

Issue: Qualification – Work Conditions (Violence in the Workplace); Ruling Date: August 5, 2008; Ruling #2009-2066; 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 No. 2009-2066, 2009-2092  
August 5, 2008

The grievant has requested a qualification ruling in his December 19, 2007 grievances with the Department of Corrections (the agency). For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

On December 19, 2007, the grievant initiated two grievances regarding confrontations with his supervisor on December 18, 2007. In one grievance, the grievant alleges that his supervisor "willfully and in an abusive and threatening manner order[ed] me to remove a safety related lock-out device that I had placed on [a trailer]." The other grievance asserts that the supervisor "willfully, violently and abusively confront[ed] me in the parking lot ... concerning the safety issues of [the trailer]." The grievant states numerous ways in which he believes his supervisor engaged in misconduct. The agency investigated the grievant's claims by interviewing and taking statements from witnesses. The agency determined that there was insufficient evidence to warrant disciplinary action against the supervisor. However, the third step-respondent indicated that he would meet with the supervisor to counsel him on proper demeanor in assigning duties to subordinate employees.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>1</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. The grievant has not alleged that he has been subject to discrimination, retaliation or discipline in this case.<sup>2</sup> Therefore, the

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> On both Form A's, the grievant did check the box for "Discrimination or Retaliation by Immediate Supervisor." However, there are no allegations in the grievance materials to support such claims sufficient to qualify them for a

only basis on which these grievances might qualify is whether the agency misapplied or unfairly applied policy.

The applicable policy in this case is Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*.<sup>3</sup> That policy requires that the grievant's employing agency provide a safe working environment for its employees.<sup>4</sup> Federal and state laws also require employers to provide safe workplaces.<sup>5</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 employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his or her employment.<sup>6</sup>

Assuming without deciding, for purposes of this ruling only, that the grievant's allegations about the supervisor's conduct are true, and that an unreasonably unsafe work environment resulted, this is not a case that qualifies for hearing. In some cases such as here, qualification is inappropriate even if policy has been violated or misapplied. For example, during the resolution steps, an issue may become moot, either because the agency granted the specific relief requested by the grievant or an interim event would prevent 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.

This is a case in which the requested relief not yet provided (disciplining the supervisor) is relief that a hearing officer could not order. Hearing officers cannot order agencies to take corrective action against employees.<sup>7</sup> Consequently, effectual relief is unavailable to the grievant through the grievance procedure. Also, in many cases if 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" has little effect with respect to a prior incident of alleged workplace violence, especially when it appears the agency investigated the incident and counseled the supervisor about the alleged conduct. In light of the foregoing, these grievances do not qualify for a hearing.

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hearing. Indeed, there is no discussion of an adverse action against the grievant based on a protected status of the grievant (discrimination) or because of a protected activity (retaliation).

<sup>3</sup> "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.

<sup>4</sup> DHRM Policy No. 1.80.

<sup>5</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 physical harm to his employees." Va. Code § 40.1-51.1 (A); 16 VAC 25-60-30.

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

<sup>7</sup> *Grievance Procedure Manual* § 5.9(b).

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 the grievances, 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 he wishes to conclude the grievance.

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Claudia Farr  
Director