

Issue: Qualification/discrimination based on sex, hostile work environment; Ruling Date: September 2, 2004; Ruling #2004-741; 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 2004-741
September 2, 2004

The grievant has requested a ruling on whether his March 18, 2004 grievance with the Department of Corrections (DOC) qualifies for hearing. The grievant claims that management misapplied policy and discriminated against him, resulting in the creation of a hostile work environment. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

The grievant, a male, is employed as a Corrections Officer. On March 11, 2004, the grievant, along with another corrections officer, was assigned to escort an inmate from segregation to the Watch Office area. While in the Watch Office area, the other officer was reassigned to perform another task, resulting in the grievant being the only officer remaining at the site to observe an inmate during a visit with his attorney. The grievant asserts that the removal of the other corrections officer from the detail constituted a misapplication of institutional procedures and created a hostile work environment due to unsafe work conditions.

The grievant also asserts that he has been discriminated against based on gender because female corrections officers are not utilized in the same capacity as male officers. Specifically, the grievant claims that female officers are not required to perform "in cell" window checks¹ or to push food carts on his shift.²

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as the methods, means, and personnel by which work activities are

¹ Each day, a security check is made of the inmates' cell to determine if windows are secure or have been tampered with by the inmate. Although the cell door is left open, the procedure requires that the corrections officer enter the cell with the inmate present, thus the term "in cell" window check.

²IOP 822-7.3 (4) and 822-7.5 (4) direct that inmates in isolation and segregation receive the same number and type of meals served in the general population. Trays of food are carted into the unit by assigned floor officers.

³ See Va. Code § 2.2-3004(B).

to be carried out 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.⁴

Misapplication or Unfair Application of Policy/Hostile Workplace

The grievant claims that management misapplied institutional operating procedures by removing another corrections officer who was assisting him in escorting an inmate, thereby creating a hostile work environment due to unsafe work conditions.

The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."⁵ 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."⁶ 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.⁷

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."⁸ Federal and state laws also require employers to provide safe workplaces.⁹ 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.¹⁰

⁴ Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1 (c).

⁵ Va. Code § 2.2-3004(A).

⁶ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁷ *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.3 239, 243 (4th Cir. 1997)).

⁸ DHRM Policy 1.80, "Workplace Violence."

⁹ 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).

¹⁰ *See Patrolman's Benevolent Association of the City of New York v. 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

In this case, the facts are not in dispute that Institutional Operating Procedure 822, *Isolation, Segregation and Detention* was not followed when the grievant was left alone to escort an inmate.¹¹ The policy violation was affirmed by the warden in his second-step response to the grievance. The warden contends, however, that corrective action has been taken in accordance with the Standards of Conduct. In contrast, the grievant asserts that his safety continues to be routinely compromised due management's failure to comply with the provisions of IOP 822.

In view of the above facts, this case warrants further examination by an administrative hearing officer. First, there is sufficient evidence to support the position that the agency has contravened its own safety and security policy by failing to assign the specified number of officers to perform escort duty. Additionally, there is the remaining question of whether, after acknowledging the policy violation, the agency continues to place the grievant at risk and in a hostile workplace by not complying with operating procedure. Accordingly, this issue qualifies for hearing.

Gender Discrimination

Grievances that may qualify for a hearing include those alleging discrimination on the basis of sex.¹² To qualify his grievance for a hearing, however, there must be facts that raise a sufficient question as to whether an adverse employment action resulted from prohibited discrimination based on the grievant's protected status, in other words, that because of his gender, the grievant was treated differently than other "similarly-situated" employees. If the agency provides a legitimate, nondiscriminatory business reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.¹³

The grievant claims that female employees are not required to perform "in cell" window checks or to push food carts on his assigned shift. According to the grievant, this constitutes discrimination on the part of management. As evidence of discrimination, the grievant points to the warden's comments in the second-step response, which stated that he "had confirmed that female officers were not being utilized to perform in cell window checks on [the grievant's] shift" and that "this has been addressed and corrected with your Watch Commander."

subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment...."315 F.3d at 744 (emphasis added).

¹¹ Institutional Operating Procedure 822-8 B, states that two corrections officers should accompany inmates when they meet with their lawyers. Although the language in the IOP uses the term "should," during this Department's investigation of this matter, the Assistant Warden affirmed that all the provisions are mandatory.

¹² See *Grievance Procedure Manual*, § 4.1 (b)(2).

¹³ *Hutchinson v. INOVA Health System, Inc.*, 1998 U. S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973)).

As a male, the grievant is a member of a protected class. In this case, the warden's statement provides potential evidence establishing that the grievant was treated differently than other similarly situated female employees with respect to the assignment of duties. Although the warden asserts that the cited practice has ceased, the grievant claims that it has continued through the time of this Department's investigation of this matter. Because fact-finding of this nature is best left to a hearing officer, the issue of gender discrimination is also qualified for a hearing.¹⁴

APPEAL RIGHTS AND OTHER INFORMATION

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 on the merits of the grievant's claim.

Further, it should be noted that as a part of his relief, the grievant requests that the individuals who made the decisions causing the alleged unsafe working condition be disciplined. He also requests the payment of \$5,000,000 over a five-year period. The grievant should note that even if he prevails at hearing, a hearing officer has no authority to award monetary damages or to direct that corrective action be taken against another employee. If gender discrimination or policy violations are found, the hearing officer may order the agency to create an environment free from discrimination and/or policy violations, and to take corrective actions necessary to cure the violation and/or minimize its reoccurrence.¹⁵

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¹⁴ The warden also asserts that only male officers push food carts to segregation because these posts are bona fide occupation qualification (BFOQ) posts, requiring the assignment of male officers only. The issue of whether the cart pushing duty is a true BFOQ post is also qualified for hearing.

¹⁵ See *Rules for Conducting Grievance Hearings* § VI(C).