Issue: Qualification – Separation from State (Layoff/Recall); Ruling Date: August 20, 2010; Ruling #2010-2660; 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 Number 2010-2660
August 20, 2010

The grievant has requested a ruling on whether his March 25, 2010 grievance with the Department of Transportation (the agency or VDOT) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

During a phase of the agency's restructuring, the grievant was not selected for layoff, but volunteered to be a substitute for any matched employee whose position was being eliminated. If he had been selected to serve as a substitute, it appears that the grievant's employment with the state would have ended and he would have received enhanced retirement benefits under the Workforce Transition Act (WTA).[1] The agency, however, did not select him as a substitute, thus the grievant did not retire with enhanced benefits. The grievant asserts that the agency's failure to select him as a substitute was inconsistent with the agency's published sequence of consideration of matches. The grievant argues that in at least two cases, the agency failed to select him as the correct and most closely matched substitute based on his position and seniority.[2] As relief, the grievant seeks a "WTA severance package upon retirement."

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.[3] 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.[4]

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[1] Va. Code §§ 2.2-3200 et seq.
[2] Additional facts about each of these potential matches will be included in the Discussion section of this ruling.
[3] *See Grievance Procedure Manual* § 4.1.
[4] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[6] An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] In this case, even assuming without deciding that the grievant experienced an adverse employment action, his grievance alleging a misapplication or unfair application of policy would not qualify for a hearing.

For such an allegation 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."[9] 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.[10]

DHRM's Layoff Policy, supplemented by its published 2009 Layoff Policy Exceptions, appears to provide significant discretion to an agency in determining whether and how it wishes

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[5] *See Grievance Procedure Manual* § 4.1(b).
[6] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[9] DHRM Policy 1.30, *Layoff*.
[10] *Id.*

to utilize a substitute in the layoff process.[11] VDOT's own Blueprint Placement Prioritization chart ("Placement Prioritization") and Substitution Rules ("Rules") also provide significant discretion to management in determining individual placements. However, even where policies afford agencies great flexibility in making such decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that in such cases, qualification is warranted where evidence presented by the grievant 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.[12]

VDOT's Placement Prioritization describes a general hierarchy of priorities and considerations in placing employees otherwise targeted for layoff into a vacant or substitute position. Under the Placement Prioritization, the agency is to first look for a vacant position in the same job and work unit as the targeted employee. If such a vacant position is not available, then the agency would look to any substitutes in the same job and work unit. The process would move through a sequence of progressively less exact position matches, but at each step, looking for a vacant position first, and then, if no vacancy existed, to a substitute position. Importantly here, however, the Placement Prioritization expressly notes that it "is not an exact or all-inclusive depiction of the sequential steps or considerations in the placement process."

VDOT's Substitution Rules appear to reflect the general hierarchy of priorities and considerations in the Placement Prioritization as discussed above. In addition, the Rules expressly state that if a placement decision "comes down to more than one substitute candidate who meet the same criteria, the match will be made with the most senior substitute candidate." However, the Rules go on to provide that "[b]usiness needs are a first and primary consideration in all substitution decisions" and "[a]ll substitution requests are subject to review and approval based on critical business needs."

Further, in responding to this grievance, the agency indicated that in determining placement options for employees who received initial notice of layoff, if a vacant position (without relocation or decrease in pay) was available, the employee would be offered placement to the vacant position rather than seeking a match to a substitute, even if the vacant position was not as close a match as an available substitute position. While this approach appears to differ from the exact hierarchical sequence outlined in the Placement Prioritization and reflected in the Rules, the Placement Prioritization itself states that it "is not an exact or all-inclusive depiction of the sequential steps or considerations in the placement process." Moreover, the approach of using vacancies before substitutes would appear to support an agency's legitimate business needs to reduce its expenditures and limit payouts of severance and/or enhanced retirement benefits

[11] *See id.* ("Agencies <u>may</u> choose to place on LWOP-Layoff employees who agree to accept layoff instead of those employees identified by the above process.") (emphasis added); *see also* Layoff Policy Exceptions 2009 (allowing agencies to select substitutes from (i) any organizational unit, geographic area, within the same pay band; and (ii) any organizational unit, geographic area, within the same Role). In other words, under the 2009 Exceptions, substitutes need not be in the same work unit, Role, and performing substantially the same work as previously provided under DHRM Policy 1.30 alone.

[12] *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.

while filling needed vacant positions, which is consistent with the Rules' provision that critical business needs are a first and primary consideration in all substitution decisions.

In this case, however, the grievant's position is understandable. He asserts that in two instances, he was the best match under the terms of the Placement Prioritization and the Rules, but was not selected as a substitute. In both of those instances, the grievant appears to have been in the same Role and Geographic Area as the impacted employee. Nevertheless, the first possible match, an employee subject to layoff in Residency C, was placed in a vacant position in a different Role in another work unit. The second, an employee subject to layoff in Residency A, was placed in a substitute position in Residency SH, in the same Role and Geographic Area as the grievant, even though the grievant had more seniority than the substitute in Residency SH. The agency maintains that the grievant and the Residency SH substitute did not meet the "same criteria" because of the location of their work sites. Specifically, the agency asserts that the location of Residency SH was closer to the Residency A employee's home base, and for that reason the agency selected the Residency SH candidate over the grievant to serve as the substitute.

As to the possible match with the Residency A employee, there is no express provision in the agency's Placement Prioritization or Substitution Rules indicating that a work site location within a Geographic Area was to be a controlling consideration in selecting vacant or substitute positions as placements for employees targeted for layoff. We are also mindful of the express provisions in the Rules regarding seniority, and the grievant's seniority over the Residency SH substitute. As to the possible match with the Residency C employee, as mentioned previously, placing a targeted employee in a vacancy that is not as close a match as a substitute appears to differ from the exact hierarchical sequence set out in the Placement Prioritization.

However, the Placement Prioritization states that the steps and considerations it describes are not "exact or all-inclusive." In addition, the Rules expressly state that in determining substitutions, business needs are the "first and primary consideration" and that "[a]ll substitution requests are subject to review and approval based on critical business needs." In light of these provisions in the Rules and Placement Prioritization, which give great latitude to the agency, it does not appear that the agency violated any mandatory policy provision by failing to select the grievant as a substitute for either of the two possible matches. The language of the Placement Prioritization and Rules appears to be broad enough to allow filling vacancies to take priority over using substitutions, and to allow an employee's location, even within a Geographic Area, to be a controlling factor in selecting a substitute. Nor does it appear that the agency disregarded the intent of any policy by considering the use of substitutes based on what management perceived to be the agency's critical business needs. Reasonable persons can disagree as to what makes the best business sense regarding substitutions, but that determination rests with the agency, unless the determination is arbitrary or capricious, which is not the case here. The agency's decisions appear to have a reasoned basis, consistent with the broad latitude provided under applicable policy. Further, this Department has reviewed no evidence that suggests that

the agency's approach to the grievant was different than in other similar cases.[13] In sum, though the grievant may disagree with the agency's determinations, his arguments do not raise a sufficient question that 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

[13] For instance, although the Residency A employee was matched to a substitute instead of a vacant position, the agency apparently found no suitable vacant positions for the Residency A employee.