

Issue: Qualification/Work conditions/supervisor-employee conflict/violence in the workplace; Ruling Date: October 6, 2006; Ruling #2006-1364; Agency: Department of Social Services; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services  
Ruling No. 2006-1364  
October 6, 2006

The grievant has requested a ruling on whether her April 5, 2006 grievance with the Department of Social Services (DSS or the agency) qualifies for a hearing. The grievant claims that the agency has subjected her to a hostile work environment and that she has been the victim of workplace violence.

FACTS

The grievant is employed as a Program Administration Specialist I with DSS. On April 5, 2006, she initiated a grievance alleging that a supervisor in her office (Supervisor A) has harassed her, physically assaulted her and otherwise created a hostile work environment.<sup>1</sup> The third step respondent ordered an internal investigation of the grievant's allegations. The internal investigation revealed "no evidence of a hostile work environment," but did find that Supervisor A's behavior in the workplace needed to be modified and monitored.

After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of her grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

DISCUSSION

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

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<sup>1</sup> Supervisor A does not supervise the grievant.

<sup>2</sup> See Va. Code § 2.2-3004(B).

In this case, the grievant alleges that Supervisor A has harassed her and created a hostile work environment. In addition, her grievance, fairly read, asserts that the agency has misapplied and/or unfairly applied Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence." Each of these claims will be addressed below.

#### *Harassment/Hostile Work Environment*

While all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment and/or a "hostile work environment" must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy."<sup>3</sup> Here, the grievant has not alleged that Supervisor A's actions were based on any of these factors. As such, the grievant's claim of harassment/hostile work environment does not qualify for a hearing.

#### *Workplace Violence*

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<sup>4</sup> 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.

Policy 1.80 requires an agency to provide a safe working environment for its employees.<sup>5</sup> Federal and state laws also require employers to provide safe workplaces.<sup>6</sup> 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

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<sup>3</sup> DHRM Policy 2.30, "Workplace Harassment" (effective 5/1/02). Policy 2.30 was revised 5/16/06 and now prohibits conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.

<sup>4</sup> Va. Code § 2.2-3004(A). 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." *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

<sup>5</sup> DHRM Policy No. 1.80.

<sup>6</sup> 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). Virginia state employees are covered by the Virginia Occupational Safety and Health Program (VOSH) which also requires "every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees." VA. Code 40.1-51.1 (A); 16 VAC 25-60-30.

employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.<sup>7</sup>

“Workplace violence” is defined as “[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties.”<sup>8</sup> 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.”<sup>9</sup> This Department has previously sought informal guidance from DHRM regarding the applicability of the Workplace Violence policy to claims of supervisor-subordinate conflict. DHRM subsequently advised this Department that Policy 1.80 may be violated if the employee subjectively experiences the supervisor’s conduct as threatening or intimidating.<sup>10</sup>

In this case, the grievant alleges three incidents of workplace violence by Supervisor A. In the first incident, which occurred in February 2006, the grievant claims that Supervisor A intentionally bumped into the grievant in the hallway. In contrast, the agency claims that its investigation found that the contact between Supervisor A and the grievant in February 2006 was accidental and unintentional and was most likely caused by the narrowness of the corridor where the “bump” took place.

The second alleged incident of workplace violence occurred in March 2006 when the grievant claims she “was turning the corner towards the fax machine to check my mailbox and [Supervisor A] was coming in the opposite direction. I turned my body to move out of the way and as [Supervisor A] went around me, she extended her arm to hit me.” The agency determined this incident to be accidental and unintentional as well. More specifically, the agency found in its investigation that one cannot see who is on the other side of the corner where the March 2006 incident took place and that the grievant ran into Supervisor A’s extended arm when turning this corner.

The final incident alleged occurred in April 2006 when Supervisor A would not move out of the way so that the grievant could get to the copy machine and they “brushed against each other.” The grievant claims that she later heard Supervisor A tell a co-worker “next time somebody is going to get hurt.” The agency determined both the grievant and Supervisor A to be equally culpable with regard to the April 2006 incident. Further, the agency claims that its investigation revealed no evidence of any threats made by either party.

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<sup>7</sup> See *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742 (7<sup>th</sup> 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 subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment....”315 F.3d at 744 (emphasis in original).

<sup>8</sup> DHRM Policy No. 1.80.

<sup>9</sup> *Id.*

<sup>10</sup> See EDR Ruling Nos. 2006-1248, 1249, 1278.

The agency contends that corrective action has been taken in accordance with the findings of its internal investigation. In contrast, the grievant asserts that her safety continues to be compromised.<sup>11</sup> In light of the factual disputes present in this case and more importantly, the grievant's assertion that her safety continues to be compromised, this Department concludes that the grievant has presented evidence raising a sufficient question as to whether the agency's actions failed to protect her against the threat of workplace violence and/or were otherwise contrary to the state's workplace violence policy. Accordingly, the grievant's claim of misapplication and/or unfair application of the workplace violence policy qualifies for hearing.

### CONCLUSION

For the reasons discussed above, this Department qualifies for hearing the grievant's claim that the agency misapplied and/or unfairly applied the workplace violence policy. This qualification ruling in no way determines that the agency's actions were a misapplication of policy or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear this issue, using the Grievance Form B.

For additional 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 to the circuit court the denial of qualification of her claim of harassment/hostile work environment, she 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 notifies the agency that she does not wish to proceed.

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Claudia T. Farr  
Director

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<sup>11</sup> In particular, the grievant claims that on September 15, 2006, four months after the agency investigation and alleged corrective action, Supervisor A stated to a co-worker, "let me tell you about a friend of mine that just got beat up" as the grievant walked by her. The grievant perceived Supervisor A's comment as a threat to her safety and the safety of others. Also on September 15, 2006, the grievant claims that she and three of her co-workers stopped outside after work to talk. Supervisor A allegedly was talking on her cell phone and paced back and forth behind the grievant and her co-workers. The grievant's supervisor saw Supervisor A pacing back and forth behind the grievant and allegedly later told the grievant that he was concerned that Supervisor A was capable of physically harming her. Additionally, on September 18, 2006, the grievant was informed that she was being transferred to another office. While one could view the agency's action as an attempt to protect the grievant from Supervisor A, the grievant sees the transfer as punishment for complaining about Supervisor A's harassing behavior and a failure to correct Supervisor A's inappropriate and unprofessional behavior. It should further be noted that the grievant has resigned from her position as a result of the alleged threatening and harassing behavior by Supervisor A.