

Issue: Qualification/violence in the workplace; Ruling Date: November 8, 2005; Ruling #2006-1146; Agency: Department of Corrections; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2006-1146
November 8, 2005

The grievant has requested a ruling on whether his June 27, 2005 grievance¹ with the Department of Corrections (DOC or the agency) qualifies for hearing. The grievant alleges that the agency misapplied and unfairly applied policy by failing to conduct an investigation and take disciplinary action against a co-worker that physically assaulted him. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Corrections Officer Senior with DOC. On June 4, 2005 the grievant went to relieve another officer (Officer C) of his post. Upon grievant's arrival, Officer C allegedly held keys out to the grievant, which the grievant refused to accept because he had not been advised of what was happening at that particular post. After a verbal exchange between them, Officer C allegedly opened a door close to the grievant and as he did so, the door struck the grievant.²

Following the incident, the grievant, the watch commander and two other officers that witnessed the incident each filed an internal incident report and the Assistant Warden was contacted. The Assistant Warden allegedly advised the watch commander to tell Officer C to go home and not report back to work until the following Wednesday.³ This action was allegedly taken so that the Assistant Warden would have time to investigate the incident before she met with Officer C. The Assistant Warden's subsequent investigation allegedly included review of

¹ The grievant actually dated his grievance July 27, 2005. This appears to be a mistake as the first-step respondent indicates the grievance was received on June 27, 2005 and ultimately responds to the grievance on July 1, 2005. Accordingly, this Department will assume that the grievant mistakenly dated his grievance July 27th rather than June 27th.

² Nine days after the incident, the grievant was seen by a medical professional for stress and other injuries allegedly sustained as a result of the door hitting him.

³ The incident occurred on a Saturday. Officer C was allegedly scheduled to work on Sunday, rest on Monday and Tuesday and return to work on Wednesday morning.

the internal incident reports and talking with the grievant and Officer C, as well as other witnesses.⁴

According to the Assistant Warden, her investigation revealed that the grievant was in fact struck by the door, but the contact was unintentional and Officer C was unaware of the door striking the grievant until it was brought to his attention. Despite the agency's finding that Officer C's act was unintentional, the agency concluded that Officer C's conduct was nevertheless inappropriate in that he had "rushed through [the] situation." Accordingly, management took action against Officer C.⁵ In addition to the action taken against Officer C, the agency offered to change the grievant's breaks if he was uncomfortable working with Officer C. The grievant claims that he declined the agency's offer due to family related issues and concerns.

DISCUSSION

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that show that the grievant was subjected to an adverse employment action and 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.⁶ The grievant alleges that the agency has misapplied and unfairly applied state and agency workplace violence policies⁷ by failing to adequately investigate the June 4th incident and take appropriate disciplinary action against Officer C. In support of his claim that the agency has unfairly applied policy, the grievant asserts that Officer C has been treated more favorably due to his relationship with the Assistant Warden.⁸

State and agency policy require an agency to provide a safe working environment for its employees.⁹ "Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."¹⁰ Prohibited conduct includes, but is not limited to the following: "injuring another person physically," and engaging in behavior that "creates a reasonable fear of injury to another person" or "subjects another individual to extreme emotional distress."¹¹ Under DOC's Workplace Violence policy, the

⁴ The Assistant Warden further asserts that she met with an employee of the human resources office to discuss the June 4th incident and the agency's anticipated response and together they contacted an employee of DOC's central Equal Employment Opportunity office regarding the appropriate course of action.

⁵ While the grievant may have an interest in any disciplinary action taken against Officer C, the agency is not required to provide this identifiable information to the grievant: in fact, state policy mandates that an agency may not disclose information regarding a disciplinary action without the consent of the disciplined employee. DHRM Policy No. 6.05, "Personnel Records Disclosure."

⁶ For purposes of this analysis, we assume, without deciding, that the conduct alleged by the grievant would constitute an adverse employment action.

⁷ DHRM Policy No. 1.80; DOC Operating Procedure Number 130.3 (effective 2/15/04).

⁸ During this Department's investigation, the grievant stated that he believes that Officer C's wife is related to the Assistant Warden and this is why Officer C has been treated more favorably than others who have committed similar offenses. The Assistant Warden denies any relation to Officer C or his wife.

⁹ DHRM Policy No. 1.80; DOC Operating Procedure Number 130.3 (effective 2/15/04).

¹⁰ *Id.*

¹¹ *Id.*

Office of the Inspector General will be notified promptly of all reported acts of workplace violence and all reported incidents of violence should be investigated.¹² Employees that are determined to have violated the workplace violence policy shall be subject to disciplinary action under the Standards of Conduct.¹³

Under the facts of this case, we cannot conclude that the agency misapplied or unfairly applied the applicable workplace violence policies or the Standards of Conduct. First, while DOC policy states that the Office of the Inspector General is to be notified promptly of all incidents of workplace violence, the agency claims that this notification is only required if the act complained of is deemed an intentional act. Under the particular facts of this case, it appears that the agency's interpretation and application of its workplace violence policy was reasonable and as such, this Department concludes that the agency was not required to notify the Office of the Inspector General of the June 4th incident.

Moreover, it appears that the grievant's complaints were appropriately addressed by the agency's investigation, which concluded that Officer C did not intend to hit the grievant with the door, and that the contact was accidental and caused by Officer C's haste. Further, following the investigation, the agency took action consistent with the investigation results, and the grievant has not been subjected to additional physical contact by Officer C. In fact, during this Department's investigation, the grievant admitted that he sees Officer C occasionally at work and is not afraid of Officer C. Although the grievant may be disappointed that Officer C was not terminated for his actions, the agency was not mandated by policy to take this disciplinary action under the circumstances here and it appears that Officer C's apparent lack of intent was properly considered by the agency in determining the appropriate level of discipline.

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.

Claudia T. Farr
Director

Jennifer S.C. Alger

¹² See DOC Operating Procedure Number 130.3 (effective 2/15/04).

¹³ DHRM Policy No. 1.80; DOC Operating Procedure Number 130.3 (effective 2/15/04).

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