

Issue: Qualification/co-worker conflict; Ruling Date: November 22, 2005; Ruling #2006-1154; 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 2006-1154
November 22, 2005

The grievant has requested a ruling on whether her June 3, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant alleges hostile work environment and misapplication and/or unfair application of policy. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Corrections Officer Senior with DOC. On May 13, 2005, a hostile work environment claim was allegedly filed against the grievant by a co-worker, Officer P. When the grievant arrived at work on May 27, 2005, she allegedly noticed a lieutenant (Officer W) staring at her as she walked across the parking lot to enter her work facility. According to the grievant, Officer W, who is normally in central control during the change of shift, continued to watch and stare at the grievant while she was being searched by Officer P.¹ The grievant states that Officer W's actions caused her to feel uncomfortable and intimidated. During this Department's investigation, the grievant further stated that she felt she was being watched by Officer W as a result of Officer P's complaint and that she was being treated as if she were going to do something inappropriate. According to the agency, Officer W was instructed by his supervisor to observe the shake down area on May 27th to ensure that employee searches were being done correctly.

The grievant further claims that although Officer P did not say anything to her or otherwise act inappropriately during the shake down procedure, given the ongoing investigation of Officer P's complaint against the grievant, Officer P should not have been conducting a search of the grievant until resolution of that complaint. The agency alleges that Officer P remained professional at all times during the shake down of the grievant.

¹ According to the grievant, she and the other employees are searched upon entering the facility.

DISCUSSION

Hostile Work Environment

While grievable through the management resolution steps, claims of hostile work environment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.² Here, the grievant has not alleged that her co-worker's or management's actions were based on any of these factors. Accordingly, this issue does not qualify for hearing.

Misapplication of Policy/Unfair Application of Policy

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 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.⁴ Although not specifically designated as such, the grievant's challenge to being searched by Officer P prior to resolution of Officer P's hostile work environment claim against the grievant can be properly viewed as a misapplication or unfair application of policy claim.

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

² *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).

³ *See* Va. Code § 2.2-3004(B).

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.3d 239, 243 (4th Cir. 1997)).

Assuming without deciding that the workplace harassment policy would apply in this case,⁸ the grievant has failed to present sufficient evidence that the contact permitted between herself and Officer P during the pending investigation of Officer P's complaint against the grievant detrimentally affected the terms, conditions or benefits of her employment.⁹ Accordingly, the grievant's misapplication and/or unfair application of policy claim does not qualify for a hearing.

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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⁸ Under the workplace harassment policy, management is responsible for taking "immediate action to eliminate any hostile work environment where there has been a complaint of workplace harassment." DHRM Policy 2.30, page 3 of 4 (effective 05/01/02). In other words, the workplace harassment policy is generally intended to protect the party that has made a complaint of workplace harassment from further harassment.

⁹ It should be noted that in an attachment to Form A, the grievant states that "this incident upset me to the point that I am physically affected and under doctor's care." It is somewhat unclear from the Form A attachment what "incident" has caused the grievant to seek doctor's care. However, during this Department's investigation, the grievant stated that she was unable to sleep as a result of the alleged false harassment complaint against her and as such, sought treatment from a doctor.