

Issue: Qualification/Discrimination/Sexual Harassment; Compliance/Documents; Ruling  
Date: April 9, 2003; Ruling #2003-032; Agency: Department of Corrections; Outcome:  
Not qualified; Agency in compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Department of Corrections  
Ruling Number 2003-032  
April 9, 2003

The grievant has requested a ruling on whether her November 6, 2002 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that a male Lieutenant approached her in a threatening manner and made inappropriate sexual contact. Additionally, the grievant alleges DOC is out of compliance with the grievance procedure because management refused to provide information relevant to her grievance and refused her proper representation during the second management resolution step meeting. For the reasons discussed below, this grievance does not qualify for hearing. Furthermore, this Department determines that DOC is not out of compliance with the grievance procedure.

**FACTS**

The grievant is employed as a Correctional Officer Senior. On November 6, 2002, the grievant was in front of the Master Control area in a facility building, waiting to receive a battery for her radio. At that time, the grievant was wearing a stocking cap on her head because her hair was damp. She states that she planned to place her uniform cap over the stocking cap when in the compound, as required by policy. While she was waiting for the battery, a Lieutenant approached her about her alleged noncompliance with the agency's dress code policy. She claims that the Lieutenant's behavior was threatening, with his finger touching the side of her face and his shoulder bumping her shoulder, and that he spoke in a loud and discourteous tone. The grievant asserts that the Lieutenant physically invaded her personal space, and that she felt threatened by his actions. Shortly after the alleged confrontation, the grievant submitted an incident report and initiated a grievance. Immediately upon hearing of the alleged incident, the Warden contacted DOC's Office of the Inspector General to begin an internal investigation into the matter.

On November 12, 2002, the grievant appointed an individual to act as her representative during the resolution step process and requested that he be permitted to attend the second-step meeting and be given access to any information pertaining to her

allegations.<sup>1</sup> The second-step meeting was held on November 25, 2002. In attendance were the grievant, her representative, the Warden (the second-step respondent) and the center's Human Resource Manager. At this time, the grievant requested copies of all witnesses' statements and any additional evidence obtained by the agency directly relating to her claim;<sup>2</sup> she also informed the Warden that the video camera surveillance system should have recorded the altercation. Further, the grievant advised the Warden that she no longer wished to consider mediation of the matter. During the meeting, the Warden determined that the behavior and attitude of the grievant's representative was disrespectful and inappropriate, and the representative was asked to leave the facility. The grievant decided to proceed with the meeting without the presence of her representative. In his written second-step response, the Warden informed the grievant that the official internal investigation was still ongoing and that when it was complete he would take appropriate action.

On January 27, 2003, the agency head denied qualification of the grievance, indicating that the Inspector General's Office thoroughly investigated her claims and that no evidence was found to support her allegations that the Lieutenant approached her in a threatening manner or made sexual contact with her during their discussion. Subsequently, on February 7, 2003, the grievant requested qualification of her grievance from this Department and simultaneously raised two issues of alleged noncompliance by the agency concerning the refusal of DOC (1) to produce information relevant to her grievance and (2) to allow her proper representation at the second-step meeting.

## DISCUSSION

### Qualification

On her grievance Form A, the grievant claims that she was threatened and subjected to unwanted sexual contact by a male Lieutenant. However, during the investigation for this ruling, the grievant informed the investigating consultant that the physical contact by the Lieutenant was not so much sexual in nature (his shoulder bumping her shoulder and his finger touching her face/glasses), as his entire demeanor was threatening and intimidating.<sup>3</sup> As relief, the grievant requested a full investigation,

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<sup>1</sup> Letter to Warden from Grievant, dated November 12, 2002.

<sup>2</sup> Letter to Warden from Grievant, dated November 25, 2002.

<sup>3</sup> To the extent that the grievant alleges sexual harassment, this Department finds that she has not provided evidence of such. In order to qualify a hostile work environment sexual harassment claim for hearing, a grievant must present evidence raising a sufficient question as to whether the conduct in question was (1) unwelcome; (2) based on her sex; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency. If any of these four elements are not met, the grievance may not qualify for hearing. *Ocheltree v. Scollon Productions, Inc.*, 308 F. 3d 351, 356 (4<sup>th</sup> Cir. 2002). In this case, while the grievant may have found the alleged bumping of her shoulder and touching of her face and glasses unwelcome, she has not proffered evidence that it was based on her sex or so pervasive as to alter the conditions of her employment. See also Department of Human Resource Management (DHRM) Policy No. 2.30 *Workplace*

mediation, and no direct contact with the Lieutenant until the matter was resolved. Significantly, part of the relief requested by the grievant on her Form A is no longer an issue. During the management resolution steps, the grievant withdrew her mediation request. Furthermore, while the Warden indicated that he did not find it necessary to limit the grievant's contact with the Lieutenant,<sup>4</sup> both the grievant and the Lieutenant are now assigned to the night shift and work different nights.

The grievant also requested as relief a full investigation into the matter. In this case, management and the investigative unit of DOC's Office of the Inspector General investigated the grievant's allegations, but found no evidence to support her claims. According to the Assistant Inspector General for DOC, the only witness to the incident firmly corroborates the Lieutenant's position that his actions were not threatening and that no physical contact occurred during the altercation. Furthermore, the videotape that the grievant maintains can verify her claims failed to record the confrontation. Therefore, based upon the evidence presented, management and the investigator for DOC's Office of the Inspector General concluded the grievant's claims were unfounded. However, the grievant remains dissatisfied with the outcome of the investigation and management's failure to discipline the Lieutenant. Thus, the grievant essentially challenges management's conduct of the investigation and the resulting determination that no disciplinary action against the Lieutenant is warranted.

Importantly, although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing.<sup>5</sup> Claims relating to issues such as the methods, means and personnel by which work activities are carried on (including management's determination whether to counsel or discipline another employee and to what extent) 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 improperly influenced management's decision, or whether state policy has been misapplied. The grievant has not presented evidence of discrimination, retaliation, or discipline. Furthermore, while the allegations in the grievance could be viewed as describing a violation of the *Standards of Conduct* and/or the *Workplace Violence* policies by the Lieutenant, no evidence was presented that the agency misapplied or unfairly applied policy in this matter.<sup>6</sup> DOC investigated the matter promptly and determined that disciplinary action was not warranted. While the grievant clearly

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*Harassment* (effective date May 1, 2002)(defining hostile environment sexual harassment as occurring when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work).

<sup>4</sup> Second-Step Response, dated December 2, 2002.

<sup>5</sup> Va. Code § 2.2-3004 (A).

<sup>6</sup> See DHRM Policy 1.60 (effective date September 16, 1993; revised September 25, 2000) and DHRM Policy No. 1.80 (effective date May 1, 2002) (defining "workplace violence" as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace," including "an intimidating presence" and "harassment of any nature such as stalking, shouting or swearing").

disagrees with management's determination, as discussed above, this type of issue does not qualify for hearing.

### Compliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>7</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department's involvement. Specifically, a party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency is out of compliance, written notice of noncompliance must be made to the agency head.<sup>8</sup> If the agency fails to correct the alleged noncompliance, then the grievant may request a ruling from this Department. Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

The grievant first claims that management failed to comply with the procedural requirements of the grievance procedure because DOC did not provide her with requested information that is relevant to her grievance, including a videotape, witnesses' statements, and a copy of the report issued by DOC's Office of the Inspector General. While this information may relate to the grievant's claims and may assist the grievant in understanding management's actions in her case, a ruling regarding this issue would be premature because the grievant has not notified the agency head in writing of the alleged procedural violation, as required by the grievance procedure.<sup>9</sup>

Additionally, the grievant alleges that she was denied proper representation during the second management resolution step meeting because the second-step respondent demanded that the grievant's representative leave the premises. Significantly, the grievance procedure requires that all claims of noncompliance be raised immediately.<sup>10</sup> Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.<sup>11</sup> Further, this Department has long held that it is

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<sup>7</sup> See *Grievance Procedure Manual* § 6, pages 16-18.

<sup>8</sup> See *Grievance Procedure Manual* § 6.3 (1), page 17.

<sup>9</sup> The grievant may wish to note, however, that the Assistant Inspector General advised the investigating consultant that his office would provide a copy of the report at issue (which should include a summary of any witnesses' statements) to the grievant if she requested the information pursuant to the Freedom of Information Act (FOIA). Further, with respect to the surveillance videotape, DOC has indicated that the grievant may review the tape as soon as the agency has the proper equipment available for her to do so. The Warden and two investigators reviewed the videotape at another location because the agency's equipment was not working. Moreover, the Assistant Inspector General states that the videotape did not record the incident because the surveillance equipment was not functioning properly.

<sup>10</sup> See *Grievance Procedure Manual* § 6.3, page 17.

<sup>11</sup> *Id.*

incumbent upon each employee to know her responsibilities under the grievance procedure. Thus, while the grievant was aware of a possible procedural violation by the second-step respondent, she waited until the grievance had progressed to the qualification phase before raising an issue of noncompliance. As such, the grievant waived her right to challenge the agency's alleged noncompliance at the second-step meeting.

This Department's rulings on matters of compliance are final and nonappealable.<sup>12</sup>

#### 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 this 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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Director

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<sup>12</sup> Va. Code § 2.2-1001(5).