Issue: Qualification/Methods/Means/Other; Ruling Date: September 3, 2003; Ruling #2002-232; Agency: Department of Corrections; Outcome: Qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2002-232
September 3, 2003

The grievant has requested a ruling on whether his September 4, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that management's unfair application or misapplication of certain policies, rules, and regulations has undermined his ability to keep secure the floor he patrols and has caused him to fear for his safety. Additionally, the grievant asserts that management retaliated against him for having voiced his concerns about these issues.

FACTS

The grievant is employed as a Corrections Officer. He claims that on July 14, 2002, he filed charges against an inmate for not being in his bunk area as required by Dorm Restriction rules. He asserts that because no action was taken against the inmate as a result of these charges, the particular inmate became more aggressive and provocative in his behavior towards him. Other inmates soon mirrored this same behavior, causing him to fear for his safety.

The grievant asserts that management allowed this same inmate to make informal complaints of harassment against him, rather than following policy and requiring that the complaint be documented under the rules governing the Inmate Grievance Procedure.[1]

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the method, means, and personnel by which work activities are to be carried out (to include the administration of Inmate Disciplinary and Grievance

[1] The inmate grievance procedure is a mechanism for inmates to resolve complaints, appeal administrative decisions, and challenge the substance of procedures. The process provides agency administrators a means to assess potential problem areas and, if necessary, correct those areas in a timely manner.
[2] *See* Va. Code § 2.2-3004(B).

policies) generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied.[3]

Misapplication of Policy

The grievant claims that management misapplied the Inmate Disciplinary and Grievance policies by: (1) failing to promptly hear and decide charges brought by him against an inmate,[4] and (2) failing to require that an inmate formally document complaints against him under the Inmate Grievance procedure.[5] Furthermore, while the grievant did not expressly cite to the state's workplace violence policy,[6] a fair reading of the grievance makes out a claim that the agency's actions (or inactions) caused the grievant to be subject to threatening behavior and a heightened risk of physical violence.

The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[7] The threshold question then becomes 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."[8] A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

State policy requires agencies to take steps to assure that workplaces are free of violence. Workplace violence includes "any physical assault, *threatening behavior* or verbal abuse occurring in the workplace by employees *or third parties*."[10] DHRM Policy 1.80 expressly requires that agencies must protect victims of workplace violence and those who report acts of violence.[11] Federal and state laws also require employers to

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[3] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1 (C), page 11.
[4] In response to this claim, management reported that the four charges brought by the grievant against the inmate were heard. Three of the charges resulted in guilty verdicts and the administration of disciplinary action. The fourth charge was dismissed as unfounded.
[5] In response to this assertion, management reported that the inmate's informal complaint of harassment against the grievant was not acted upon. Further, the inmate was instructed on the procedure for initiating a formal complaint against the grievant using the Inmate Grievance Procedure, but elected not to do so.
[6] Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence."
[7] Va. Code § 2.2-3004(A).
[8] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[9] 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)).
[10] DHRM Policy 1.80, "Workplace Violence," page 1 of 3 (emphasis added).
[11] DHRM Policy 1.80, pages 2-3 of 3.

provide safe workplaces.[12] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.[13]

In this case, the grievant has presented evidence raising a sufficient question as to whether he has been subjected to workplace violence. The grievant asserts that the inmate that he previously charged with misconduct "approached [him] in an aggressive manner and grabbed his chair … and swung it at [him]."[14] According to the grievant, this was one of several "out-of-character" incidents in which this inmate exhibited aggression toward him.[15] The grievant further asserts that as a result of this inmate's actions, other inmates have mimicked his behavior, thus "affecting [the grievant's] ability to keep a well-disciplined and secure floor and making [him] concerned about [his] safety."[16] A corrections lieutenant confirmed that three other corrections officers stated that "they have noticed that the inmates are giving [the grievant] a harder time than they used to."[17]

The grievant claims that his safety has been compromised by the agency's refusal to appropriately discipline the inmate who swung the chair in his direction. The grievant had previously charged this inmate with infractions including being in an unauthorized area (away from his bunk). The grievant alleges that the hearing officer who presided over the inmate's disciplinary hearing regarding the bunk matter was influenced by factors other than the facts of the case, which caused the hearing officer to dismiss the charge. Specifically, the grievant asserts that the inmate was serving as an informant for the Internal Affairs Unit[18] and, as a result, received preferential treatment from the agency, including the dismissal of what the grievant claims was a warranted disciplinary charge (being in an unauthorized area). As evidence of the preferential treatment afforded the inmate, the grievant asserts that the hearing officer privately confided that

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[12] Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1).

[13] *See* Patrolman's Benevolent Association of the City of New York, Inc. v. the City of New York, 310 F.3d 43 (2nd Cir. 2002). A police officer's transfer to a position where the officer no longer worked in his area of expertise (domestic violence) coupled with his fear for personal safety because the level of mistrust among the other officers in the precinct entitled jury to conclude, "if it so chose, that the transfer had a sufficiently material negative impact on the terms and conditions of [the officer's] employment with the NYPD to constitute an adverse employment action." 310 F.3d. at 51-52. *See also* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742 (7th Cir. 2002), describing a "materially adverse employment action" or "tangible employment action" as including the circumstance where "the employee is not moved to a different job or the skill requirements of his present job altered, but the conditions in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment . . . ." 315 F.3d at 744 (emphasis added).

[14] *Grievance Form A*, Attachment 2 page 1, filed September 4, 2002.

[15] *Id*.

[16] *Id.* at page 2.

[17] *See*, Memorandum from Lieutenant, dated September 28, 2002.

[18] The grievant asserts that the hearing officer confidentially divulged to him that the inmate was an informant.

charges issued against this particular inmate "wouldn't reach his file because they are for looks only."[19]

In view of the above facts, this case warrants further examination by an administrative hearing officer. First, the grievance raises a sufficient question as to whether the agency has contravened the state's workplace violence policy by failing to follow its own polices concerning reports against inmates. Specifically, there is a question as to whether this inmate received improper preferential treatment, including a favorable disposition of charges against him.[20] Additionally, there remains a question as to whether the agency's alleged preferential treatment of the purported informant placed the grievant at risk of violence by undermining his authority and ability to maintain order. Accordingly, this issue is qualified for hearing.[21]

Retaliation

The grievant claims that he is concerned about retaliation for having voiced his concerns regarding the issue discussed above. Because the issue of purported misapplication of the workplace violence policy has been qualified for a hearing, this Department deems it appropriate to send this ancillary issue for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

CONCLUSION

For the reasons discussed above, this grievance is qualified for a hearing. For more information, please refer to the enclosed sheet. Additionally, please note that this qualification ruling is not a determination regarding the merits of the grievant's claims.

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Claudia T. Farr
Director

[19] Grievance Form A, Attachment 6.

[20] The grievant claims that a review of agency's computer records shows a discrepancy in the charges issued to the inmate, which might bolster the grievant's contention that charges against this individual do not "stick." For instance, the log book in the watch office showed that the inmate had been charged six times between 2/21/02 and 7/14/02. A review of a similar set of records contained on the agency's computer database showed only three charges.

[21] By qualifying this grievance, this Department does not question the agency's ability to utilize informants as it sees fit. However, to the extent that this or any management practice has the unintended result of unnecessarily placing the safety of employees at risk, then the agency could potentially find itself in violation of state policy and the worker safety statutes.

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June M. Foy
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