

Issue: benefits/leave/severance benefits; Separation from state/layoff-recall; Ruling Date:  
October 24, 2006; Ruling #2007-1405; Agency: Department of Transportation;  
Outcome: not qualified



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

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation  
Ruling No. 2007-1405  
October 24, 2006

The grievant has requested a ruling on whether her June 2, 2006 grievance with the Department of Transportation (DOC or agency) qualifies for a hearing. The grievant essentially claims the agency misapplied or unfairly applied the layoff and severance policies by placing her in a position after it had presented her with a Final Notice of Layoff, thus denying her severance benefits. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed by VDOT as an Administrative Office Specialist III prior to her retirement on June 30, 2006. On December 22, 2005, the agency presented the grievant with a Final Notice of Layoff (Final Notice) to be effective on July 1, 2006. Despite having given the grievant the Final Notice, the agency informed the grievant on or about May 9, 2006, that it had found a comparable position for her and that it would not be necessary for her to be laid off. In addition, the grievant was informed that the agency was aware that she had begun preparations for retirement but that because a comparable position had been found she would not be eligible for any layoff or severance benefits. On June 2, 2006, the grievant initiated a grievance in which she essentially claimed that the agency had improperly denied her severance benefits by finding her a comparable work position. On June 30, 2006, the grievant retired from state service.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Further, complaints relating solely to layoff or to the transfer and assignment of employees “shall not proceed to a hearing.”<sup>2</sup> Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the

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<sup>1</sup> Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(C).

agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the transfer decision.<sup>3</sup> Here, the grievant claims the agency misapplied or unfairly applied the layoff and severance policies by not awarding her severance benefits.

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.

The controlling policies in this case are the Department of Human Resource Management (DHRM) Layoff Policy, which addresses the issue of placement opportunities within an agency prior to layoff,<sup>4</sup> and the Severance Policy, which provides severance benefits to eligible employees who have been involuntarily separated from state service by the Layoff Policy.<sup>5</sup>

### *Layoff*

The Layoff Policy has written notification requirements. Under the Layoff Policy, an agency must provide an Initial Notice of Layoff to an employee at least two weeks before the date of layoff or placement.<sup>6</sup> Agencies are encouraged to provide as much notice as feasible to employees anticipated to be affected by layoff.<sup>7</sup> If no placement options are available within the employee's agency or within other Executive Branch agencies, the agency must: give the employee a Final Notice of Layoff using the L-1 Form and indicating that the employee will be placed on Leave Without Pay-Layoff status on the layoff effective date.<sup>8</sup> The Final Notice "must be given to employees on the L-1 form immediately prior to the effective date of the layoff."<sup>9</sup>

During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.<sup>10</sup> According to the Layoff Policy, after an agency identifies all employees eligible for placement, the agency must attempt to place them by seniority in any valid vacancies agency-wide in the current or a lower Pay Band.<sup>11</sup> Additionally, the placement must "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."<sup>12</sup> If such a position is

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<sup>3</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

<sup>4</sup> DHRM Policy No. 1.30, Layoff, page 10 of 21 (effective September 25, 2000, revised May 16, 2006).

<sup>5</sup> DHRM Policy No. 1.57, Severance, page 1 of 10 (effective January 1, 1995, revised August 10, 2002).

<sup>6</sup> DHRM Policy No. 1.30, Layoff, page 2 of 21.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, page 14 of 21.

<sup>9</sup> *Id.*, page 2 of 21.

<sup>10</sup> DHRM Policy No. 1.30, Layoff, page 10 of 21.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis in original).

offered and declined by the employee, the agency is under no obligation to consider additional placement options for the employee.<sup>13</sup>

In this case, the agency marked the December 22, 2005 L-1 Form as the Final Notice of Layoff. Because the Final Notice is to be presented “immediately prior to the effective date of the layoff,” the December 22<sup>nd</sup> L-1 should have been marked as the Initial Notice of Layoff. Thus, the agency misapplied policy by giving the grievant the Final Notice Layoff six months prior to the effective date of the layoff. However, despite mischaracterizing the L-1 Form as the Final Notice of Layoff, the agency nevertheless appropriately continued to search for a comparable placement position for the grievant. Such a position was identified and offered to the grievant on or about May 9, 2006. The grievant declined the position because she had begun her retirement plans based on the agency’s representation that she was being given a “final” layoff notice.

In some cases where sufficient evidence of a misapplication of policy exists, there are some instances where qualification may be inappropriate based upon the circumstances of the case. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available. This is such a case.

Under the *Rules for Conducting Grievance Hearings*, in a misapplication of policy case, a hearing officer is limited to ordering the agency to reapply the policy at the point at which it became tainted. Here, the misapplication occurred in December of 2005, when the agency marked the L-1 form as “Final” rather than “Initial.” Thus, if the layoff issue proceeded to hearing, the hearing officer would be limited to ordering the agency to reissue retroactively the L-1 Form as “Initial” rather than “Final.” However, changing the character of the L-1 Form would be of no real import because the agency had already done what policy required during the Initial Notice period: to search for and offer the grievant a comparable position. Thus, there is no effectual relief available to the grievant under the Layoff Policy.

### *Severance*

The Severance Policy “[p]rovides severance benefits to eligible full-time classified and restricted employees and to eligible part-time classified and restricted employees who have been involuntarily separated from state service by Policy 1.30, Layoff.”<sup>14</sup> In this case the grievant was not eligible for severance benefits because she

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<sup>13</sup> *Id.* If no internal placement options are available within the agency, the agency must attempt to assist employees in securing employment in other executive branch agencies by issuing a preferential hiring Interagency Placement Screening Form, (“Yellow Form”), and ensuring that employees have access to the state vacancy listings. DHRM Policy No. 1.30, Layoff, page 13 of 21 .

<sup>14</sup> DHRM Policy No. 1.57, Severance, page 1 of 10 (effective January 1, 1995, revised August 10, 2002).

was not “involuntarily separated from state service” by the Layoff policy. She was informed nearly two months before the effective date of the anticipated layoff that the agency had found a comparable position. Although she had begun retirement paperwork, she made no attempt to halt it, because she had decided that she would voluntarily resign from her position on June 30, 2006. Because the grievant decided to voluntarily resign her employment with the Commonwealth, she was not eligible for severance benefits und state policy.<sup>15</sup>

#### APPEAL RIGHTS AND OTHER INFORMATION

For additional 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 circuit court, she 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 notifies the agency that she does not wish to proceed.

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Claudia T. Farr  
Director

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<sup>15</sup> The Severance Policy arises from the Workforce Transition Act of 1995 (WTA) which provides a “transitional severance benefit, under the conditions specified, to eligible state employees who are *involuntarily* separated from their employment with the Commonwealth.” Va. Code 2.2-3200(B), (emphasis added).