually happened as a result of the information being disclosed. However, even if the actions challenged in this case amounted to an adverse employment action, this grievance would still not qualify for a hearing.

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 challenged by the grievant constituted a misapplication 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 disclosure of personnel information. Additionally, hearing officers cannot order agencies to take corrective action against employees.[7] Similarly, the hearing officer does not have any express authority to prohibit Employee A from improperly using the information she learned about the grievant's disciplinary history, much less to enforce any such prohibition against Employee A. Therefore, because a hearing officer could not provide the grievant with any meaningful relief, this grievance is not qualified for hearing.

In addition, disclosure of confidential employee personnel information to EDR or an EDR-appointed hearing officer is routine and a required part of the grievance procedure. Therefore, disclosure to such entities would not appear to violate any policy as the statutorily required grievance procedure could not be effectuated without being able to receive and address

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[3] 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.

[4] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[5] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[6] *Cf.* Doe v. Henderson, No. 00-1398, 2001 U.S. Dist. LEXIS 25175, at *40-43 (D.D.C. Sept. 10, 2001) (applying adverse employment action standard to plaintiff's claim of disclosure of medical information under the Rehabilitation Act).

[7] *Grievance Procedure Manual* § 5.9(b).

confidential personnel information.[8] Further, the disclosure of such information to other participants in grievance hearings and, especially, to those whose grievances are consolidated with another employee's grievance is unavoidable. Indeed, simply appearing at the consolidated hearing in this manner allowed Employee A to become privy to certain confidential personnel information about the grievant. Such sharing of information is a natural result and inescapable consequence of having consolidated hearings with multiple grievants. By consenting to the consolidated hearing,[9] the grievant effectively acquiesced to her grievance-related personnel information being shared with Employee A during the hearing process. The required disclosure of the information in this case did not violate any grievance procedure provision.[10]

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 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.

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Claudia Farr
Director

[8] *See, e.g.*, Va. Code §§ 2.2-3004(D) (requiring agencies to transmit "the entire grievance record" to EDR), 2.2-3005(C) (authorizing hearing officers to require testimony of witnesses, order the production of evidence, and receive probative evidence in deciding grievance matters on the grievance record and other probative evidence).

[9] *See* EDR Ruling No. 2009-2353, 2009-2354.

[10] However, nothing in this Ruling should be taken to mean that a hearing officer cannot limit the disclosure of certain personnel information about grievance hearing participants during the hearing process. Indeed, had the hearing officer in Case Nos. 9145 & 9146 ordered that such nonmaterial information (the grievant's inactive disciplinary history) not be shared with Employee A (i.e., redacted from the records given to Employee A), it would not have been an abuse of discretion.