Issue: Qualification/Separation/Layoff-Recall; Ruling date: July 17, 2003; Ruling #2003-094; Agency: Department of Corrections; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2003-094
July 17, 2003

The grievant has requested a ruling on whether his grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that the agency's decision not to allow substitution in layoff was arbitrary and capricious. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant was Corrections Officer Senior with DOC until he retired in May 2003. In April 2002, a budget reduction plan proposed the closure of the grievant's facility in June 2003. On August 13 and 14, 2002, employees were notified that the facility was being placed in layoff status in anticipation of a revised December 2002 closure date. On September 27, 2002, employees at the facility were informed through an employee bulletin that the placement process would begin on September 30, 2002.

Under Department of Human Resource Management (DHRM)'s layoff policy, agencies may choose to allow substitutions for employees who are being laid off.[1] Under that policy, employees may volunteer to accept layoff in the place of another employee identified for layoff.[2] Agencies must decide before the layoff process whether or not to allow substitutions and how substitutes will be chosen.[3] On November 25, 2002, DOC's Human Resources Director issued a memorandum to all DOC unit heads, outlining DOC's procedure for substitutions in the layoff process.[4]

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[1] DHRM Policy 1.30, Layoff, "Alternative Employee Designation When No Placement Options Available," page 12 of 21 (effective Sept. 25, 2000, revised August 10, 2002).
[2] *Id.*
[3] *Id.*
[4] *See* Memorandum to Executive Staff/Organizational Unit Heads from Human Resources Director, dated November 25, 2002. The memorandum stated that substituting employees must be in the same role and organizational unit as the employees identified for layoff, except in the case of the grievant's facility, where any DOC employee could volunteer to substitute because the entire organizational unit was closing. The memorandum further required, among other things, that substitutions must be voluntary, must be made before the layoff date, must be agreed to by both employees and the Department, and that the Director makes the final decision. *Id*.

According to the grievant, between November 25 and December 9, 2002, four Correctional Officers, including the grievant, who were slated to remain at the facility after inmates had been moved, applied to be substitutes for any officers being laid off.[5] On December 9, 2002, the grievant was notified that no substitutions were being made even though there were three Correctional Officers at his facility who had not been placed in other facilities and were being laid off. On December 11, 2002, the grievant received an email from DOC's Human Resources Director, explaining the agency's decision not to allow substitutions for employees laid off at this facility. He explained that management considered a number of factors in its decision, including the cost of severance for the employees being laid off and the likelihood that any laid off employees would be placed in new positions in the near future due to a high turnover at a neighboring facility. The grievant alleges that the agency's decision was arbitrary and capricious because (1) in April 2002, substitutions were made after the closing of another facility, (2) it would have *saved* DOC money to lay him off in place of another employee,[6] and (3) it was not proper for DOC to base its decision on a speculation that there *may* be positions available in the near future.

DISCUSSION

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. In this case, the grievant alleges that DOC unfairly applied state and agency layoff policy, claiming that its decision to lay off three employees rather than to allow substitutions was arbitrary and capricious.[7]

The applicable policy in this case is DHRM Policy 1.30, Layoff. DHRM Policy 1.30 specifically provides that each agency must identify employees for layoff in a manner consistent with its business needs and the provisions of that policy. Policy specifically states that "[a]gencies *may* choose to place on LWOP-Layoff employees who agree to accept layoff instead of those employees identified" for layoff.[8] Similarly, DOC

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[5] Five Correctional Officers remained at the facility after inmates were moved out to assist in the closing of the facility. Their duties included providing 24-hour security, protecting assets left at the facility, overseeing inmate work crews from other facilities, and wrapping up any other loose ends. Those who stayed were later placed in positions at other facilities or retired.

[6] The grievant was hoping to use layoff severance benefits to purchase years of service credit towards retirement, which would have resulted in him receiving approximately $300 per month more in retirement benefits. *See* DHRM Policy 1.57, Severance Benefits, "Enhanced Retirement Benefits," page 5 of 10. The grievant calculated, using the state's worksheet, that it would save DOC $37,200 per year to abolish his position. *See* "Employer Guide of the Retirement Benefits Under the Workforce Transition Act," page 9.

[7] *See Grievance Procedure Manual* § 9, page 23. "Arbitrary or capricious" is defined as a decision made in disregard of the facts or without a reasoned basis.

[8] DRHM Policy No. 1.30, Layoff, "Alternative Employee Designation When No Placement Options Available, page 12 of 21 (emphasis added).

has stated that "the Department can determine if there are any substitutions that may be made" and that the Department "must agree to the substitution."[9]

Here, DOC decided not to allow substitutions based on the business reasons of cost and the likelihood of future placement for laid-off employees. While the grievant may disagree with management's determination, state policy grants to agency management alone the authority to allow substitutions or not.[10] Management is afforded great discretion when making such determinations. Furthermore, it does not appear that management's decision was arbitrary or capricious. As long as the agency's determinations regarding layoff substitutions are based on legitimate business considerations and not on impermissible factors such as discrimination or retaliation, management's decisions regarding the elimination or reassignment of work and whether or not to make substitutions for layoff cannot be overturned through the grievance hearing process.[11] While the grievant may be disappointed with the agency's decision not to allow substitutions in this case, this issue cannot qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification 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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Leigh A. Brabrand
EDR Consultant

[9] Memorandum to Executive Staff/Organizational Unit Heads from Human Resource Director, dated November 25, 2002.
[10] DHRM Policy No. 1.30, Layoff, page 12 of 21.
[11] "Management reserves the exclusive right to manage the affairs and operations of state government." Va. Code § 2.2-3004 (B).