Issue: Qualification/Supervisor/Employee Conflict; Ruling Date: November 19, 2004; Ruling #2004-885; Agency: Department of Juvenile Justice; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling Number 2004-885
November 19, 2004

The grievant has requested a ruling on whether her March 9, 2004 grievance with the Department of Juvenile Justice (DJJ or the agency) qualifies for hearing. The grievant alleges that based on the actions of her supervisor, she is forced to work in a hostile environment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Fiscal Technician. It appears that during the past few years, the grievant has had various conflicts with her supervisor. Most recently, she asserts that her supervisor has violated her privacy by examining a credit card application he discovered in her desktop "in-box."[1] Also, the grievant claims that although she has no proof, she believes that her supervisor has removed things from her in-box such as a credit card and a requisition.

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 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 or unfairly applied.[3] In this case, the grievant asserts that her supervisor's actions constitute harassment and an invasion of privacy.

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[1] The application was for a work-related business credit card, not a personal card.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).

Harassment

While all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy."[4] Here, the grievant has not alleged that management's actions were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and her supervisor. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.[5]

Violation of Privacy

The grievant claims that her supervisor's actions of searching through her inbox constitute an invasion of privacy. While courts have recognized privacy rights in the workplace,[6] the Commonwealth has not promulgated a privacy policy that covers the conduct described in this grievance.[7] Because there is no applicable state privacy policy, there can be no unfair or misapplication of policy.

By not qualifying this issue of invasion of privacy, this Department by no means endorses unfettered, unwarranted searches of the workplace. Notwithstanding, the lack of a state policy specifically addressing the issue of privacy, state agencies should be mindful of the limits placed on searches by law.[8] Also, we wish to note that mediation

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[4] Department of Human Resource Management (DHRM) Policy 2.30, Workplace Harassment.
[5] *See* Va. Code § 2.2-3004 (A).
[6] In O'Connor v. Ortega, the Supreme Court recognized that public employees frequently have "substantial" privacy expectations in private property maintained at their workplaces. 480 U.S. 709, 721, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (O'Connor, J., plurality opinion); *see id.* at 730 (Scalia, J., concurring in the judgment); *id.* at 737 (Blackmun, J., dissenting). At the same time, however, the Court acknowledged that "the operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official." *Id.* at 717 (plurality opinion) (emphasis in original); *see also id.* at 737 (Blackmun, J., dissenting). As the plurality observed, some workplaces "are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits," under which circumstances "no expectation of privacy is reasonable." *Id.* at 718; accord Leventhal, 266 F.3d at 73; *see also* Katz v. United States, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").
[7] The Department of Human Resources Management (DHRM) has a policy that prohibits the disclosure of personnel records, DHRM Policy 6.05. DHRM has also addressed the issue of privacy, in Policy 1.75, the Use of Internet and Electronic Communications Systems policy. Under that policy, the DHRM makes it clear that "no user should have any expectation of privacy in any message, file, image, or data created, sent, retrieved or received by use of the Commonwealth's equipment and /or access."
[8] A plurality of the Supreme Court has held that public employers may, consistent with the Fourth Amendment, conduct workplace searches without a warrant and without probable cause when there are

may be a viable option to pursue in this case. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved.

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. 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 T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

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reasonable grounds to suspect work-related misconduct. O'Connor v. Ortega, 480 U.S. 709, 725-26, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987) (plurality opinion); *see also* O'Connor, 480 U.S. at 732 (Scalia, J., concurring in judgment and concluding government searches to investigate work-related misconduct "do not violate the Fourth Amendment"). A workplace search by a government employer implicates an employee's Fourth Amendment rights only if the employer's conduct infringes upon the employee's reasonable expectations of privacy. O'Connor, 480 U.S. at 715; *see also* United States v. Bach, 310 F.3d 1063, 1066 (8th Cir. 2002) ("in order to find a violation of the Fourth Amendment, there must be a legitimate expectation of privacy in the area searched and the items seized"), cert. denied, 538 U.S. 993, 155 L. Ed. 2d 693, 123 S. Ct. 1817 (2003).