

Issue: Qualification/ Layoff/Recall; Ruling date: June 17, 2003; Ruling #2003-086 and #2003-071; Agency: Department of Corrections; Outcome: not qualified, but consolidated for purposes of grievance process.



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

**QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2003-071 and 2003-086  
June 17, 2003

The grievant has requested a ruling on whether his December 2, 2002 and January 7, 2003 grievances with the Department of Corrections (DOC) qualify for hearing. In both grievances, the grievant claims that the agency misapplied the layoff policy.<sup>1</sup> For the reasons stated below, these two grievances do not qualify for hearing, but are consolidated for the remainder of the grievance process.

FACTS

At the time of his December 2, 2002 grievance, the grievant was employed as an Assistant Warden. In the fall of 2002, due to budget reductions, one assistant warden position was identified for elimination at each correctional facility authorized to have two such positions, resulting in the layoff of identified employees, including the grievant. On November 5, 2002, the grievant was offered placement in a Corrections Captain position within his same facility and pay band, which would have resulted in no loss of pay. The grievant failed to respond by the established deadline of November 7, 2002. Accordingly, the agency considered his nonresponse as an acceptance under the procedures established for the placement process.

On December 6, 2002, the grievant submitted a signed declination of the placement offer, citing the loss of an earned Virginia Law Officer's Retirement System (VALORS) benefit<sup>2</sup> if he accepted the position.<sup>3</sup> To avoid the potential financial loss of retirement pay (the hazardous duty supplement), the grievant voluntarily accepted a position as Records Manager on December 10, 2002. His acceptance resulted in a

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<sup>1</sup> See Department of Human Resource Management (DHRM) Policy No. 1.30, (effective 09/25/00) as revised 08/10/02. See also Department of Corrections Policy Number 5-39, *Layoffs; Reductions in Work Force*.

<sup>2</sup>The Virginia Law Officer's Retirement System (VALORS) allows those employees covered by the law to retire with unreduced benefits at age 50 with 25 years of service. Additionally, those employees with 20 years of service in a covered hazardous duty position are eligible to receive a supplement to their retirement until age 65. (Va. Code § 51.1-211 et seq.)

<sup>3</sup> The grievant estimated that he would lose a \$ 818.00 monthly retirement supplement if he accepted the Corrections Captain position.

demotion from a Pay Band 5 to a Pay Band 4 position, and the loss of salary and recall rights.

## DISCUSSION

### *Qualification*

For an allegation of misapplication of policy or 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.

### Seniority

The grievant claims that the agency misapplied policy by not applying seniority agency-wide in determining layoffs. Under the DHRM Layoff policy, however, agencies may designate the entire agency or only certain work units for layoff.<sup>4</sup> Therefore, the agency did not misapply policy by designating each facility as a separate organizational work unit for the purpose of eliminating one of the two authorized assistant warden positions. In this instance, seniority was used as prescribed by policy to identify the less senior of the two incumbents at each facility identified for layoff.

### Substitution

The grievant asserts that the agency misapplied policy by allowing substitutions for two assistant wardens targeted for layoff. He claims that because the substitutes chose to retire, their vacated positions should have been used for placement to the most senior eligible employee agency-wide. Under the DHRM Layoff Policy, however, agencies may choose to allow employees in the same work unit and Role to volunteer for layoff in place of those employees who otherwise would be laid off under the policy's layoff sequence.<sup>5</sup> Further, under the DOC Substitution Policy, employees are encouraged to submit requests for substitution in order to aid placement.<sup>6</sup> DHRM policy grants the agency the discretion to use the substitution provision whenever the agency deems it appropriate. Here, the agency simply exercised its discretion to accept two voluntary substitution requests for assistant wardens targeted for layoff.

### Placement in Human Resource Position

The grievant claims that policy was misapplied when his request for placement in a vacant human resources position was denied. Under state and DOC Policy 5-39, the

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<sup>4</sup> See DHRM Policy 1.30, *Agency Decisions Prior to Implementing Layoff*, page 6 and 7; See also DOC Policy 5-39.

<sup>5</sup> See DHRM Policy 1.30, *Alternative Employee Designation When No Placement Options Available*.

<sup>6</sup> See DOC Memorandum, *Budget Reductions-Substitution for Involuntary Separation*, April 15, 2002.

agency has the final authority to determine which vacant position to offer an employee if there is more than one vacancy. In this case, both a Corrections Captain and a Human Resource Officer position, in the same pay band, were vacant at the grievant's facility. Based upon its assessment of the grievant's qualifications and experience, the agency determined that the grievant was best suited for the Corrections Captain position and made the placement offer. Furthermore, the agency did not misapply policy by not considering, in making its placement offer, the potential future adverse impact on the grievant's VALOR retirement benefit, if he accepted the placement offer. State policy does not mandate that an agency consider the consequences on retirement benefits when it makes a determination of which position to offer an employee.

#### Placement in a Records Manager Position

The grievant asserts that policy was misapplied when he was assigned to a Records Manager position, resulting in a loss of pay. Under DHRM Voluntary Demotion Policy, an employee may request demotion to a vacant position in a lower pay band. If the employee's current salary exceeds the maximum of the lower pay band, it must be reduced to the maximum of the new Pay Band after six months.<sup>7</sup> Although the grievant may have believed that he had no other alternative, the facts reflect that he voluntarily requested assignment to the Records Manager position in order to avoid the loss of his VALORS benefits and with the knowledge that the position was in a lower Pay Band. Based upon his decision, the agency had no option but to reduce his salary to the maximum of the new Pay Band as mandated by policy.<sup>8</sup>

#### Recall Rights

Finally, the grievant claims that the agency misapplied policy by not according him recall rights after his transfer to the Records Manager position. Under DHRM Recall Policy, employees who (1) have been placed on leave without pay-layoff; (2) have accepted a placement option with a reduced salary; or (3) have been demoted in lieu of layoff have recall rights to positions for which they are minimally qualified in their former Role, salary and agency. Recall rights cease, however, if an employee is employed in a position that is in the same or a higher Pay Band as the former position and the employee's salary is equal or greater than their salary prior to layoff.<sup>9</sup>

By his failure to respond to the placement offer of the Corrections Captain position within specified 48-hour time period, the grievant was deemed to have accepted the position, effective on November 7, 2002, under the terms of DOC's Placement Procedures, which were communicated to the grievant at the time of the offer. Because the Corrections Captain position was in the same Pay Band as his former Assistant

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<sup>7</sup> See DHRM Policy 3.05, *Demotion*, page 8.

<sup>8</sup> In the Pay Band 5 positions of Assistant Warden and Corrections Captain, the grievant had an annual salary of \$62,075. Upon his reassignment to the Pay Band 4 Records Manager position, his annual salary was reduced to \$ 54,842.

<sup>9</sup> See DHRM Policy 1.30, *Placement Opportunities After Layoff*, page 15.

Warden position, the grievant's recall rights ceased effective on November 7, 2002. Accordingly, the agency did not misapply policy by not granting the grievant additional recall rights after granting his request to take the Records Manager position following his placement in the Captain's position.

In light of all the above, this grievance fails to raise a sufficient question as to whether policy was misapplied or unfairly applied.

### *Consolidation*

Written approval by the Director of this Department in the form of compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.<sup>10</sup>

This Department finds that the two grievances arise out of the same material facts and should be consolidated and proceed as one grievance for the remainder of the grievance process (the optional appeal of this decision to the circuit court in the jurisdiction in which the grievance arose). This Department's rulings on compliance are final and nonappealable.<sup>11</sup>

### APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr  
Director

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June M. Foy  
EDR Consultant, Sr.

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<sup>10</sup> *Grievance Procedure Manual* § 8.5, page 22.

<sup>11</sup> Va. Code § 2.2-1001 (5).

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