Issue: Qualification – Work Conditions (workplace violence); Ruling Date: June 26, 2008; Ruling #2008-2043; Agency: Virginia Community College System; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Community College System
Ruling No. 2008-2043
June 26, 2008

The grievant has requested a qualification ruling in her October 24, 2007 grievance against the Virginia Community College System (VCCS or the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with the agency as an administrative assistant. The grievant asserts that on September 26, 2007, she was subjected to a "[p]hysical assault at the workplace." Specifically, the grievant asserts that during an event held at her work facility, a co-worker struck her in the back with a wiffle ball. On October 24, 2007, the grievant initiated a grievance regarding this incident.

Subsequently, on October 31, 2007, the agency issued the co-worker a "Letter of Corrective Action." This resolution was not satisfactory to the grievant, and on December 18, 2007, apparently in conjunction with the second grievance resolution step, the agency took additional corrective action with respect to the co-worker. In addition, the second-step respondent advised the grievant that she could transfer "if a lateral position is open and the supervisor is agreeable to the transfer." The second-step respondent further suggested that the grievant and her co-worker engage in mediation if the grievant chose not to seek transfer.

The grievant continued to object to the agency's resolution of her grievance, and she advanced the grievance to the third resolution step. The third-step respondent met with the grievant on February 25, 2008. In his written response to the grievant, the third-step respondent noted that he had gathered additional information and that appropriate corrective action had been taken by the agency. In addition, the third-step respondent advised the grievant that he would meet with the grievant and her co-worker the next week, for the express purpose of having the co-worker apologize to the grievant (which apparently was one of the concerns the grievant shared with the third-step respondent during their meeting).

The grievant advised the agency that she still did not believe the matter had "been handled appropriately" and requested qualification of the grievance for hearing. The agency denied the grievant's request for qualification, 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.[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.

The applicable policy in this case is Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*. That policy requires that the grievant's employing agency provide a safe working environment for its employees.[2] Federal and state laws also require employers to provide safe workplaces.[3] 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 having an adverse effect on the terms, conditions, or benefits of his employment.[4]

"Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."[5] Prohibited conduct includes, but is not limited to the following: engaging in behavior which subjects another individual to extreme emotional distress and includes shouting and "an intimidating presence."[6]

In this case, the grievant's co-worker arguably violated the workplace violence policy. But while this Department certainly does not condone the co-worker's behavior, there are some cases where qualification is inappropriate even if policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate

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[1] *See* Va. Code § 2.2-3004(B).
[2] DHRM Policy No. 1.80.
[3] 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 physical harm to his employees." VA. Code 40.1-51.1 (A); 16 VAC 25-60-30.
[4] *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742 (7th 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).
[5] DHRM Policy 1.80.
[6] *Id.*

where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In the present case, the grievant seeks, as relief, to have "the issues acknowledged and addressed" and to have "fair and appropriate action taken." The agency has provided evidence that it has investigated the grievant's allegations, taken appropriate corrective action against the grievant's co-worker, had the co-worker apologize to the grievant, and offered the grievant either a lateral transfer or mediation. The grievant acknowledges that since the September 26th incident, her co-worker has not engaged in "any further behavior" that the grievant considered "inappropriate, certainly not as [she] stated in the grievance."

It therefore appears that this is a case where much of the requested relief has been provided, and the requested relief that has not been provided is not relief that a hearing officer could order, as hearing officers cannot order agencies to take corrective action against employees.[7] Consequently, further effectual relief is unavailable to the grievant through the grievance procedure. When there has been a misapplication of policy, a hearing officer could order that the agency reapply policy correctly. However, as a practical matter, "reapplying policy" would have little effect on a prior incident of workplace violence where, as in this case, the incident has been properly investigated, measures have been taken to remedy such behavior, and no further incidents of workplace violence have occurred.

In light of the foregoing, the grievant's misapplication 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 Department's 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 notifies the agency that she wishes to conclude the grievance.

Claudia Farr
Director

[7] *See Grievance Procedure Manual* §5.9(b) (providing that the taking of an adverse action against an employee is not relief available through a grievance hearing.)