Issue: Qualification – Separation from State (Layoff); Ruling Date: April 27, 2010; Ruling #2010-2562; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling No. 2010-2562
April 27, 2010

The grievant has requested qualification of his October 14, 2009 grievance with the Department of Transportation (the agency). For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

The agency is currently undertaking a vast restructuring. The grievant, formerly a surveyor, was impacted by a part of the restructuring plan in that his position was identified for elimination. He received initial notice of layoff and was offered placement into a transportation operator position out of a different office. The grievant initiated this grievance to challenge the placement process in this layoff. He alleges that he should have been offered placement into another employee's position who had offered to be a substitute. Prior to the layoff, this other employee ("Substitute") appeared to hold the same role title as the grievant, but in a different office.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.[1] By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[2] Further, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as layoff, position classifications, hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[3] In this case, the grievant essentially claims that the agency misapplied and/or unfairly applied policy.

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[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

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. The Department of Human Resource Management (DHRM) Layoff Policy allows "agencies to implement reductions in workforce according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force."[4] Policy mandates that each agency identify employees for layoff in a manner consistent with its business needs and the provisions of the Layoff Policy. As such, the policy states that before implementing layoff, agencies must:

- determine whether the entire agency or only certain designated work unit(s) are to be affected;
- designate business functions to be eliminated or reassigned;
- designate work unit(s) to be affected as appropriate;
- review all vacant positions to identify valid vacancies that can be used as placement options during layoff, and
- 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.[5]

An agency's decisions as to what work units will be affected by layoff and the business functions to be eliminated or reassigned are generally within the agency's discretion. In this case, however, the grievant has not asserted that the elimination of his position was a misapplication or unfair application of policy. Rather, the grievant argues that the vacant position into which the agency offered to place him was incorrect and he should have been allowed to take the Substitute's position.

The Layoff Policy appears to provide significant discretion to an agency in determining whether it wishes to utilize a substitute in the layoff process.[6] However, even though agencies are afforded great flexibility in making such decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant

[4] DHRM Policy 1.30, *Layoff*.
[5] *Id.*
[6] *See id.* ("Agencies may choose to place on LWOP-Layoff employees who agree to accept layoff instead of those employees identified by the above process.") (emphasis added).

raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[7]

The agency states that in determining placement options for employees who received initial notice of layoff, if a vacant position was available, the employee would be offered placement to such a vacant position (without relocation or decrease in pay) rather than seeking a match to a substitute, even if there was a substitute for a better position available. Such an approach would appear to support an agency's legitimate business interests in reducing its expenditures and limiting payouts of severance and/or enhanced retirement benefits while filling needed vacant positions.

Also relevant here is the guidance and/or exceptions to the Layoff Policy granted by DHRM. Given the scope of the agency's restructuring, DHRM allowed the agency to identify placement opportunities for all impacted positions in a particular phase concurrently. As such, all impacted employees would receive offers of placement at the same time. The effect of this is that if employees higher on the seniority chain declined offers of placement, an employee lower on that chain may not have the ability to obtain such a better placement opportunity that became available because of the declined placement. The agency would not go back to make changes as the process evolved. Once an employee accepted the initial offer of placement, the agency would not readjust available placements if better opportunities became available later.

Although these appear to be legitimate and appropriate approaches and considerations, some issues have arisen. For instance, documents produced by the agency that describe its substitute process appear to contradict the agency's stated goal of placing employees to vacant positions first, rather than looking to available substitutes. These documents appear to describe a hierarchy of placing employees to a best matched position. The agency is to first look for a vacant position that is the same role the impacted employee held and in the same work unit. If such a vacant position is not available, then the agency would look to any substitutes in the same role, same work unit. The process would progress down a hierarchy of less exact position matches, but at each step, looking for a vacant position first, and then to a substitute position. This differs from the agency's stated method of looking for a vacant position wherever it sits on the hierarchy before considering a substitute. Given these documents, it is understandable that the grievant would complain about his placement in this case. It appears that he was transferred to a position that can be best described as other role, other work unit. However, the Substitute was in the same role, different work unit, which is higher in the hierarchy than the grievant's offered placement.

In addition, the grievant asserts that there were differences in how the agency addressed errors in the placement process. While the effect of the concurrent identification of placement opportunities would appear to be that the agency would not go back to readjust if better options became available later, the grievant has asserted that such changes may have

[7] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.,* EDR Ruling 2008-1879.

been made in other situations. However, the evidence presented does not necessarily support the grievant's position. The examples described appear to be the agency's attempts to correct errors in the placement opportunity initially offered to an employee, which would then have effects to other placement opportunities, rather than readjusting down the chain of seniority as new options became available.

Even taking all these issues into account, the grievant has not presented evidence that raises a sufficient question as to whether the grievant should have been offered placement to the Substitute's position. First, because of the concurrent offers of placement, the Substitute's position was not available. The Substitute was matched to another employee in a different office. However, that employee declined the placement. That process was complicated by the fact that there were errors regarding the Substitute's work location as listed on the organization chart. Once the agency corrected that error, the employee declined placement to the Substitute's position. At that point, the grievant asserts, the Substitute's position was available as a placement option. However, there were other impacted employees with more seniority than the grievant who might also have been matches to the Substitute. Even if the agency were required to go back and re-do placement opportunities for others in the grievant's work unit, those more senior employees would appear to have had priority in the substitute process over the grievant. Consequently, there is no basis to infer that the grievant would have been clearly entitled to placement to the Substitute's position.

Though the grievant may disagree with the agency's determinations, his arguments do not raise a sufficient question as to whether the agency's decisions violated any mandatory provision of policy or were arbitrary or capricious. There is no basis to qualify this grievance for a 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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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