

Issue: Misapplication of the Layoff Policy; Hearing Date: 02/24/11; Decision Issued: 03/30/11; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9489; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 04/13/11; Reconsideration Decision issued 07/05/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 04/13/11; EDR Ruling No. 2011-2957 issued 07/25/11; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 04/13/11; DHRM Ruling issued 07/26/11; Outcome: AHO’s decision affirmed; Administrative Review: EDR Ruling Request on 07/05/11 Reconsideration Decision received 07/11/11; Outcome: Ruling is Moot – appealed to Circuit Court; Judicial Review: Appealed to Circuit Court in Halifax County on 08/03/11; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9489

Hearing Date: February 24, 2011
Decision Issued: March 30, 2011

PROCEDURAL HISTORY

The Virginia Department of Transportation reorganized its business operations and significantly reduced its staff through layoffs. The Agency created a system to permit employees who wished to leave the Agency to substitute for employees subject to layoff who did not wish to leave the Agency. An employee selected by the Agency as a substitute could receive an enhanced retirement benefit under the Work Force Transition Act of 1995. Grievant applied to be a substitute so he could receive an enhanced retirement benefit. The Agency chose not to select Grievant as a substitute thereby preventing him from receiving an enhanced retirement package.

On March 25, 2010, Grievant filed a grievance challenging the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The appeal was qualified for hearing by the Circuit Court on November 29, 2010. On January 18, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On February 24, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee

ISSUES

1. Whether Grievant should receive enhanced retirement benefits under the Workforce Transition Act and/or State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employed Grievant as a Residency Maintenance Manager (formerly known as a Residency Administrator) until he retired in January 2011. He had been employed by the Agency for approximately 42 years. He was the longest-serving Resident Maintenance Manager in Virginia prior to his retirement.

In 2008, the Agency decided to make permanent long-term business changes to ensure that the agency remained viable in the future. Agency managers developed a "Blueprint for Our Future" to address the demands of the following two years and position the agency to deal with "economic realities" projected for the following six years. The Blueprint had three major components: (1) restructuring the Agency's construction program, (2) restructuring the Agency's services and customer programs, and (3) reshaping the Agency's organization and streamlining staffing.

The Agency has offices located throughout the State referred to as Residencies. As part of the restructuring¹, the Agency decided to eliminate more than 30% of its Residencies.² The Agency recognized that eliminating so many Residencies would result in a significant number of employee layoffs. Agency managers met with staff of

¹ The restructuring occurred in stages. Stage 3 began in the fall of 2009 and involved a reduction of more than 300 classified positions.

² The Agency intended to reduce the number of Residencies from 44 to 29.

the Department of Human Resource Management to discuss the Agency's implementation of the DHRM Policy 1.30 governing layoffs. DHRM granted the Agency flexibility to implement DHRM Policy 1.30. The Agency decided to use substitution rules within DHRM Policy 1.30 to create placement options for employees given notice of layoff. The Agency's objective was to create more placement options for affected employees who wished to remain employed with the Agency. For example, the Agency intended to solicit substitutes beyond just the affected workgroups.

In an email to VDOT employees dated July 16, 2009, the Agency Head wrote:

Substitution – With large numbers of VDOT employees approaching retirement, a number of employees who are eligible for retirement may choose to exit under Workforce Transition Act enhanced retirement benefits if given the opportunity. With expanded flexibility for substitution, we will generate employment opportunities for many affected employees who wish to remain at VDOT while creating options for those wishing to retire or to otherwise leave the agency for personal reasons.

Here's how substitution works: After affected employees had been given notification, non-affected employees who are eligible for retirement or wish to leave the agency can submit a request within a limited time frame. A review team will evaluate vacancies first and then substitution request to determine a potential placement match for each affected employee who requested placement. The affected employee who originally received a layoff notification must meet the minimum qualifications for the potential placement opportunity. If a substitute match is appropriate, the substitute receives notification of layoff and the affected employee assumes the substitute's position.

In an email dated August 3, 2009, the Agency Head informed employees that:

Affected employees have until August 11 to submit their request for placement or not. Unaffected employees have until August 14 to submit a substitution interest form if they find that the severance benefits offered to substitutes may be beneficial. A substitute must be willing to give up their employment for an employee who received the initial notice of layoff, has similar job skills, and wants placement at VDOT. Matched substitutes will receive the same severance benefits as those who receive notice of layoff with the exception of recall rights and preferential treatment in a hire for a state position.

Prior to the layoff, the Agency defined the work unit to the Residency.

A Residency Maintenance Manager is the individual in charge of operations at a Residency. Grievant was in charge of Residency H. Mr. G. was in charge of Residency SH. Mr. S was in charge of Residency A. They were all Residency Maintenance

Managers performing the same job but in different locations. Their positions were in the same Pay Band. Mr. S was minimally qualified to perform the job duties of Mr. G and Grievant. Grievant had more seniority than did Mr. G.

The Agency decided to close Residency A and layoff all of the employees working there including Mr. S. Mr. S was an “affected” employee. Mr. S decided that he did not wish to leave the Agency and asked the Agency placed him in another position.

Mr. S’s residence was located in Town V. He drove approximately 35 miles from his residence in Town V to County A to work in his office at the Agency’s Residency A.

Residency H is within a 50 mile radius of Town V. If Mr. S drove from his residence in Town V to Residency H he would travel approximately 48 miles. Residency SH is within a 50 mile radius of Town V. If Mr. S drove from his residence in Town V to Residency SH, he would travel approximately 30 miles. If Mr. S began working at Residency SH instead of Residency A, his daily morning commute from his home to his office would be reduced by approximately 5 miles. If Mr. S began working at Residency H, his daily morning commute from his home to his office would increase by approximately 12 miles.

On January 11, 2010, Grievant submitted a Substitute Request to the Agency. He intended to be considered as a substitute for another Agency employee who had been identified for layoff. He made the following certification:

My invitation below is my understanding of the following:

- Submission of this form is not a guarantee that I will be able to substitute for another employee who will be laid off.
- If I am selected to substitute for someone else being laid off, my last work day will be determined by the agency. I will receive notification of that day, if I have been approved to substitute.
- The Department of Human Resources Management (DHRM) policy 1.57, Severance Benefits, explains eligibility for and the value of severance benefits.
- To revoke this expression of interest I must keep my withdrawal into the Blueprint Transition system by the deadline published.
- I will have a very limited opportunity to withdrawal my submission in the current Blueprint stage. The specific withdrawal period for this stage is documented in communication published about the substitution option. After that limited withdrawal period I may only withdraw my submission after the end of the current Blueprint stage and before the beginning of the next day; or during a subsequent stage’s open submission period, to be published at a later date.
- This expression of interest will become void if my position is identified for elimination.

- Any work visa I have through VDOT could be impacted and I could lose my eligibility to remain in the United States, if my application is approved.
- Any learning partnership agreements I entered into become null and void upon my scheduled separation, if I am approved as a substitute. I may retain any funds paid to me prior to my date of separation.
- If I am laid-off, my responsibilities for repayment under a tenure agreement will be waived upon my layoff date.
- I will remain responsible for the paying a debt I owe to the Commonwealth (e.g., salary overpayment, leave overpayment) even if I am laid off.
- If I leave the agency voluntarily before an affected employee is scheduled to assume my current position, any written agreements will be enforced.
- Any approval to substitute I receive will be withdrawn if the affected employee scheduled to assume my position becomes unavailable to do so, due to voluntary or involuntary separation before the reassignment is to become effective.

Grievant was not an “affected” employee because he was not an employee who was being laid off by the Agency.

Members of the Agency’s Placement Team³ looked for vacant positions available to Mr. S within a 50 mile radius of Town V. They found no vacant position in Mr. S’s Pay Band for which he was minimally qualified. Once the Placement Team determined that there were no vacant positions available to Mr. S, they considered whether substitution would be appropriate.

The Agency chose Mr. G as the substitute for Mr. S instead of choosing Grievant. The Placement Team found 71 possible substitutes across the state. One substitute was in County W. The Placement Team excluded the possible substitute in County W because County W was more than 50 miles from Town V.

The Placement Team considered seniority as being relevant only if one or more substitutes worked in the same Residency.⁴ For example, if two potential substitutes worked in the same Residency, the Agency would select as the substitute the employee in that Residency with the most seniority. The Placement Team did not compare Grievant’s seniority with Mr. G’s seniority because they worked in different Residencies.

³ Five employees served on the Agency’s placement team. They decided which substitutes would be matched with affected employees.

⁴ The Agency considered Residency H and Residency SH to be different work units.

Only if Grievant and Mr. G had worked at Residency SH would the Agency have selected Grievant as the substitute because of his seniority.⁵

The Agency chose Mr. G as a substitute because Mr. G worked at Residency SH and Residency SH was closer to the Town where Mr. S lived. The Agency believed that it would be best for the Agency and for Mr. S to have a shorter commute to Residency SH than a longer commute to Residency H. The Agency did not consult with Mr. S regarding his preference of working at Residency SH or Residency H. If Mr. S. had preferred to work at Residency H and the Agency had learned of that preference, the Agency would likely have disregarded Mr. S's preference and placed him in Residency SH because the commute from Mr. S's home to Residency SH was shorter than his commute to Residency H. The Agency disregarded the fact that Grievant had more seniority than did Mr. G and that Residency H where Grievant work was within a 50 mile radius of Town V.

If the Agency had chosen Grievant instead of Mr. G to serve as a substitute for Mr. S, Grievant would have been eligible to receive an enhanced retirement benefit that would have increased his monthly retirement benefit by over \$600 for the remainder of his life.

As part of the reorganization, the Agency created a Planning and Investment Management (PIM) position in District L.⁶ Mr. H worked as a Residency Maintenance Manager at Residency C located in County P. The Agency decided to close Residency C. Mr. H wished to remain with the Agency and sought placement. He informed the Agency that he was willing to relocate to another area of the State. Mr. H was minimally qualified for the vacant PIM position but taking the position would have increased Mr. H's commute to 56 miles. Because the commute exceeded 50 miles, the Agency did not insist that Mr. H accept the vacant position. Only because Mr. H was willing to relocate to District L did the Agency decide to place them in the vacant PIM position. If Mr. H had rejected the option of being placed in a position outside of a 50 mile radius of his home, the Agency would have attempted to find a substitute for Mr. H. Because Residency H was within a 50 mile radius of Mr. H's home, Grievant would have been considered as a possible substitute for Mr. H.

CONCLUSIONS OF POLICY

Grievant argues that because of his seniority and because Residency H was within a 50 mile radius of Town V, the Agency should have selected Mr. S to begin

⁵ If Grievant and Mr. G worked in Residency SH and Mr. S had expressed a preference to have Mr. G be the substitute, the Agency would have disregarded Mr. S's preference. Only if Mr. S would have agreed to take a position located farther than a 50 mile commute would the Agency have considered Mr. S's preference.

⁶ The Agency created the PIM position based on its business needs and not for the purpose of finding a position in which to place Mr. H.

working at Residency H instead of Residency SH. If the Agency had done so, Grievant would have been given the option to receive an enhanced retirement benefit. If Grievant had received an enhanced retirement benefit when he retired, his monthly income would have increased by approximately \$600.

An increase in income of approximately \$600 per month is not *de minimus*. In Grievant's case, it amounts to approximately a 10% increase in retirement income. If the Agency incorrectly were to deny Grievant a 10% increase in income, that denial would constitute an adverse employment action.

The Agency argues that it had the sole discretion to determine where to assign Mr. S. The Agency argues that the Agency's substitution method was not established for the purpose of assisting Grievant, but rather was established for the purpose of assisting employees like Mr. S. Grievant's seniority was not relevant because Grievant was not an "affected employee" under the layoff, according to the Agency.

The material facts of this case are not in dispute. This is not a case in which the Agency is interpreting facts one way and the Grievant is interpreting facts another way.

Degree of Agency Discretion

The outcome of this case depends upon the degree of discretion possessed by the Agency when making its decision. A degree of discretion possessed by a State agency depends on the source of the rule being applied by the Agency. For example, when a State agency applies a Virginia statute, the agency typically has little or no discretion to vary from the words and meaning of the statute. When a State agency applies a DHRM policy, the agency has the discretion expressly granted by DHRM to the Agency. To the extent DHRM policy does not expressly grant discretion to an agency, the State agency has some discretion to apply the terms of the DHRM policy to the unique aspects of the agency so long as the agency's application is consistent with DHRM policy.⁷ When a State agency applies internal procedures, the agency has wide discretion to apply the procedures so long as the application does not violate DHRM policy or a controlling regulation or statute.

There are three sources of rules governing the Agency's decision-making with respect to Grievant and his entitlement to an enhanced retirement benefit: (1) the Workforce Transition Act of 1995, (2) DHRM Policy 1.30 (including a modification in 2009) and DHRM Policy 1.57, and (3) VDOT Blueprint implementation documents.

Workforce Transition Act of 1995

⁷ For example, some State agencies operate on a 24-hour basis while other State agencies only provide services Monday through Friday during the morning and afternoon. Agencies with 24-hour operations may apply DHRM scheduling policies differently from other State agencies so long as the application is not inconsistent with DHRM policy.

The Workforce Transition Act of 1995 authorized State agencies to give severance benefits to certain employees. The purpose of the Workforce Transition Act of 1995 is:

to provide a transitional severance benefit, under the conditions specified, to eligible state employees who are involuntarily separated from their employment with the Commonwealth. "Involuntary separation" includes, but is not limited to, terminations and layoffs from employment with the Commonwealth, or being placed on leave without pay-layoff or equivalent status, due to budget reductions, agency reorganizations, workforce down-sizings, or other causes not related to the job performance or misconduct of the employee, but shall not include voluntary resignations. As used in this chapter, a "terminated employee" shall mean an employee who is involuntarily separated from employment with the Commonwealth.⁸

Va. Code § 2.2-3201 provides, in part:

A. Prior to terminating or placing on leave without pay-layoff or equivalent status any employee of an agency or institution in the executive branch of state government, the management of the agency or institution shall make every effort to place the employee in any vacant position within the agency for which the employee is qualified. If reemployment within the agency or institution is not possible because there is no available position for which the employee is qualified or the position offered to the employee requires relocation or a reduction in salary, the name of the employee shall be forwarded to the Department of Human Resource Management (the "Department").

B. Any preferential employment rights vested in the employee under the Commonwealth's layoff policy shall not be denied, abridged, or modified in any way by the Department. The Department shall coordinate the preferential hiring of the employee, at the same salary classification, in any agency or institution of the executive branch of state government. The Department shall also establish a program to assist employees in finding employment outside of state government.

Va. Code § 2.2-3202 provides, in part:

A. Any full-time employee of the Commonwealth (i) whose position is covered by the Virginia Personnel Act (§ [2.2-2900](#) et seq.), *** and (a) for whom reemployment with the Commonwealth is not possible because there is no available position for which the employee is qualified or the

⁸ Va. Code § 2.2-3200.

position offered to the employee requires relocation or a reduction in salary and (b) whose involuntary separation was due to causes other than job performance or misconduct, shall be eligible, under the conditions specified, for the transitional severance benefit conferred by this chapter. The date of involuntary separation shall mean the date an employee was terminated from employment or placed on leave without pay-layoff or equivalent status.

D. Eligibility shall commence on the date of involuntary separation.

Va. Code § 2.2-3203 confers a transitional severance benefit to certain eligible employees. For example, an eligible employee with “fifteen years or more of consecutive service to the Commonwealth shall be entitled to receive a transitional severance benefit equivalent to two weeks of salary for every year of service, not to exceed thirty-six weeks of salary.” Va. Code § 2.2-3204 creates a retirement program on the date of involuntary separation in lieu of receiving transitional severance benefits as follows:

A. In lieu of the transitional severance benefit provided in § [2.2-3203](#), any otherwise eligible employee who, on the date of involuntary separation, is also (i) a vested member of the Virginia Retirement System, the State Police Officers' Retirement System, or the Virginia Law Officers' Retirement System and (ii) at least fifty years of age, may elect to have the Commonwealth purchase on his behalf years to be credited to either his age or creditable service or a combination of age and creditable service, except that any years of credit purchased on behalf of a member of the Virginia Retirement System, the State Police Officers' Retirement System, or the Virginia Law Officers' Retirement System who is eligible for unreduced retirement shall be added to his creditable service and not his age. The cost of each year of age or creditable service purchased by the Commonwealth shall be equal to fifteen percent of the employee's present annual compensation. The number of years of age or creditable service to be purchased by the Commonwealth shall be equal to the quotient obtained by dividing (i) the cash value of the benefits to which the employee would be entitled under subsections A and D of § [2.2-3203](#) by (ii) the cost of each year of age or creditable service. Partial years shall be rounded up to the next highest year. Deferred retirement under the provisions of subsection C of §§ [51.1-153](#), [51.1-205](#), and [51.1-216](#), and disability retirement under the provisions of § [51.1-156](#) et seq. and § [51.1-209](#), shall not be available under this section.

C. The retirement allowance for any employee electing to retire under this section who, by adding years to his age, is between ages fifty-five and sixty-five, shall be reduced on the actuarial basis provided in subdivision A. 2. of § [51.1-155](#).

The Workforce Transition Act of 1995 does not create any right for Grievant regarding being treated as a substitute and receiving an enhanced retirement benefit. Grievant was not “involuntarily separated”. The Workforce Transition Act of 1995 addresses employees who have been “involuntarily separated.” The Agency’s decision to reject Grievant as a substitute for Mr. S was not contrary to the Workforce Transition Act of 1995. The Agency’s decision to place Mr. H in a vacant position is consistent with Va. Code § 2.2-3201 which states, “the management of the agency or institution shall make every effort to place the employee in any vacant position within the agency for which the employee is qualified.”

DHRM Policy 1.30 and DHRM Policy 1.57

The Department of Human Resource Management is:

The State agency authorized to develop and interpret human resource policies in accordance with Title 2.2, Chapter 12 of the Code of Virginia.

The Director of the Department of Human Resource Management is responsible for the official interpretation of this policy, in accordance with Va. Code § 2.2-1201. The Department of Human Resource Management issued DHRM Policy 1.30 governing Layoff and then amended that policy in 2009 to establish certain Exceptions. An employee who is laid off under DHRM Policy 1.30 may be entitled to severance benefits under DHRM Policy 1.57.

DHRM Policy 1.57. DHRM Policy 1.57, Severance Benefits, provides, in part:

The following employees are eligible to receive severance benefits:

- All full-time classified employees who are involuntarily separated as defined in this policy.

Involuntary separation is defined by DHRM Policy 1.57 as:

Layoff due to budget reductions, agency reorganization, work force downsizing, or other causes not related to the job performance or conduct of the employee, but shall not include voluntary resignations.

Transitional severance benefits include:

Benefits provided to eligible employees that are designed to lessen the impact of involuntary separation by providing some cash payments and continuing key benefits for a period of time. Severance benefits include:

- severance payments,
- continued state contribution toward health insurance premiums, and
- continued state contribution of life insurance premiums, OR
- **enhanced retirement option.** Employees who are eligible to retire may choose enhanced retirement (see above) in lieu of receiving other severance benefits. (Emphasis added).

An enhanced retirement is defined as:

A non-deferrable option for an eligible employee that adds the value of the employee's entire severance benefit (including severance payments and the value of the state's contribution to life and health insurance premiums) to the calculation of the retirement benefit. An employee may choose this option and retire instead of being placed on Leave Without Pay-Layoff.

Before providing severance benefits to an eligible employee, the agency must:

- ensure that the provisions of the [Layoff Policy No. 1.30](#) have been made available to eligible employees;
- determine eligibility of restricted and part-time employees to receive Severance Benefits; and
- provide information to employees explaining their options and access to appropriate benefits.

The decision to provide severance benefits must not be made on the basis of an employee's race, color, religion, gender, age, national origin, disability, or political affiliation.⁹

DHRM Policy 1.30. DHRM Policy 1.30, Layoff:

Permits agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force including change of positions from full-time to part-time status. The decision to implement layoff must be non-discriminatory and must comply with the provisions of [Policy 2.05, Equal Employment Opportunity](#). This policy should be used with [Policy 1.57, Severance Benefits](#).

Abolishing positions is defined as:

⁹ Grievant did not allege that the Agency made its decision based on a protected status.

Discontinuing a position due to agency needs based on funding or organizational changes. Classified employees in positions identified for abolishment will be considered for placement and layoff benefits according to the provisions of this policy.

Eligible employees for benefits are defined as:

All full-time classified employees. Full-time and part-time restricted employees and part-time classified employees are eligible for layoff benefits only if (a) the position held immediately prior to the position being discontinued was a full-time non-restricted classified position, and (b) there was no break in service between the full-time non-restricted classified position and the restricted or part-time position.

Traditional severance benefits under DHRM policy 1.30 are:

Benefits provided to eligible employees that are designed to lessen the impact of involuntary separation by providing some cash payments and continuing key benefits for a period of time. Severance benefits include:

- severance payments.
- continued state contribution toward health insurance premiums, and
- continued state contribution of life insurance premiums, OR
- **enhanced retirement option.** Full-time employees who are eligible to retire may choose enhanced retirement in lieu of receiving other benefits. (See [Policy 1.57, Severance Benefits](#)) (Emphasis added).

The Agency's placement options are:

During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees. After an agency has identified all employees eligible for placement, an attempt must be made to place them by seniority to any valid vacancies agency-wide in the current or a lower Pay Band. Such placement shall be in the highest position available for which the employee is *minimally qualified* at the same or lower level in the same or lower Pay Band, regardless of work hours or shift. Once such a position has been offered and declined by the employee, the agency has no obligation to consider additional placement options for the employee. Agencies should use the Compensable Factors to determine if positions are at the same or lower level.

An agency may choose an alternative employee when no placement option is available:

Alternative Employee Designation When No Placement Options Available

Agencies may choose to place on LWOP-Layoff employees who agree to accept layoff instead of those employees identified by the above process. Before this can occur agencies must:

1. determine that they want to use this option in implementing this policy;
2. notify other employees in the same work unit who are in the same Role performing substantially the same duties as those of the identified employee; and
3. ensure that these decisions support agency operational needs and are in compliance with the other provisions of this policy.
Eligible employees placed on LWOP-layoff will receive layoff benefits and severance benefits if applicable.

Under DHRM Policy 1.30 (without considering the change in 2009), a “work unit” is defined as:

Designation that an agency may use to define the scope of the layoff to organizational units smaller than the entire agency. The Work Unit designation may be by geographic area(s) or business unit(s) to be impacted. If such a designation is used by the agency, the designation must be made *prior to* implementing a layoff.

DHRM Policy 1.30 (without considering the Layoff Policy Exceptions of 2009) permits VDOT to choose an alternative employee for layoff if that employee agrees. The policy does not provide restrictions on the selection of the alternative employee except that the Agency must:

1. determine that they want to use this option in implementing this policy;
2. notify other employees in the same work unit who are in the same Role performing substantially the same duties as those of the identified employee; and
3. ensure that these decisions support agency operational needs and are in compliance with the other provisions of this policy.

DHRM Policy 1.30 (without considering the Layoff Policy Exceptions of 2009) grants agencies discretion regarding whether to choose alternative employees for layoff. The policy lacks sufficient specificity to support Grievant’s claim that the Agency was obligated to select him as the alternative employee instead of Mr. G. The Agency did not act contrary to DHRM Policy 1.30 (without considering Layoff Policy Exceptions of 2009) when it selected Mr. G as the substitute for Mr. S instead of selecting Grievant.

DHRM Policy 1.30 (without considering the Layoff Policy Exceptions of 2009) authorizes agencies to “to place them by seniority to any valid vacancies” Accordingly, DHRM Policy 1.30 authorized Mr. H to be placed in a vacant position without regard to Grievant’s claim as a substitute.

Layoff Policy Exceptions 2009. In 2009, DHRM issued Layoff Policy Exceptions to provide State agencies with more flexibility regarding DHRM Policy 1.30, Layoff. Layoff Policy Exceptions 2009 provides, in part:

Recognizing the magnitude of the impact that projected budget reductions may have on the state workforce, and in an effort to provide agencies with more flexibility regarding DHRM Policy 1.30 – Layoff, the following policy exceptions are available to all Executive Branch agencies effective immediately.

From Policy 1.30 – Layoff:

Before implementing a layoff, agencies must:

1. determine whether the entire agency or only certain designated work unit(s) are to be affected;
2. designate business functions to be eliminated or reassigned;
3. designate work unit(s) to be affected as appropriate;
4. review all vacant positions to identify valid vacancies that can be used as placement options during layoff, and
5. determine if they will offer the option that allows other employee(s) in the same work unit, Role, and performing substantially the same duties to request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff.

Once an agency has worked through the steps listed above, they then proceed with the identification and notification of impacted employees as follows:

1. Identify position(s)/duties to be eliminated using steps provided in the Layoff Policy.
2. Identify employees affected by the decision to reduce or reconfigure the work force using steps provided in this policy. Determine if placement options exist within the agency and make offer(s) to affected employee(s).

This may result in:

- placement in the same Pay Band;
- demotion in lieu of layoff; or
- separated-layoff.

3. If no placement option exists prior to layoff for employees identified by the layoff sequence, agencies may decide to notify other employees in the same work unit, geographic area, and Role, who are performing substantially similar job duties of the need to place an employee or employees on LWOP-layoff. Employees may then notify management of their interest in being considered for LWOP-layoff.

4. Management assesses the impact of placing specific employee(s) on LWOP-layoff and determines which employee(s) will be affected by that decision.

Available Exceptions to the above provisions of policy

During the steps noted above an agency may choose to implement the following exceptions to policy:

1. Expansion of the Substitution rules

a. Option 1 – ***Any organizational unit, geographic area, same pay band***

i. Employees identified for layoff must first be notified of their pending layoff before an agency may request substitutes.

ii. Substitutes **do not** need to be in the same work unit, geographic area, and role.

iii. The employee identified for layoff must be minimally qualified to perform the job duties of the substitute employee.

iv. Substitutes are not eligible for placement or recall rights.

v. Substitutes are eligible for severance benefits.

b. Option 2 - ***Any organizational unit, geographic area, same role***

i. Employees identified for layoff must first be notified of their pending layoff before an agency may request substitutes.

ii. Substitutes do not need to be in the same work unit, or geographic area, but must be in the same role.

iii. The employee identified for layoff must be minimally qualified to perform the job duties of the substitute employee.

iv. Substitutes are not eligible for placement or recall rights.

v. Substitutes are eligible for severance benefits.

Notes on the benefits of this exception:

- May provide placement options for employees who would otherwise be laid off.
- Permits those willing/able to leave the organization to do so.

- Provides greater workforce flexibility by allowing the placement of impacted employees in the same or different roles for which they are minimally qualified.

Under the Exceptions to Layoff Policy of 2009, substitutes may be granted severance benefits. Agencies, however, are given the authority to assess the impact of placing specific employees on LWOP-layoff and determining which employees including substitutes will be affected by that decision. The Exceptions to Layoff Policy of 2009 was intended to provide agencies with flexibility with substitution rules. It does not place restrictions on VDOT such that VDOT was obligated to select Grievant instead of Mr. G to substitute for Mr. S. In particular, the policy does not require VDOT to select Grievant as a substitute instead of Mr. G based on Grievant's seniority and the proximity of Residency H being within a 50 mile radius of Town V.

VDOT Guidance/Decision-making Documents

The Agency drafted several policy guidance documents to inform employees how it would implement DHRM layoff policy. These documents included: (1) VDOT Blueprint Implementation DHRM Policy Exceptions and Flexibilities, (2) Blueprint Organizational Restructuring Frequently Asked Questions, and (3) VDOT Quick Tips. These documents do not represent a separate VDOT policy that is independent of DHRM policy.

Blueprint Implementation. The VDOT Blueprint Implementation DHRM Policy Exceptions and Flexibilities document provides, in part:

Most Executive Branch agencies began implementing staffing reductions in Fall/Winter 2008/2009. None were as extensive as the changes planned in VDOT's Blueprint for our future. Treatment of state employees affected by a reorganization and reductions in work force are governed by the Department of Human Resource Management's (DHRM's) Layoff Policy, No. 1.30, and Severance Benefits Policy, No. 1.57.

Following is a list of exceptions and policy flexibilities that were approved by DHRM for VDOT's use. They are ordered to correspond with the sequence of events laid out in the Layoff Policy.

Work Unit Definition: Smallest recognizable subset within an organizational unit where...

1. Employees/positions perform same or very similar work
2. Similar occupation
3. Similar qualifications

Relocation Distance and Geographic Area Definition: Current commute or 50 miles from home to assigned work location, whichever is greater.

Seniority: Calculation based on total continuous salaried state service, starting from the last employment or re-employment date into a classified position.

Placement Preferences:

1. VDOT will invite affected employees to express interest in placement before the placement process begins.
2. Affected employees who do not submit preferences will be treated as if they requested internal placement (i.e., placement within VDOT).

Substitution Interest: VDOT developed a form/process for documenting an unaffected employees' interest in substituting for someone who is affected.

Substitution Criteria: Same as placement process (same pay band or lower, minimally qualified).

Placement Process: Placements are considered for all affected employees, in order of seniority. Once placement offers are extended and decisions made by employees, a second round of the placement process will begin for those 1) who declined because it required relocation or reduction in salary, or 2) for whom a placement could not be found initially.

Placement Order: Placement to vacant positions that are closest to an affected employee's current job will be explored before placement to positions held by substitutes. The placement search will be broadened incrementally, each time looking to vacant positions before positions filled by substitutes, until a placement can be found or until it is determined that no placement opportunity exists for that affect employee.

Substitute's Benefits: Approved substitutes are eligible for severance benefits only. Substitutes are not eligible for recall rights, preferential hiring, re-op pool or pre-layoff leave.

FAQs. The VDOT Blueprint Organizational Restructuring Frequently Asked Questions provides, in part:

2. Who made the decisions about how the agency should restructure?

[Agency Head] established Blueprint teams led by agency executives to make recommendations for restructuring and streamlining our organization. These teams assess the organizational structure and make recommendations for enhancing organizational efficiency and performance. Over the next several months, we will work to finalize the new organizational design, staffing structure and business processes.

15. How does my seniority factor into the layoff process?

Seniority is one of many factors that determines who will receive layoff notice. Other factors include the type of work performed, work unit, geographic area, roll, the type of position (i.e., whether wage or classified), the position's funding source, and whether the position is full-time or part-time.

47. Is the option to convert severance benefits to retirement age/service credit only available for employees whose positions are being eliminated? Can an employee get additional VRS age/service credit if they are approved to substitute for an affected employee whose position is being eliminated?

The state's Severance benefits policy is based on the Workforce Transition Act (WTA). The Severance Benefits policy defines conditions under which employees are eligible to receive benefits and converts the value of those benefits to additional retirement age/service credit. Severance benefits are available to employees who are directly affected by layoff (provided they do not decline a placement that does not require relocation or reduction in salary after requesting placement consideration), and to those who are approved as a substitute for someone who is directly affected by layoff.

There are no voluntary separation incentives. Employees who retire voluntarily, not associated with layoffs/substitution, are not eligible for severance benefits or to convert the value of severance benefits to additional retirement age/service credit.

66. If an employee identified for layoff is offered placement to a position outside her normal work location, what are the defined parameters used to

determine if the offer would be considered as requiring relocation (i.e., mileage, time, base location, etc.)?

The definition that will be used by the agency, for the purposes of layoff and severance eligibility, in determining whether or not relocation is required will be the distance of the employee's current commute to work or 50 miles, whichever is greater. In other words, if the employee will have to travel 50 miles or more from home to get to the new position, the new position will be considered as requiring relocation, unless the employee already commutes more than 50 miles to work one-way. In that case, the distance of the current commute, e.g., 60 miles, is the boundary for determining whether the new position would require relocation.

71. Who will make the decision regarding the definition of a "work unit"?

The decision regarding definition of work units will be made by the Blueprint Implementation Teams. Leaders from across the agency will participate in this process. This process will be completed before the affected positions are determined. Notably, "work unit" is only one of several factors in the layoff sequence that determines who will be affected. Other factors include the position type (wage or classifieds/salaried), whether the position's funding is restricted, geographic area, state Role title, and work performed.

83. How does substitution work?

Non-affected employees, who are interested in substituting for an employee affected by layoff, are required to submit a request into the Transitional Tool. A central placement team will review all substitution requests, along with valid vacancies, to determine potential placement matches. In order to qualify for placement into a vacant or into a substitution's position, an affected employee must meet the minimum qualifications for the potential placement. If a match is made to a substitution candidate's position, the substitute will receive notice of layoff and the affected employee will assume the substitute's position the day after the substitute separates (effective April 25, 2010).

Substitutes cannot identify which individuals for whom they want to substitute. Placements are determined based on the qualifications of the affected employee and factors in how closely each potential placement matches the affected staff's current job, commuting distance, and placement preferences.

106. Where can employees find answers to questions that are not covered in this handout?

Employees are encouraged to raise questions to their managers or contact Human Resources directly. In addition “Frequently Asked Questions” documents will be provided in layoff notice and substitute approval packages, pertaining directly to the circumstances at that time.

107. Who can employees talk with if help is needed?

Affected employees will be provided a list of resources in the initial and final notice packages. They include contacts in Human Resources and Civil Rights.

Quick Tips. The VDOT Quick Tips regarding Substitution provides, in part:

SUBSTITUTION RULES

- The consideration of substitutes for employees affected by layoffs is part of the placement process
- Substitution requests will be entered in by the interested employee through People Transitions Tracking Tool and managed by the HR Division
- A central review team will attempt to find the best match possible that doesn't require relocation or reduction in salary. If none exist, the next best alternative will be explored
- If an affected employee requests placement then declines the opportunity to take the job of a substitute (in the same pay band or lower), and the match does not require relocation or a reduction in pay, no other substitute matches will be sought and the employee forfeits the right to layoff rights and severance benefits
- Once an affected employee accepts the match, even if it requires relocation or reduction in salary, the match is considered final and the affected employee will not be considered for any other placements to vacant or substitutes' positions
- If an affected employee is matched to a substitute, the affected employee will begin performing the substitute's job the day after the substitute leaves.

Order of consideration of matches:

- Affected employees in a particular stage who wish to remain employed with VDOT are ordered by seniority, statewide, on one consolidated list
- The central review team evaluates matches in order of most senior affected first
- Potential matches begin with the placement that most closely matches the job of the affected (same work unit, geography, role, substantially the same work – DHRM rules)
- The best match would be a position that does substantially the same thing in the same place, in the same role, at the same pay rate as the affected employee. This would require the least amount of adjustment for the affected employee, and it would require the least investment and retraining by the agency
- If vacant positions meeting these criteria are not available, a match to a substitute that meets these criteria will be sought
- The next closest match would be a job in another work unit doing the same thing at the same rate of pay
- As the match process continues, the search for vacant or substitute positions would be broadened until a match could be found or until the search was exhausted
- If a placement in the same role was not available, jobs and other roles (in the same or lower pay band) would be considered
- If the search had to be broadened to the point of considering placements to jobs that require relocation or reduction in salary, the affected employee's preferences would be considered
- If there is more than one ideal match and at least one is a vacant position, the placement would be made to the vacant position
- If the placement decision comes down to more than one substitute candidate who meets the same criteria, the match will be made with the most senior substitute candidate
- Business needs are a first and primary consideration in all substitute decisions

SUBSTITUTION CONSIDERATIONS:

- VDOT will strive to communicate to affected employees who are considering placement in a substitute's position about the potential for future organizational changes that could result in a layoff in substitute's position
- The affected employee must be minimally qualified to perform a substitute's job to be placed into it
- In addition to minimum qualifications, the Central review team will consider the affected employee's ability to meet the working conditions of the substitute's position

- The determination of “minimally qualified” for placement or substitution will be based on a comparison of the qualifications information that the affected employee has provided (application and resume), against the job requirements defined in the Employee Work Profile (EWP) for the substitute’s job
- All substitution requests are subject to review and approval based on critical business needs. As such, some requests may not be approved

Grievant argues that the Quick Tips requires the Agency to select him as a substitute instead of selecting Mr. G. He argues that his position most closely matched the position of Mr. S because it was in the same geography, role, and performing the same work. He argues that his position is the best match because he performed substantially the same thing as Mr. S, in the same role and at the same pay rate as the affected employee. He argues that selecting him as a substitute would require the least amount of adjustment for the affected employee, Mr. S, and it would require the least investment in retraining by the agency. He argues that even if the Agency considers different residencies as different “work units” his position also would be the next closest match. Grievant relies on the language in the Quick Tips which states:

If the placement decision comes down to more than one substitute candidate who meets the same criteria, the match will be made with the most senior substitute candidate.

Grievant argues that the placement decision came down to Grievant and Mr. G. Grievant and Mr. G held the same position in different residencies. Both met the geographic criteria which the Agency defined as being within 50 miles of Town V. There is no dispute that Grievant had seniority over Mr. G. Because Grievant had seniority over Mr. G, the Agency was obligated to select him as a substitute for Mr. S, according to Grievant.

If the Hearing Officer considers only the portions of the Quick Tips relied upon by Grievant, Grievant’s argument has merit. The difficulty with Grievant’s argument is that this language cannot be read alone. It must be read in context. That context includes the discretion given to the Agency under DHRM policy. For example, DHRM Policy 1.30 was amended in 2009 “in an effort to provide agencies with more flexibility regarding DHRM Policy 1.30 – Layoff.” That flexibility is for the purpose of “allowing the placement of impacted employees in the same or different roles for which they are minimally qualified.” Context also include statements in the Quick Tips such as “Business needs are a first and primary consideration in all substitution decisions”. The Quick Tips also states, “All substitution requests are subject to review and approval based on critical business needs. As such, some requests may not be approved.”¹⁰ Minimizing an employee’s commute was a primary consideration by the Agency in

¹⁰ In addition, Grievant’s Substitute Request stated, “Submission of this form is not a guarantee that I will be able to substitute for another employee who will be laid off.”

selecting Mr. G as the substitute. The Agency had discretion to assign greater significance to its business needs than to the seniority of potential substitutes.

Grievant argues that he should have been given the opportunity to serve as a substitute for Mr. H instead of the Agency's decision to place Mr. H in the Planning and Investment Management Position in District L. The evidence showed that the Agency followed a process with several steps. The first step was to place employees in vacant positions. The second step was to find substitutes for employees who could not be placed in vacant positions. Once Mr. H was placed in the vacant PIM position, it was not necessary for the Agency to address whether a substitute existed for Mr. H.

In conclusion, the Agency had the discretion to select Mr. G as the substitute for Mr. S instead of selecting Grievant. Grievant has not established that the Agency's decision was contrary to the Workforce Transition Act of 1995. Grievant has not established that the Agency's decision was contrary to DHRM policy. Grievant has not established that the Agency's guidance/decision-making documents created an independent VDOT policy¹¹ granting him the right to receive enhanced retirement benefits. Grievant's request for relief regarding the Agency's failure to select him as a substitute for Mr. S must be denied.

The Agency was authorized by State policy to place Mr. H in a vacant position. Only if placing Mr. H in a vacant position was not feasible, would the issue of finding a substitute for Mr. H become actionable. Because the Agency found a vacant position for Mr. H, it was not necessary for the Agency to address whether Grievant should be selected as a substitute for Mr. H. Grievant's request for relief regarding the Agency's failure to select him as a substitute for Mr. H must be denied.

DECISION

For the reasons stated herein, the Grievant's request for relief is **denied**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

¹¹ It would be an unusual practice for a State agency, including VDOT, to create an agency policy using "quick tips" and "Frequently Asked Questions". When State agencies create policies they typically identify the documents as policies.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9489-R

Reconsideration Decision Issued: July 5, 2011

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant seeks reconsideration and restates the arguments he made during the hearing. In addition, Grievant refers to the Agency’s guidance documents as “published rules”. The Agency’s guidance documents are not “published” in the sense that Agency regulations might be published in the Register of Regulations. The Agency’s guidance documents are not “rules” that are binding on Agency managers without regard to the discretion of Agency managers. Grievant argued that any “short commute should not be considered a business need of the agency”. The Agency has discretion to determine what factors are within the Agency’s business need. The Hearing Officer is not free to substitute his opinion regarding what the Agency should and should not consider as its business needs.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Transportation

July 26, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9489. The grievant is challenging the decision because he believes the hearing decision is inconsistent with several policies. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.*

In his **PROCEDURAL HISTORY**, the hearing officer wrote, in part, the following:

On March 25, 2010, Grievant filed a grievance challenging the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The appeal was qualified for hearing by the Circuit Court on November 29, 2010. On January 18, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On February 24, 2011, a hearing was held at the Agency's office.

In his **FINDINGS OF FACT**, the hearing officer wrote, in part, the following:

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employed Grievant as a Residency Maintenance Manager (formerly known as a Residency Administrator) until he retired in January 2011. He had been employed by the Agency for approximately 42 years. He was the longest-serving Resident Maintenance Manager in Virginia prior to his retirement.

* Footnotes contained in the original hearing decision are not included in this DHRM ruling.

In 2008, the Agency decided to make permanent long-term business changes to ensure that the agency remained viable in the future. Agency managers developed a "Blueprint for Our Future" to address the demands of the following two years and position the agency to deal with "economic realities" projected for the following six years. The Blueprint had three major components: (1) restructuring the Agency's construction program, (2) restructuring the Agency's services and customer programs, and (3) reshaping the Agency's organization and streamlining staffing.

The Agency has offices located throughout the State referred to as Residencies. As part of the restructuring, the Agency decided to eliminate more than 30% of its Residencies. The Agency recognized that eliminating so many Residencies would result in a significant number of employee layoffs. Agency managers met with staff of the Department of Human Resource Management to discuss the Agency's implementation of the DHRM Policy 1.30 governing layoffs. DHRM granted the Agency flexibility to implement DHRM Policy 1.30. The Agency decided to use substitution rules within DHRM Policy 1.30 to create placement options for employees given notice of layoff. The Agency's objective was to create more placement options for affected employees who wished to remain employed with the Agency. For example, the Agency intended to solicit substitutes beyond just the affected workgroups.

In an email to VDOT employees dated July 16, 2009, the Agency Head wrote:

Substitution - With large numbers of VDOT employees approaching retirement, a number of employees who are eligible for retirement may choose to exit under Workforce Transition Act enhanced retirement benefits if given the opportunity. With expanded flexibility for substitution, we will generate employment opportunities for many affected employees who wish to remain at VDOT while creating options for those wishing to retire or to otherwise leave the agency for personal reasons.

Here's how substitution works: After affected employees had been given notification, non-affected employees who are eligible for retirement or wish to leave the agency can submit a request within a limited time frame. A review team will evaluate vacancies first and then substitution request to determine a potential placement match for each affected employee who requested placement. The affected employee who originally received a layoff notification must meet the minimum qualifications for the potential placement opportunity. If a substitute match is appropriate, the substitute receives notification of layoff and the affected employee assumes the substitute's position.

In an email dated August 3, 2009, the Agency Head informed employees that:

Affected employees have until August 11 to submit their request for placement or not. Unaffected employees have until August 14 to submit a substitution interest form if they find that the severance benefits offered to substitutes may be beneficial. A substitute must be willing to give up their employment for an employee

who received the initial notice of layoff, has similar job skills, and wants placement at VDOT. Matched substitutes will receive the same severance benefits as those who receive notice of layoff with the exception of recall rights and preferential treatment in a hire for a state position.

Prior to the layoff, the Agency defined the work unit to the Residency.

A Residency Maintenance Manager is the individual in charge of operations at a Residency. Grievant was in charge of Residency H. Mr. G. was in charge of Residency SH. Mr. S was in charge of Residency A. They were all Residency Maintenance Managers performing the same job but in different locations. Their positions were in the same Pay Band. Mr. S was minimally qualified to perform the job duties of Mr. G and Grievant. Grievant had more seniority than did Mr. G.

The Agency decided to close Residency A and layoff all of the employees working there including Mr. S. Mr. S was an "affected" employee. Mr. S decided that he did not wish to leave the Agency and asked the Agency placed him in another position.

Mr. S's residence was located in Town V. He drove approximately 35 miles from his residence in Town V to County A to work in his office at the Agency's Residency A.

Residency H is within a 50 mile radius of Town V. If Mr. S drove from his residence in Town V to Residency H he would travel approximately 48 miles. Residency SH is within a 50 mile radius of Town V. If Mr. S drove from his residence in Town V to Residency SH, he would travel approximately 30 miles. If Mr. S began working at Residency SH instead of Residency A, his daily morning commute from his home to his office would be reduced by approximately 5 miles. If Mr. S began working at Residency **H**, his daily morning commute from his home to his office would increase by approximately 12 miles.

On January 11, 2010, Grievant submitted a Substitute Request to the Agency. He intended to be considered as a substitute for another Agency employee who had been identified for layoff. He made the following certification:

My invitation below is my understanding of the following:

- Submission of this form is not a guarantee that I will be able to substitute for another employee who will be laid *off*.
- If I am selected to substitute for someone else being laid *off*, my last work day will be determined by the agency. I will receive notification of that day, if I have been approved to substitute.
- The Department of Human Resources Management (DHRM) policy 1.57, Severance Benefits, explains eligibility for and the value of severance benefits.
- To revoke this expression of interest I must keep my withdrawal into the Blueprint Transition system by the deadline published.

- I will have a very limited opportunity to withdrawal my submission in the current Blueprint stage. The specific withdrawal period for this stage is documented in communication published about the substitution option. After that limited withdrawal period I may only withdraw my submission after the end of the current Blueprint stage and before the beginning of the next day; or during a subsequent stage's open submission period, to be published at a later date.
- This expression of interest will become void if my position is identified for elimination.
- Any work visa I have through VDOT could be impacted and I could lose my eligibility to remain in the United States, if my application is approved.
- Any learning partnership agreements I entered into become null and void upon my scheduled separation, if I am approved as a substitute. I may retain any funds paid to me prior to my date of separation.
- If I am laid-off, my responsibilities for repayment under a tenure agreement will be waived upon my layoff date.
 - I will remain responsible for the paying a debt I owe to the Commonwealth (e.g., salary overpayment, leave overpayment) even if I am laid off.
 - If I leave the agency voluntarily before an affected employee is scheduled to assume my current position, any written agreements will be enforced.
 - Any approval to substitute I receive will be withdrawn if the affected employee scheduled to assume my position becomes unavailable to do so, due to voluntary or involuntary separation before the reassignment is to become effective.

Grievant was not an "affected" employee because he was not an employee who was being laid off by the Agency.

Members of the Agency's Placement Team looked for vacant positions available to Mr. S within a 50 mile radius of Town V. They found no vacant position in Mr. S's Pay Band for which he was minimally qualified. Once the Placement Team determined that there were no vacant positions available to Mr. S, they considered whether substitution would be appropriate.

The Agency chose Mr. G as the substitute for Mr. S instead of choosing Grievant. The Placement Team found 71 possible substitutes across the state. One substitute was in County W. The Placement Team excluded the possible substitute in County W because County W was more than 50 miles from Town V

The Placement Team considered seniority as being relevant only if one or more substitutes worked in the same Residency. For example, if two potential substitutes worked in the same Residency, the Agency would select as the substitute the employee in that Residency with the most seniority. The Placement Team did not compare Grievant's seniority with Mr. G's seniority because they worked in different Residencies. Only if Grievant and Mr. G had worked at Residency SH would the Agency have selected Grievant as the substitute because of his seniority.

The Agency chose Mr. G as a substitute because Mr. G worked at Residency SH and Residency SH was closer to the Town where Mr. S lived. The Agency

believed that it would be best for the Agency and for Mr. S to have a shorter commute to Residency SH than a longer commute to Residency H. The Agency did not consult with Mr. S regarding his preference of working at Residency SH or Residency H. If Mr. S. had preferred to work at Residency H and the Agency had learned of that preference, the Agency would likely have disregarded Mr. S's preference and placed him in Residency SH because the commute from Mr. S's home to Residency SH was shorter than his commute to Residency H. The Agency disregarded the fact that Grievant had more seniority than did Mr. G and that Residency H where Grievant work was within a 50 mile radius of Town V.

If the Agency had chosen Grievant instead of Mr. G to serve as a substitute for Mr. S, Grievant would have been eligible to receive an enhanced retirement benefit that would have increased his monthly retirement benefit by over \$600 for the remainder of his life.

As part of the reorganization, the Agency created a Planning and Investment Management (PIM) position in District L. Mr. H worked as a Residency Maintenance Manager at Residency C located in County P. The Agency decided to close Residency C. Mr. H wished to remain with the Agency and sought placement. He informed the Agency that he was willing to relocate to another area of the State. Mr. H was minimally qualified for the vacant PIM position but taking the position would have increased Mr. H's commute to 56 miles. Because the commute exceeded 50 miles, the Agency did not insist that Mr. H accept the vacant position. Only because Mr. H was willing to relocate to District L did the Agency decide to place them in the vacant PIM position. If Mr. H had rejected the option of being placed in a position outside of a 50 mile radius of his home, the Agency would have attempted to find a substitute for Mr. H. Because Residency H was within a 50 mile radius of Mr. H's home, Grievant would have been considered as a possible substitute for Mr. H.

CONCLUSIONS OF POLICY

Grievant argues that because of his seniority and because Residency H was within a 50 mile radius of Town V, the Agency should have selected Mr. S to begin working at Residency H instead of Residency SH. If the Agency had done so, Grievant would have been given the option to receive an enhance retirement benefit. If Grievant had received an enhanced retirement benefit when he retired, his monthly income would have increased by approximately \$600.

An increase in income of approximately \$600 per month is not *de minimus*. In Grievant's case, it amounts to approximately a 10% increase in retirement income. If the Agency incorrectly were to deny Grievant a 10% increase in income, that denial would constitute an adverse employment action.

The Agency argues that it had the sole discretion to determine where to assign Mr. S. The Agency argues that the Agency's substitution method was not established for the purpose of assisting Grievant, but rather was established for the purpose of

assisting employees like Mr. S. Grievant's seniority was not relevant because Grievant was not an "affected employee" under the layoff, according to the Agency.

The material facts of this case are not in dispute. This is not a case in which the Agency is interpreting facts one way and the Grievant is interpreting facts another way.

Degree of Agency Discretion

The outcome of this case depends upon the degree of discretion possessed by the Agency when making its decision. A degree of discretion possessed by a State agency depends on the source of the rule being applied by the Agency. For example, when a State agency applies a Virginia statute, the agency typically has little or no discretion to vary from the words and meaning of the statute. When a State agency applies a DHRM policy, the agency has the discretion expressly granted by DHRM to the Agency. To the extent DHRM policy does not expressly grant discretion to an agency, the State agency has some discretion to apply the terms of the DHRM policy to the unique aspects of the agency so long as the agency's application is consistent with DHRM policy." When a State agency applies internal procedures, the agency has wide discretion to apply the procedures so long as the application does not violate DHRM policy or a controlling regulation or statute.

There are three sources of rules governing the Agency's decision-making with respect to Grievant and his entitlement to an enhanced retirement benefit: (1) the Workforce Transition Act of 1995, (2) DHRM Policy 1.30 (including a modification in 2009) and DHRM Policy 1.57, and (3) VDOT Blueprint implementation documents.

Workforce Transition Act of 1995

The Workforce Transition Act of 1995 authorized State agencies to give severance benefits to certain employees. The purpose of the Workforce Transition Act of 1995 is:

to provide a transitional severance benefit, under the conditions specified, to eligible state employees who are involuntarily separated from their employment with the Commonwealth. "Involuntary separation" includes, but is not limited to, terminations and layoffs from employment with the Commonwealth, or being placed on leave without pay-layoff or equivalent status, due to budget reductions, agency reorganizations, workforce downsizings, or other causes not related to the job performance or misconduct of the employee, but shall not include voluntary resignations. As used in this chapter, a "terminated employee" shall mean an employee who is involuntarily separated from employment with the Commonwealth. Va. Code § 2.2-3201 provides, in part:

A. Prior to terminating or placing on leave without pay-layoff or equivalent status

any employee of an agency or institution in the executive branch of state government, the management of the agency or institution shall make every effort to place the employee in any vacant position within the agency for which the employee is qualified. If reemployment within the agency or institution is not possible because there is no available position for which the employee is qualified or the position offered to the employee requires relocation or a reduction in salary, the name of the employee shall be forwarded to the Department of Human Resource Management (the "Department").

B. Any preferential employment rights vested in the employee under the Commonwealth's layoff policy shall not be denied, abridged, or modified in any way by the Department. The Department shall coordinate the preferential hiring of the employee, at the same salary classification, in any agency or institution of the executive branch of state government. The Department shall also establish a program to assist employees in finding employment outside of state government.

Va. Code § 2.2-3202 provides, in part:

A. Any full-time employee of the Commonwealth (i) whose position is covered by the Virginia Personnel Act (§ et seq.), *** and (a) for whom reemployment with the Commonwealth is not possible because there is no available position for which the employee is qualified or the position offered to the employee requires relocation or a reduction in salary and (b) whose involuntary separation was due to causes other than job performance or misconduct, shall be eligible, under the conditions specified, for the transitional severance benefit conferred by this chapter. The date of involuntary separation shall mean the date an employee was terminated from employment or placed on leave without pay-layoff or equivalent status.

D. Eligibility shall commence on the date of involuntary separation.

Va. Code § 2.2-3203 confers a transitional severance benefit to certain eligible employees. For example, an eligible employee with "fifteen years or more of consecutive service to the Commonwealth shall be entitled to receive a transitional severance benefit equivalent to two weeks of salary for every year of service, not to exceed thirty-six weeks of salary." Va. Code § 2.2-3204 creates a retirement program on the date of involuntary separation in lieu of receiving transitional severance benefits as follows:

A. In lieu of the transitional severance benefit provided in §2.2-3203, any otherwise eligible employee who, on the date of involuntary separation, is also

(i) a vested member of the Virginia Retirement System, the State Police Officers' Retirement System, or the Virginia Law Officers' Retirement System and (ii) at least fifty years of age, may elect to have the Commonwealth purchase on his behalf years to be credited to either his age or creditable service or a combination of age and creditable service, except that any years of credit purchased on behalf of a member of the Virginia Retirement System, the State Police Officers' Retirement System, or the Virginia Law Officers' Retirement System who is eligible for unreduced retirement shall be added to his creditable service and not his age. The cost of each year of age or creditable service purchased by the Commonwealth shall be equal to fifteen percent of the employee's present annual compensation. The number of years of age or creditable service to be purchased by the Commonwealth shall be equal to the quotient obtained by dividing (i) the cash value of the benefits to which the employee would be entitled under subsections A and D of §2.2-3203 by (ii) the cost of each year of age or creditable service. Partial years shall be rounded up to the next highest year. Deferred retirement under the provisions of subsection C of §§ 51.1-205, and 51.1-216, and disability retirement under the provisions of § 51.1-156 et seq. and § 51.1- shall not be available under this section.

- B. The retirement allowance for any employee electing to retire under this section who, by adding years to his age, is between ages fifty-five and sixty-five, shall be reduced on the actuarial basis provided in subdivision A. 2. of § 51.1-155.

The Workforce Transition Act of 1995 does not create any right for Grievant regarding being treated as a substitute and receiving an enhanced retirement benefit. Grievant was not "involuntarily separated". The Workforce Transition Act of 1995 addresses employees who have been "involuntarily separated." The Agency's decision to reject Grievant as a substitute for Mr. S was not contrary to the Workforce Transition Act of 1995. The Agency's decision to place Mr. H in a vacant position is consistent with Va. Code § 2.2-3201 which states, "the management of the agency or institution shall make every effort to place the employee in any vacant position within the agency for which the employee is qualified."

DHRM Policy 1.30 and DHRM Policy 1.57

The Department of Human Resource Management is:

The State agency authorized to develop and interpret human resource policies in accordance with Title 2.2, Chapter 12 of the Code of Virginia.

The Director of the Department of Human Resource Management is responsible

for the official interpretation of this policy, in accordance with Va. Code § 2.2-1201. The Department of Human Resource Management issued DHRM Policy 1.30 governing Layoff and then amended that policy in 2009 to establish certain Exceptions. An employee who is laid off under DHRM Policy 1.30 may be entitled to severance benefits under DHRM Policy 1.57.

DHRM Policy 1.57. DHRM Policy 1.57, Severance Benefits, provides, in part:

The following employees are eligible to receive severance benefits:

- All full-time classified employees who are involuntarily separated as defined in this policy.

Involuntary separation is defined by DHRM Policy 1.57 as:

Layoff due to budget reductions, agency reorganization, work force downsizing, or other causes not related to the job performance or conduct of the employee, but shall not include voluntary resignations.

Transitional severance benefits include:

- Benefits provided to eligible employees that are designed to lessen the impact of involuntary separation by providing some cash payments and continuing key benefits for a period of time. Severance benefits include:
 - severance payments,
 - continued state contribution toward health insurance premiums, and
 - continued state contribution of life insurance premiums, OR
 - **enhanced retirement option.** Employees who are eligible to retire may choose enhanced retirement (see above) in lieu of receiving other severance benefits. (Emphasis added).

An enhanced retirement is defined as:

A non-deferrable option for an eligible employee that adds the value of the employee's entire severance benefit (including severance payments and the value of the state's contribution to life and health insurance premiums) to the calculation of the retirement benefit. An employee may choose this option and retire instead of being placed on Leave Without Pay-Layoff.

Before providing severance benefits to an eligible employee, the agency must:

- ensure that the provisions of the Layoff Policy No. 1.30 have been made available to eligible employees;
- determine eligibility of restricted and part-time employees to receive Severance Benefits; and
- provide information to employees explaining their options and access to appropriate benefits.

The decision to provide severance benefits must not be made on the basis of an employee's race, color, religion, gender, age, national origin, disability, or political affiliation."

DHRM Policy 1.30. DHRM Policy 1.30, Layoff:

Permits agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force including change of positions from the decision to implement layoff must be non-discriminatory and must comply with the provisions of Policy 2.05, Equal Employment Opportunity. This policy should be used with Policy 1.57, Severance Benefits.

Abolishing positions is defined as:

Discontinuing a position due to agency needs based on funding or organizational changes. Classified employees in positions identified for abolishment will be considered for placement and layoff benefits according to the provisions of this policy.

Eligible employees for benefits are defined as:

All full-time classified employees. Full-time and part-time restricted employees and part-time classified employees are eligible for layoff benefits only if (a) the position held immediately prior to the position being discontinued was a full-time non-restricted classified position, and (b) there was no break in service between the full-time non-restricted classified position and the restricted or part-time position.

Traditional severance benefits under DHRM policy 1.30 are:

Benefits provided to eligible employees that are designed to lessen the impact of involuntary separation by providing some cash payments and continuing key benefits for a period of time. Severance benefits include:

- severance payments.
- continued state contribution toward health insurance premiums, and
- continued state contribution of life insurance premiums, OR
- **enhanced retirement option.** Full-time employees who are eligible to retire may choose enhanced retirement in lieu of receiving other benefits. (See Policy 1.57, Severance Benefits) (Emphasis added).

The Agency's placement options are:

During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees. After an agency has identified all employees eligible for placement, an attempt must be made to place them by seniority to any valid vacancies agency-wide in the current or a lower Pay Band. Such placement shall be in the highest position available for which the employee is *minimally qualified* at the same or lower level in the same or lower Pay Band,

regardless of work hours or shift. Once such a position has been offered and declined by the employee, the agency has no obligation to consider additional placement options for the employee. Agencies should use the Compensable Factors to determine if positions are at the same or lower level.

An agency may choose an alternative employee when no placement option is available:

Alternative Employee Designation When No Placement Options Available

Agencies may choose to place on LWOP-Layoff employees who agree to accept layoff instead of those employees identified by the above process. Before this can occur agencies must:

1. determine that they want to use this option in implementing this policy;
2. notify other employees in the same work unit who are in the same Role performing substantially the same duties as those of the identified employee; and
3. ensure that these decisions support agency operational needs and are in compliance with the other provisions of this policy.

Eligible employees placed on LWOP-layoff will receive layoff benefits and severance benefits if applicable.

Under DHRM Policy 1.30 (without considering the change in 2009), a "work unit" is defined as:

Designation that an agency may use to define the scope of the layoff to organizational units smaller than the entire agency. The Work Unit designation may be by geographic area(s) or business unit(s) to be impacted. If such a designation is used by the agency, the designation must be made *prior to* implementing a layoff.

DHRM Policy 1.30 (without considering the Layoff Policy Exceptions of 2009) permits VDOT to choose an alternative employee for layoff if that employee agrees. The policy does not provide restrictions on the selection of the alternative employee except that the Agency must:

1. determine that they want to use this option in implementing this policy;
2. notify other employees in the same work unit who are in the same Role performing substantially the same duties as those of the identified employee; and
3. ensure that these decisions support agency operational needs and are in compliance with the other provisions of this policy.

DHRM Policy 1.30 (without considering the Layoff Policy Exceptions of 2009) grants agencies discretion regarding whether to choose alternative employees for layoff. The policy lacks sufficient specificity to support Grievant's claim that the Agency was obligated to select him as the alternative employee instead of Mr. G. The Agency did not act contrary to DHRM Policy 1.30 (without considering Layoff Policy Exceptions of 2009) when it selected Mr. G as the substitute for Mr. S instead of selecting Grievant.

DHRM Policy 1.30 (without considering the Layoff Policy Exceptions of 2009) authorizes agencies to "to place them by seniority to any valid vacancies " Accordingly, DHRM Policy 1.30 authorized Mr. H to be placed in a vacant position without regard to Grievant's claim as a substitute.

Layoff Policy Exceptions 2009. In 2009, DHRM issued Layoff Policy Exceptions to provide State agencies more flexibility regarding DHRM Policy 1.30, Layoff. Layoff Policy Exceptions 2009 provides, in part:

Recognizing the magnitude of the impact that projected budget reduction may have on the state workforce, and in an effort to provide agencies with more flexibility regarding DHRM Policy 1.30 – Layoff, the following policy exceptions are available to all Executive Branch agencies effective immediately.

From Policy 1.30 – Layoff

Before implementing a layoff, agencies must:

1. determine whether the entire agency or only certain designated work unit(s) are to be affected;
2. designate business functions to be eliminated or reassigned;
3. designate work unit(s) to be affected as appropriate;
4. review all vacant positions to identify valid vacancies that can be used as placement options during layoff, and
5. determine if they will offer the option that allows other employee(s) in the same work unit, Role, and performing substantially the same duties to request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff.

Once an agency has worked through the steps listed above, they then proceed with the identification and notification of impacted employees as follows:

1. Identify position(s)/duties to be eliminated using steps provided in the Layoff Policy.
2. Identify employees affected by the decision to reduce or reconfigure the work force using steps provided in this policy. Determine if placement options exist within the agency and make offer(s) to affected employee(s).

This may result in:

- placement in the same Pay Band;
 - demotion in lieu of layoff; or
 - separated-layoff.
3. If no placement option exists prior to layoff for employees identified by the layoff sequence, agencies may decide to notify other employees in the same work unit, geographic area, and Role, who are performing substantially similar job duties of

the need to place an employee or employees on LWOP-layoff. Employees may then notify management of their interest in being considered for LWOP-layoff.

4. Management assesses the impact of placing specific employee(s) on LWOP-layoff and determines which employee(s) will be affected by that decision.

Available Exceptions to the above provisions of policy

During the steps noted above an agency may choose to implement the following exceptions to policy:

1. Expansion of the Substitution rules

- a. Option 1 - ***Any organizational unit, geographic area, same pay band***

- i. Employees identified for layoff must first be notified of their pending layoff before an agency may request substitutes.
- ii. Substitutes **do not** need to be in the same work unit, geographic area, and role.
- iii. The employee identified for layoff must be minimally qualified to perform the job duties of the substitute employee.
- iv. Substitutes are not eligible for placement or recall rights.
- v. Substitutes are eligible for severance benefits.

- b. Option 2 - ***Any organizational unit, geographic area, same role***

- i. Employees identified for layoff must first be notified of their pending layoff before an agency may request substitutes.
- ii. Substitutes do not need to be in the same work unit, or geographic area, but must be in the same role.
- iii. The employee identified for layoff must be minimally qualified to perform the job duties of the substitute employee.
- iv. Substitutes are not eligible for placement or recall rights.
- v. Substitutes are eligible for severance benefits.

Notes on the benefits of this exception:

- May provide placement options for employees who would otherwise be laid off.
- Permits those willing/able to leave the organization to do so.
- Provides greater workforce flexibility by allowing the placement of impacted employees in the same or different roles for which they are minimally qualified

Under the Exceptions to Layoff Policy of 2009, substitutes may be granted severance benefits. Agencies, however, are given the authority to assess the impact of placing specific employees on LWOP-layoff and determining which employees including substitutes will be affected by that decision. The Exceptions to Layoff Policy of 2009 was intended to provide agencies with flexibility with substitution rules. It does not place restrictions on VDOT such that VDOT was obligated to select Grievant instead of Mr. G to substitute for Mr. S. In particular, the policy does not require VDOT

to select Grievant as a substitute instead of Mr. G based on Grievant's seniority and the proximity of Residency H being within a 50 mile radius of Town V.

VDOT Guidance/Decision-making Documents

The Agency drafted several policy guidance documents to inform employees how it would implement DHRM layoff policy. These documents included: (1) VDOT Blueprint Implementation DHRM Policy Exceptions and Flexibilities, (2) Blueprint Organizational Restructuring Frequently Asked Questions, and (3) VDOT Quick Tips. These documents do not represent a separate VDOT policy that is independent of DHRM policy.

Blueprint Implementation. The VDOT Blueprint Implementation DHRM Policy Exceptions and Flexibilities document provides, in part:

Most Executive Branch agencies began implementing staffing reductions in Fall/Winter 2008/2009. None were as extensive as the changes planned in VDOT's Blueprint for our future. Treatment of state employees affected by a reorganization and reductions in work force are governed by the Department of Human Resource Management's (DHRM's) Layoff Policy, No. 1.30, and Severance Benefits Policy, No. 1.57.

Following is a list of exceptions and policy flexibilities that were approved by DHRM for VDOT's use. They are ordered to correspond with the sequence of events laid out in the Layoff Policy.

Work Unit Definition: Smallest recognizable subset within an organizational unit where:

1. Employees/positions perform same or very similar work
2. Similar occupation
3. Similar qualifications

Relocation Distance and Geographic Area Definition: Current commute or 50 miles from home to assigned work location, whichever is greater.

Seniority: Calculation based on total continuous salaried state service, starting from the last employment or re-employment date into a classified position.

Placement Preferences:

1. VDOT will invite affected employees to express interest in placement before the placement process begins.
2. Affected employees who do not submit preferences will be treated as if they requested internal placement (i.e., placement within VDOT).

Substitution Interest: VDOT developed a form/process for documenting an

unaffected employees' interest in substituting for someone who is affected.

Substitution Criteria: Same as placement process (same pay band or lower, minimally qualified).

Placement Process: Placements are considered for all affected employees, in order of seniority. Once placement offers are extended and decisions made by employees, a second round of the placement process will begin for those 1) who declined because it required relocation or reduction in salary, or 2) for whom a placement could not be found initially.

Placement Order: Placement to vacant positions that are closest to an affected employee's current job will be explored before placement to positions held by substitutes. The placement search will be broadened incrementally, each time looking to vacant positions before positions filled by substitutes, until a placement can be found or until it is determined that no placement opportunity exists for that affect employee.

Substitute's Benefits: Approved substitutes are eligible for severance benefits only. Substitutes are not eligible for recall rights, preferential hiring, re-op pool or pre-layoff leave.

FAQs. The DOT Blueprint Organizational Restructuring Frequently Asked Questions provides, in part:

3. Who made the decisions about how the agency should restructure?

[Agency Head] established Blueprint terms led by agency executives to make recommendations for restructuring and streamlining our organization. These teams assess the organizational structure and make recommendations for enhancing organizational efficiency and performance. Over the next several months, we will work to finalize the new organizational design, staffing structure and business processes.

15. How does my seniority factor into the layoff process?

Seniority is one of many factors that determines who will receive layoff notice. Other factors include the type of work performed, work unit, geographic area, roll, the type of position (i.e., whether wage or classified), the position's funding source, and whether the position is full-time or part-time.

47. Is the option to convert severance benefits to retirement age/service credit only available for employees whose positions are being eliminated? Can an employee get additional VRS age/service credit if they are approved to substitute for an affected employee whose position is being eliminated?

The state's Severance benefits policy is based on the Workforce Transition Act (WTA). The Severance Benefits policy defines conditions under which employees are eligible to receive benefits and converts the value of those benefits to additional retirement age/service credit. Severance benefits are available to employees who are directly affected by layoff (provided they do not decline a placement that does not require relocation or reduction in salary after requesting placement consideration), and to those who are approved as a substitute for someone who is directly affected by layoff.

There are no voluntary separation incentives. Employees who retire voluntarily, not associated with layoffs/substitution, are not eligible for severance benefits or to convert the value of severance benefits to additional retirement age/service credit.

66. If an employee identified for layoff is offered placement to a position outside her normal work location, what are the defined parameters used to determine if the offer would be considered as requiring relocation (i.e., mileage, time, base location, etc.)?

The definition that will be used by the agency, for purposes of layoff and severance eligibility, in determining whether or not relocation is required will be the distance of the employee's current commute to work or 50 miles, whichever is greater. In other words, if the employee will have to travel 50 miles or more from home to get to the new position, the new position will be considered as requiring relocation, unless the employee already commutes more than 50 miles to work one-way. In that case, the distance of the current commute, e.g., 60 miles, is the boundary for determining whether the new position would require relocation. The definition that will be used by the agency, for the purposes of layoff and severance eligibility, in determining whether or not relocation is required will be the distance of the employee's current commute to work or 50 miles, whichever is greater. In other words, if the employee will have to travel 50 miles or more from home to get to the new position, the new position will be considered as requiring relocation, unless the employee already commutes more than 50 miles to work one-way. In that case, the distance of the current commute, e.g., 60 miles, is the boundary for determining whether the new position would require relocation.

71. Who will make the decision regarding the definition of a "work unit"?

The decision regarding definition of work units will be made by the Blueprint Implementation Teams. Leaders from across the agency will participate in this process. This process will be completed before the affected positions are determined. Notably, "work unit" is only one of several factors in the layoff sequence that determines who will be affected. Other factors include the position type (wage or classifieds/salaried), whether the position's funding is restricted, geographic area, state Role title, and work performed.

83. How does substitution work?

Non-affected employees, who are interested in substituting for an employee affected by layoff, are required to submit a request into the Transitional Tool. A central placement team will review all substitution requests, along with valid vacancies, to determine potential placement matches. In order to qualify for placement into a vacant or into a substitution's position, an affected employee must meet the minimum qualifications for the potential placement. If a match is made to a substitution candidate's position, the substitute will receive notice of layoff and the affected employee will assume the substitute's position the day after the substitute separates (effective April 25, 2010).

Substitutes cannot identify which individuals for whom they want to substitute. Placements are determined based on the qualifications of the affected employee and factors in how closely each potential placement matches the affected staff's current job, commuting distance, and placement preferences.

106. Where can employees find answers to questions that are not covered in this handout?

Employees are encouraged to raise questions to their managers or contact Human Resources directly. In addition "Frequently Asked Questions" documents will be provided in layoff notice and substitute approval packages, pertaining directly to the circumstances at that time.

107. Who can employees talk with if help is needed?

Affected employees will be provided a list of resources in the initial and final notice packages. They include contacts in Human Resources and Civil Rights.

Quick Tips. The VDOT Quick Tips regarding Substitution provides, in part:

SUBSTITUTION RULES

- The consideration of substitutes for employees affected by layoffs is part of the placement process
- Substitution requests will be entered in by the interested employee through People Transitions Tracking Tool and managed by the HR Division
- A central review team will attempt to find the best match possible that doesn't require relocation or reduction in salary. If none exist, the next best alternative will be explored
- If an affected employee requests placement then declines the opportunity to take the job of a substitute (in the same pay band or lower), and the match does not require relocation or a reduction in pay, no other substitute matches will be sought and the employee forfeits the right to layoff rights and severance benefits
- Once an affected employee accepts the match, even if it requires relocation or reduction in salary, the match is considered final and the affected employee will not be considered for any other placements to vacant or substitutes' positions
- If an affected employee is matched to a substitute, the affected employee will begin performing the substitute's job the day after the substitute leaves.

Order of consideration of matches:

- Affected employees in a particular stage who wish to remain employed with VDOT are ordered by seniority, statewide, on one consolidated list
- The central review team evaluates matches in order of most senior affected first
- Potential matches begin with the placement that most closely matches the job of the affected (same work unit, geography, role, substantially the same work - DHRM rules)
- The best match would be a position that does substantially the same thing in the same place, in the same role, at the same pay rate as the affected employee. This would require the least amount of adjustment for the affected employee, and it would require the least investment and retraining by the agency
- If vacant positions meeting these criteria are not available, a match to a substitute that meets these criteria will be sought
- The next closest match would be a job in another work unit doing the same thing at the same rate of pay
- As the match process continues, the search for vacant or substitute positions would be broadened until a match could be found or until the search was exhausted
- If a placement in the same role was not available, jobs and other roles (in the same or lower pay band) would be considered
- If the search had to be broadened to the point of considering placements to

jobs that require relocation or reduction in salary, the affected employee's preferences would be considered

- If there is more than one ideal match and at least one is a vacant position, the placement would be made to the vacant position
- If the placement decision comes down to more than one substitute candidate who meets the same criteria, the match will be made with the most senior substitute candidate
- Business needs are a first and primary consideration in all substitute decisions

SUBSTITUTION CONSIDERATIONS:

- VDOT will strive to communicate to affected employees who are considering placement in a substitute's position about the potential for future organizational changes that could result in a layoff in substitute's position
- The affected employee must be minimally qualified to perform a substitute's job to be placed into it
- In addition to minimum qualifications, the Central review team will consider the affected employee's ability to meet the working conditions of the substitute's position
- The determination of "minimally qualified" for placement or substitution for will be based on a comparison of the qualifications information that the affected employee has provided (application and resume), against the job requirements defined in the Employee Work Profile (EWP) for the substitute's job
- All substitution requests are subject to review and approval based on critical business needs. As such, some requests may not be approved.

Grievant argues that Quick Tips requires the Agency to select him as a substitute instead of selecting Mr. G. He argues that his position most closely matched the position of Mr. S. because it was in the same geography, role, and performing the same work. He argues that his position is the best match because he performed substantially the same thing as Mr. S, in the same role and at the same pay rate as the affected employee. He argues that selecting him as a substitute would require the least investment in retraining by the agency. He argues that even if the Agency considers different residencies as different "work units" his position also would be the next closest match. Grievant relies on the language in the Quick Tips which states:

If the placement decision comes down to more than one substitute candidate who meets the same criteria, the match will be made with the most senior substitute candidate.

Grievant argues that the placement decision came down to Grievant and Mr. G. Grievant and Mr. G held the same position in different residencies. Both

met the geographic criteria which the Agency defined as being within 50 miles of Town V. There is no dispute that Grievant had seniority over Mr. G. Because Grievant had seniority over Mr. G, the Agency was obligated to select him as a substitute for Mr. S, according to Grievant.

If the Hearing Officer considers only the portions of the Quick Tips relied upon by Grievant, Grievant's argument has merit. The difficulty with Grievant's argument is that this language cannot be read alone. It must be read in context. That context includes the discretion given to the Agency under DHRM policy. For example, DHRM Policy 1.30 was amended in 2009 "in an *effort* to provide agencies with more flexibility regarding DHRM Policy 1.30 - Layoff." That flexibility is for the purpose of "allowing the placement of impacted employees in the same or different roles for which they are minimally qualified." Context also include statements in the Quick Tips such as "Business needs are a first and primary consideration in all substitution decisions". The Quick Tips also states, "All substitution requests are subject to review and approval based on critical business needs. As such, some requests may not be approved. Minimizing an employee's commute was a primary consideration by the Agency in selecting Mr. G as the substitute. The Agency had discretion to assign greater significance to its business needs than to the seniority of potential substitutes.

Grievant argues that he should have been given the opportunity to serve as a substitute for Mr. H instead of the Agency's decision to place Mr. H in the Planning and Investment Management Position in District L. The evidence showed that the Agency followed a process with several steps. The first step was to place employees in vacant positions. The second step was to find substitutes for employees who could not be placed in vacant positions. Once Mr. H was placed in the vacant PIM position, it was not necessary for the Agency to address whether a substitute existed for Mr. H.

In conclusion, the Agency had the discretion to select Mr. G as the substitute for Mr. S instead of selecting Grievant. Grievant has not established that the Agency's decision was contrary to the Workforce Transition Act of 1995. Grievant has not established that the Agency's decision was contrary to DHRM policy. Grievant has not established that the Agency's guidance/decision-making documents created an independent VDOT policy granting him the right to receive enhanced retirement benefits. Grievant's request for relief regarding the Agency's failure to select him as a substitute for Mr. S must be denied.

The Agency was authorized by State policy to place Mr. H in a vacant position. Only if placing Mr. H in a vacant position was not feasible, would the issue of finding a substitute for Mr. H become actionable. Because the Agency found a vacant position for Mr. H, it was not necessary for the Agency to address whether Grievant should be selected as a substitute for Mr. H. Grievant's request for relief regarding the Agency's failure to select him as a substitute for Mr. H must be denied.

DECISION

For the reasons stated herein, the Grievant's request for relief is **denied**.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his request to this Department for an administrative review of the original hearing decision, the grievant appears to indicate that VDOT was inconsistent in its application of the agency's Blueprints for Placements and substitutions procedures.

Based on our review of the decision by the hearing officer, there is no dispute that, in accordance with VDOT's step by step substitution procedures, the agency did not adhere to those steps. However, as outlined in DHRM Exceptions to Layoff Policy 1.30 issued in 2009, VDOT was authorized to make exceptions in applying the provisions of the Layoff Policy, 1.30. Under its own procedures, among other things, VDOT was permitted to do the following:

- A central review team will attempt to find the best match possible that doesn't require relocation or reduction in salary. If none exist, the next best alternative will be explored
- If the placement decision comes down to more than one substitute candidate who meets the same criteria, the match will be made with the most senior substitute candidate
- Business needs are a first and primary consideration in all substitute decisions
- All substitution requests are subject to review and approval based on critical business needs. As such, some requests may not be approved.

While VDOT did not choose the grievant, the more senior employee, to substitute for the affected employee, the agency had other considerations to make in choosing an employee for substitution, most notably the distance that the affected employee was to travel to arrive at his new place of travel. Thus, we do not find that the hearing officer's decision to be inconsistent with DHRM Policy 1.30, Layoff. We therefore will not interfere with the application of this decision.

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services