Issue: Qualification – Work Conditions (Workplace Violence); Ruling Date: May 6, 2009; Ruling #2009-2155; 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. 2009-2155
May 6, 2009

The grievant has requested a qualification ruling in his June 11, 2008 grievance with the Department of Corrections (the agency). The grievant essentially asserts that the agency failed to provide him a safe workplace when it ignored his requests to be separated from an inmate who had threatened him. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant worked as a Corrections Officer Senior at a maximum security, level 5 prison.[1] The grievant was involved with a series of confrontations with an inmate (Inmate A) which culminated in the grievant being assaulted by Inmate A with a cup containing human waste. The grievant contends that prior to the attack, he had reported to a supervisor on at least three occasions that he had been subjected to threats by Inmate A. As a result of these threats, the grievant requested that the agency move him away from Inmate A or that Inmate A be moved to a different housing unit. The grievant's requests were not granted. Moreover, the grievant asserts that in late April 2008 when he mentioned his continuing problems with Inmate A for the third time, his superior responded in a sarcastic tone asking if he was "scared."

On April 30, 2008, the grievant was warned by another inmate that Inmate A "had something" for the grievant. When Inmate A's cell was subsequently searched by the grievant and another corrections officer, a homemade weapon consisting of a piece of razor blade taped to a plastic spoon handle was purportedly found. When Inmate A discovered that his weapon had been found, he allegedly went into a rage, cursing and again threatening the grievant.

The next day when the grievant attempted to provide Inmate A his lunch, Inmate A threw a mixture of urine and feces at the grievant through the food tray slot, striking the grievant in the face and upper right side of his body. The grievant closed the slot and departed to be decontaminated. While the grievant was showering, Inmate A was moved to another building.

[1] The prison in which the grievant worked was one of two Level 5 prisons. There is only one other prison in the Commonwealth which has a higher security rating (Level 6).

The grievant asserts that during his debriefing, his superiors questioned him in a manner that he felt was intimidating.

The grievant is currently on Long-Term Disability, and purportedly suffers from Post-Traumatic Stress Disorder. The Warden has stated that, when the grievant is cleared by his doctor, based on his good work record, he is welcome to return to work. For relief, the grievant has requested full retirement as if he had worked until retirement age, and benefits for himself, spouse, and children until they have graduated from college.

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. The grievant has not alleged that he has been subjected to discrimination, retaliation or discipline in this case.[3] Therefore, the only basis on which this grievance might qualify is whether the agency misapplied or unfairly applied policy.

The grievant asserts that he was the victim of workplace violence. The Commonwealth's policy that addresses this issue is the Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*.[4] Policy 1.80 requires that the grievant's employing agency provide a safe working environment for its employees.[5] Federal and state laws also require employers to provide safe workplaces.[6] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work

[2] *See* Va. Code § 2.2-3004(B).
[3] The grievant has checked the box on his Grievance Form A indicating discrimination or retaliation by his immediate supervisor but has not stated any protected status to support a discrimination claim or any protected activity to support a retaliation claim.
[4] "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.
[5] DHRM Policy No. 1.80.
[6] 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 (2006).

environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his or her employment.[7]

Here, the grievant claims that the agency negligently failed to protect him from Inmate A. He asserts that on three occasions he requested to be separated from Inmate A following threats. In response, the agency states that it has policies and procedures in place that ensure the safety of staff who deal with inmates on a daily basis. It notes that the grievant stated in an Internal Incident Report that he opened the food-tray slot of the cell when he could not see Inmate A. When further questioned, the grievant admitted that he could not see Inmate A before he opened the food-tray slot. The agency states that agency procedure stipulates that all Special Housing Unit inmates are to be seated on their beds before the food-tray slot is opened, which reduces the possibility of an assault or attempted assault.[8] In addition, the Warden has stated that while it understands the grievant's concern, the facility is not in a position to have staff determine which inmates they are assigned and that "[u]nfortunately, the actions by the inmate were not highly unusual when considering the type(s) of inmates housed at [the facility where the grievant worked.]" The Warden stated that he too has been the victim of such an attack. Finally, the Warden states that he agrees with the rationale for placing the grievant in the facility where he worked. The Warden explained that a group of new prisoners were being brought in from out of state, and the agency needed an experienced officer to be assigned to the building where they were housed.[9]

This is a difficult case in that the grievant unquestionably endured a repulsive attack. However, given the totality of the circumstances, we cannot conclude the agency failed to provide the grievant with a reasonably safe workplace. First, prisons are inherently dangerous workplaces.[10] Despite this inherent danger, the Commonwealth would appear to have a duty to implement and enforce policies reasonably calculated to minimize harassment and protect the safety of its employees.[11] Accordingly, the agency has instituted many procedures to make the prison less unsafe. Even with such safeguards, a prison environment cannot be made hazard-free. Here, it appears that the grievant's failure to fully comply with the requirement under Post Order #80 that inmates be seated on their beds before the food tray is opened, may have contributed to his attack. Moreover, the agency has articulated what would appear to be a rational reason for assigning the grievant to the building where he worked—the agency needed an experienced officer to help to deal with a new group of inmates.

---

[7] *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).

[8] *See* Post Order #80.

[9] The Warden states the inmates that are introduced into a new environment will often test the limits of those who are charged with their oversight.

[10] United States v. Tokash, 282 F.3d 962, 970 (7th Cir. 2002) ("[P]risons are inherently dangerous places and are inhabited by violent people . . . ."). The assault on grievant was classified as a "simple assault" and, according to the agency, such assaults are not uncommon. There were 27 simple assaults on staff in the first five months of 2008.

[11] *See* Freitag v. Ayers, 468 F.3d 528, 539(9th Cir. 2006)(discussion regarding prison's duty as employer to provide reasonable measures to prevent Title VII sexual harassment of employees by inmates.)

Moreover, for purposes of this ruling only, even if it is assumed that the agency provided the grievant an unreasonably unsafe work environment, it does not appear that this is a grievance that should qualify 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.

In this case, the requested relief--full retirement as if he had worked until retirement age, and benefits for himself, spouse, and children until they have graduated from college--is not relief that a hearing officer could order.[12] Moreover, when an employee in Virginia is injured in the performance of his duties for his employer, the Virginia Workers' Compensation Act (VWCA) provides his sole and exclusive remedy against the employer.[13] In addition, the agency has stated that it will welcome the grievant back when he is cleared by his doctor. Thus, notwithstanding the unfortunate circumstances giving rise to this grievance, there is really no other effectual relief the hearing officer has the authority to order.

Therefore, for all of the reasons stated above, this grievance is not qualified 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 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.

_____
Claudia Farr
Director

[12] *See* Grievance Procedure Manual § 5.9 (b) (4).
[13] McCotter v. Smithfield Packing Co., Inc., 849 F.Supp. 443, 446 (E. Dist. Va. 1994) citing to Virginia Code § 65.2-307 and Rasnick v. Pittston Co., Inc., 237 Va. 658, 660, 379 S.E.2d 353, 354 (1989). According to the agency, the grievant's claim for compensation under the VWCA has been denied but is currently under appeal.