

Issue: Qualification/Separation-Layoff; Ruling Date: November 21, 2002; Ruling #2002-135; Agency: Department of Technology Planning; Outcome: Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Technology Planning  
No. 2002-135  
November 21, 2002

The grievant has requested a ruling on whether his May 2, 2002 grievance, challenging his layoff from the Department of Technology Planning (DTP or agency), qualifies for a hearing. In support of his grievance, the grievant claims that he was subjected to layoff without regard to his seniority, in violation of state human resource policy. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

On May 24, 2000, Executive Order 65 (00) established the Electronic Government Implementation Division (e-Gov Division) within DTP. The goal of this initiative was to enable citizens and businesses to interact with a more streamlined, service oriented government. Executive Order 65 (00) was to remain in effect until June 30, 2002.

The grievant's Role Title was IT Manager II, one of six positions within the newly created e-Gov Division. The grievant's responsibilities included: (1) work program planning and execution; (2) providing effective coordination and constituent service; (3) division personnel and financial management; and (4) serving as the Executive Director of the Council on Technology Services. All e-Gov staff reported to the grievant. Three other positions shared the same Role as the grievant.

In a January 10, 2002 memorandum to the grievant, the former Secretary of Technology (the Secretary), indicated concern about the direction and performance of the e-Gov Division, and stated that a reorganization of the e-Gov Division would take place. According to the memorandum, as of January 14, 2002, all classified employees, temporary staff, and contractors assigned to the e-Gov Division would report directly to the Director of DTP, thereby eliminating the need for grievant's position. The grievant asserts that the reorganization was precipitated by the former Secretary's strong but unwarranted desire to eliminate the e-Gov Division and remove him from state service.

Effective January 14, 2002, the grievant was reassigned to a newly created staff position at DTP. While the grievant's Role did not change upon the reassignment, his

working title and position description did change. In his new position, the grievant was responsible for special projects and reported directly to the Director of DTP. Although no longer considered part of the e-Gov Division, the agency states that his new position was funded, in part, from the same source as the e-Gov Division.

Faced with potential funding changes, the agency informed the e-Gov staff and the grievant in early 2002 that layoffs could occur. On April 3, 2002, prior to finalization of the budget, the grievant was given a Notice of Layoff effective April 30, 2002. On April 22, 2002, after finalization of the budget, the grievant received a revised Notice of Layoff, which set his layoff effective date for June 30, 2002. According to the agency, the grievant's position, one other classified position, and a part-time position were all sacrificed as a result of funding cuts. The agency has further stated that one other e-Gov staff person volunteered to leave after being informed of potential layoffs. Effective July 1, 2002, the remaining former e-Gov Division employees were assigned to different work units within DTP.

### DISCUSSION

For a grievance claiming a misapplication of policy or an unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.<sup>1</sup>

In the present case, it is the Commonwealth's policy to ensure "a system of personnel administration based on merit principles and objective methods of appointment, promotion, transfer, *layoff*, removal, discipline, and other incidents of state employment."<sup>2</sup> The Department of Human Resource Management (DHRM) Layoff Policy requires that agencies select employees for layoff based on seniority and other objective factors.<sup>3</sup> Factors such as race, religion, political affiliation, age, disability, national origin, sex or improper retaliatory motives may not form the basis for selecting an employee for layoff. Nor does the state's layoff policy list poor performance as a basis for layoff. Indeed, terminations due to perceived performance and conduct problems are to be effectuated through DHRM's Performance Evaluation policy and Standards of Conduct, not the layoff policy.

Specifically, under the state's applicable layoff policy, prior to implementing layoff, agencies must: 1) determine whether the entire agency or designated work unit(s) are to be affected; 2) designate work unit(s) to be affected as appropriate; and 3) review

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<sup>1</sup> The grievant's express claim of unfair application of policy will be treated broadly for purposes of this ruling as a claim of unfair and misapplication of policy.

<sup>2</sup> Va. Code § 2.2-2900, (emphasis added).

<sup>3</sup> See DHRM Policy No. 1.30 Layoff (effective 9/25/00). The Layoff Policy was revised 6/10/02; however, because the former policy was in effect at the time of the events that form the basis of this grievance, the former policy will be applied in this ruling.

all vacant positions that can be used as placement options.<sup>4</sup> A work unit is a “designation which may be used by the agency to define the scope of the layoff to organizational units smaller than the entire agency.”<sup>5</sup> Further, “[t]he work unit designation may be by geographic area(s) or business unit(s) to be impacted.”<sup>6</sup> Importantly, if the agency designates a work unit or unit(s), “the designation must be made **prior to**” implementing the layoff process.<sup>7</sup>

After identifying work that is no longer needed or that must be reassigned, agencies must select employees for layoff within the same work unit, geographic area, and Role, who are performing “substantially the same work,” according to the following sequence: 1) wage employees; 2) part-time restricted employees by seniority; 3) part-time classified employees by seniority; 4) full-time restricted employees by seniority; and 5) full-time classified employees by *seniority*.<sup>8</sup> Under the layoff policy, seniority is defined as “total continuous salaried state service” and is not based on a person’s tenure in a position within a particular organizational structure.<sup>9</sup> The following are factors considered by agencies in determining whether employees are performing “substantially the same work”: 1) they are in the same Role; 2) they have the same work title; 3) they are at the same reporting level in the organizational structure; 4) they have the same SOC Code; and 5) they have similar job duties, the same KSAs and other job requirements, based on the position description or Employee Work Profile.<sup>10</sup>

In its first management resolution response, the agency states that it identified two work units for layoff -- the e-Gov Division and the grievant’s position of Assistant for Special Projects. As such, the grievant was designated as a work unit of one. If properly designated as a work unit of one, the grievant could be laid off without regard to seniority or the other factors for determining “substantially the same work” as outlined above. However, this grievance presents questions of fact regarding the work unit designation(s) in this case. For instance, the agency’s first management resolution response could be viewed as inconsistent with the assertion that the grievant’s position was a work unit separate and apart from the rest of the former e-Gov Division. Specifically, after declaring the grievant’s position to be a work unit of one, the agency then analyzed the duties of the three positions in the e-Gov Division that occupied the same Role as the grievant at the time of layoff, concluding that seniority was not an issue because the three e-Gov employees, in the agency’s view, did not perform “substantially the same work” as did the grievant in his newly created position. An analysis such as this is unnecessary if those in the same Role occupy two separate work units (i.e., if the grievant is a work unit of one, there is no requirement under policy to consider whether he performs “substantially the same work” as employees in a separate work unit). Further, the

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<sup>4</sup> DHRM Policy No. 1.30 Layoff (effective 9/25/00).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (Emphasis in original).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

agency's first resolution step response later could be read as indicating that only one work unit was designated for layoff.<sup>11</sup> These factual questions are more appropriately resolved by a hearing officer after a full presentation of the evidence.

The grievance procedure accords much deference to management's exercise of judgment, including management's designation of a "work unit" and its conclusion as to whether employees in the same Role are performing substantially the same work. Accordingly, a hearing officer must defer to management's conclusions and assessments regarding a work unit as well as its assessment of whether the work performed by employees in the same Role is substantially the same, unless there is sufficient evidence that management's assessment is arbitrary or capricious, or otherwise contrary to policy. An "arbitrary or capricious" assessment would be one that was made without regard to the facts, or one that no reasonable person could have reached after considering all available evidence.<sup>12</sup> Likewise, an assessment that is merely a pretext for an improper motive or basis for layoff constitutes a misapplication of policy or an unfair application of policy and does not merit deference.

Given the similarities between the grievant's Assistant for Special Projects position and those in the same Role within the e-Gov Division, it could possibly be argued, depending upon the surrounding facts and circumstances, that the designation of the grievant's position as a separate work unit was arbitrary or capricious. There is also a question of fact as to whether the work unit designation(s) were made prior to implementing the layoff process as policy appears to require.

In light of these questions regarding the agency's designation of the work unit(s) to be affected by layoff, a fuller review of the facts by a hearing officer is warranted. Should the hearing officer find that the agency's designation of the grievant as a work unit of one was a misapplication or unfair application of policy, he may, depending upon his other findings, also need to hear evidence as to whether the grievant and any other employees in the relevant work unit performed "substantially the same work."<sup>13</sup> If a misapplication or unfair application of policy is found, a hearing officer may only order

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<sup>11</sup> See First Step Respondent Reply dated May 10, 2002. (In response to the grievant's assertion that he has seniority over others in the same Role he occupied, the agency states that "[t]hese positions and the seniority of the incumbents were not considered in the implementation of this policy because they are not part of the **work unit** designated as being affected by layoff." (Emphasis added.)

<sup>12</sup> If management's identification of a work unit or its determination that the employees were not performing substantially the same work were merely debatable (meaning that reasonable persons could draw different conclusions), then the determination would not be arbitrary or capricious. See *Norman v. Department of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999)(Delk, J.).

<sup>13</sup> According to their Employee Work Profiles, the grievant and the other e-Gov Division employees identified for layoff in his Role performed, at least to some degree, similar core responsibilities, including the development and execution of a work program and providing effective coordination and constituent service. Based on these facts (e.g., same Role, same reporting level, similarities in core responsibilities) and the layoff policy's provisions, this grievance raises a further question as to whether the grievant and the other e-Gov Division employees identified for layoff in his Role were not performing "substantially the same work."

November 21, 2002

Ruling #2002-135

Page 6

the agency to reapply the policy correctly. He may not substitute his judgment for that of management by determining whether or which employee(s) must be laid off.

### CONCLUSION

For the reasons discussed above, the issue of misapplication or unfair application of the layoff policy qualifies for hearing. Please note that this Department's qualification ruling is not a determination that an unfair application or misapplication of policy has occurred. Rather, this ruling simply reflects that this grievance raises a sufficient question as to whether the layoff policy was applied correctly and fairly and as such, further review by a hearing officer of the relevant facts, law, and policies is warranted.

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr  
Director

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Jennifer S.C. Alger  
Employment Relations Consultant