

Issue: Qualification – Work Conditions (Violence in the Workplace); Ruling Date: July 16, 2008; Ruling #2008-2051; Agency: Virginia Commonwealth University; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling No. 2008-2051
July 16, 2008

The grievant has requested a qualification ruling in her April 11, 2008 grievance with Virginia Commonwealth University (the University). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant alleges that a co-worker “committed an unprovoked assault and battery” against her at work.¹ There were no witnesses to the incident other than the two participants who have differing views of the situation. The co-worker denies touching the grievant at all. The University investigated the incident and determined that the grievant’s allegations could not be corroborated and took no other formal action. A supervisor counseled both the grievant and the co-worker about “internal customer service” and suggested the parties engage in mediation.

The grievance proceeded through the management steps and the grievant now requests qualification of her grievance for hearing. The grievant requests as relief that the co-worker be terminated or transferred to another department, or, if not feasible, to be transferred herself to another department. The grievant also seeks “compensation for pain and suffering and disability leave until issue is resolved.”

DISCUSSION

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

¹ The “assault” allegations appear to be that the co-worker “touched” the grievant on the arm(s) in an attempt to push her. However, after the date of the incident, the grievant described the co-worker’s act as a “strike.”

² Va. Code § 2.2-3004(B).

The applicable policy in this case is Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*.³ That policy requires that the grievant's employing agency provide a safe working environment for its employees.⁴ Federal and state laws also require employers to 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 having an adverse effect on the terms, conditions, or benefits of his or her employment.⁶ In this case, there is insufficient evidence that the University violated DHRM Policy 1.80 through any act or omission with respect to grievant's claim of assault.

Further, assuming for purposes of this ruling only that the grievant's assault allegations are true, and that policy had been violated or misapplied by the University, there are still some cases when qualification is inappropriate. 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 when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

It appears that this is a case in which a hearing officer could not order the requested relief. Hearing officers cannot order agencies to take corrective action against employees.⁷ Similarly, a hearing officer has no authority to award the transfer requested by the grievant or "compensation for pain and suffering."⁸ Further, the grievant has provided no evidence supporting her request for "disability leave until issue is resolved." Records submitted with the grievance to this Department indicate that the grievant was released to return to work without restriction at the end of March 2008. It appears that the grievant requested "disability leave" because of a fear of being in the workplace with the co-worker. While in some cases such a fear might necessitate disability leave under policy, no evidence has been submitted indicating that such is the case here. And while the agency might have discretion to grant leave to the grievant in the form of administrative leave or another appropriate type of leave, such an award would not be within a hearing officer's authority within the context of this grievance.

³ "Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties." DHRM Policy 1.80.

⁴ DHRM Policy No. 1.80.

⁵ 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 Va. Admin. Code § 25-60-30.

⁶ See *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (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...") (emphasis in original).

⁷ *Grievance Procedure Manual* § 5.9(b).

⁸ *Id.*

Finally, when there has been a misapplication of policy, a hearing officer may order that the agency reapply policy correctly. However, as a practical matter, “reapplying policy” would have little effect on a prior incident of alleged workplace violence when, as in this case, the incident has been investigated, the participants counseled, and no further incidents of workplace violence have occurred. In light of the foregoing, the grievance 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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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