Issue: Qualification – Work Conditions (Violence in the Workplace); Ruling Date: January 20, 2009; Ruling #2009-2199; 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. 2009-2199
January 20, 2009

The grievant has requested a qualification ruling in his August 21, 2008 grievance with the Department of Corrections (the agency). For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his August 21, 2008 grievance, the grievant alleges that he was a victim of workplace violence. He asserts that a supervisor used abusive language toward him and grabbed him by the collar. The agency appears to have investigated the grievant's claims, resulting in an "inconclusive" finding. The agency reports that "appropriate action" was taken. According to the agency, the supervisor no longer works at the same facility as the grievant. However, the grievant requests as relief that the supervisor never be allowed to supervise him again or work at the same facility. After proceeding through the management steps of the grievance process, the grievant now seeks qualification of his grievance for hearing.

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 grievant has not alleged that he has been subject to discrimination, retaliation or discipline in this case. Therefore, the only basis on which this grievance 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*.[2] That policy requires that the grievant's employing agency provide a safe working environment for its employees.[3] Federal and state laws also

[1] *See* Va. Code § 2.2-3004(B).
[2] "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.
[3] DHRM Policy No. 1.80.

require employers to provide safe workplaces.[4] 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.[5]

However, in this case, the grievance does not raise a question as to whether the agency's actions violated DHRM Policy 1.80. It appears the agency investigated grievant's claims and the grievant no longer works at the same facility as the supervisor.

Moreover, this is a case in which the requested relief that has not been provided is not relief that a hearing officer could order. Hearing officers cannot order agencies to take corrective action against employees, and it does not appear that a hearing officer could issue an order preventing the grievant and the supervisor from ever having to work together.[6] Consequently, effectual relief would be unavailable to the grievant through the grievance procedure, even if the grievant's claims are true and the agency had somehow violated DHRM Policy 1.80. 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 alleged workplace violence. 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 he wishes to conclude the grievance.

Claudia Farr
Director

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[4] 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.

[5] *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).

[6] *See Grievance Procedure Manual* § 5.9(b).