CRIMINAL PROCEDURE: ARREST.

Victims’ Services Section of Department of Criminal Justice Services, rather than Attorney General, is appropriate agency to determine what constitutes special circumstances dictating course of action other than arrest in matters involving family violence.

The Honorable Matthew J. Britton
Commonwealth’s Attorney for King George County
June 27, 2001

You ask what constitutes "special circumstances which would dictate a course of action other than an arrest" under § 19.2-81.3(B) of the Code of Virginia.

Section 19.2-81.3(B) provides:

A law-enforcement officer having probable cause to believe that a violation of § 18.2-57.2 or § 16.1-253.2 has occurred shall arrest and take into custody the person he has probable cause to believe, based on the totality of the circumstances, was the primary physical aggressor unless there are special circumstances which would dictate a course of action other than an arrest.

The 1994 Session of the General Assembly established the Commission on Family Violence Prevention to study domestic violence in the Commonwealth, to identify existing services and resources available to address family violence, to investigate ways to coordinate delivery of those services and resources and increase public awareness of their existence, and to determine services, resources and legislation which may be needed to further address, prevent and treat family violence.[1]

In 1996, the Commission issued its report to the Governor and General Assembly, and recommended that the Virginia Code be amended to "require mandatory arrest of the primary physical aggressor upon a finding of probable cause that assault and battery of a family or household member has occurred."[2] The 1996 Session of the General Assembly subsequently enacted § 19.2-81.3(B),[3] and directed the Commission to continue its study of family violence prevention and to submit its findings and recommendations to the Governor and the General Assembly.[4] In 1997, the Commission submitted its report, which contained a recommendation "that the Department of Criminal Justice Services’ Model Policy and training standards provide guidance related to the terms ‘primary physical aggressor’ and ‘special circumstances.’”[5]

I am advised that the Department of Criminal Justice Services has developed a model policy for law-enforcement agencies to adopt in responding to calls for assistance involving complaints of domestic violence. Furthermore, I am advised that the Department’s Victims’ Services Section has developed a domestic violence curriculum for law-enforcement personnel, and further, that such curriculum specifically addresses instances that constitute "special circumstances" under § 19.2-81.3(B). Unless the Department’s interpretation is clearly wrong in such a situation, I must defer to the
interpretation of § 19.2-81.3(B) by the Department regarding what constitutes "special circumstances," since the Department is specifically required by the General Assembly to make such determinations. As the Supreme Court of Virginia has noted, the General Assembly is presumed to be cognizant of the administrative construction of this particular statute and, when such construction continues without legislative alteration, will be presumed to have acquiesced in it.

A 1987 opinion of the Attorney General concludes that, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, or (4) involves a matter of purely local concern or procedure. Prior opinions also conclude that a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter. Consequently, I must respectfully decline to render an opinion on what constitutes "special circumstances which would dictate a course of action other than an arrest" under § 19.2-81.3(B). I am of the opinion that the Victims’ Services Section of the Department of Criminal Justice Services is the appropriate agency to make such determinations.


3 1996 Va. Acts ch. 866, at 1593, 1608; see id. cl. 2, at 1610 (providing for act to become effective July 1, 1997).


6 See 1999 Op. Va. Att’y Gen. 3, 5, and opinions cited at 6 n.25; cf. Board of Zoning Appeals v. 852 L.L.C., 257 Va. 485, 486, 514 S.E.2d 767, 770 (1999) ("'if the administrative interpretation of a portion of an ordinance is so at odds with the plain language used in the ordinance as a whole, such interpretation is plainly wrong, and must be reversed'" (quoting Cook v. City of Falls Church, 244 Va. 107, 111, 418 S.E.2d 879, 881 (1992))).

