

Issues: Qualification: Work Conditions – Violence in the workplace, Work Conditions – Other; Ruling Date: June 4, 2007; Ruling #2007-1672; Agency: Department of Juvenile Justice; Outcome: Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2007-1672
June 4, 2007

The grievant has requested a ruling on whether her December 14, 2006 grievance with the Department of Juvenile Justice (the agency) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is a counselor at one of the agency's facilities. In her grievance Form A, she alleged numerous "unsafe work conditions" and occurrences that have taken place affecting her ability to perform her job. The grievant's allegations included residents being present in areas during times they should not be, burning of substances in housing, residents throwing objects at staff members, residents throwing objects against the windows and walls of staff offices, residents "slam[ming]" their bodies against the windows and walls of the pod and staff offices, residents playing audio or video equipment at a high sound volume to disrupt work, and security staff failing to correct these activities. The grievant also alleged that security staff allowed residents to enter and crowd the office while therapeutic work was being performed, and turned up the volume on audio and/or video equipment to disrupt work activities.

Agency management relayed the grievant's concerns to security staff and reminded them of their duties to correct the above activities and maintain certain conditions while the grievant or other counselors are present. The grievant acknowledged on March 8, 2007, that "some effort" was made to keep residents under control.

In his decision denying qualification, the agency head stated,

While I agree that counselors should have a work environment that is conducive to the performance of their duties, disruptive and inappropriate behaviors by residents will occur in a correctional facility housing youthful and immature offenders. These are often the same behaviors that

contributed to their incarceration, and both security and treatment staff are tasked with appropriately addressing such conduct as part of the rehabilitation process.

Working with our residents, many of whom have a history of violent conduct, presents a level of risk. While we cannot guarantee a work environment that is completely safe, we are responsible for preventing violent incidents to the extent possible, and appropriately addressing such acts when they occur.

The agency head then determined that the grievance did not qualify for hearing. The grievant now appeals that decision and requests qualification from the EDR Director.

During its investigation, this Department interviewed the grievant. She indicated that most of the problems she identified in her grievance have been corrected or alleviated. However, the one problem that persists is the excessive volume of audio and/or video equipment used by residents. The grievant acknowledged that the agency has conceded that the audio and/or video equipment should be off during therapeutic sessions. However, during other parts of the day, the volume is often very loud. The grievant claims the noise inhibits her from completing her work and, in one recent example, prevented her from hearing her telephone ring. She also alleges that the volume level contributes to unsafe working conditions.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.¹ 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.²

State policy requires agencies to take steps to assure that workplaces are free of violence. Workplace violence includes "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."³ DHRM Policy 1.80 expressly requires that agencies must protect victims of workplace violence and those who report acts of violence.⁴ Federal and state laws also require employers to

¹ Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(c).

³ DHRM Policy No. 1.80, *Workplace Violence*, p. 1 of 3.

⁴ DHRM Policy No. 1.80, pp. 2-3 of 3.

provide safe workplaces.⁵ 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 a misapplication or unfair application of policy.

This Department cannot conclude that the evidence in support of the grieved conduct in this case -- the agency allegedly allowing excessive volume of residents' audio and/or video equipment -- raises a sufficient question as to whether state or agency policy was misapplied or unfairly applied. While this conduct may be disruptive, there is no evidence that the noise creates an unreasonably unsafe work condition.⁶ Accordingly, because the grievant has failed to allege facts raising a sufficient question of a misapplication or unfair application of policy, we conclude that her December 14, 2006 grievance does not qualify for 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 the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays 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

⁵ Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish a "place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm to [] employees." 29 U.S.C. § 654(a)(1); *see also* Va. Code § 40.1-51.1 (same).

⁶ While the conduct in this case is not a misapplication or unfair application of policy, there could be a situation involving noise that could rise to that level under other facts. This ruling does not foreclose the possibility that loud noise could result in an unsafe work environment.