Issue: Administrative Review of Hearing Officer's Decision in Case No. 9489; Ruling Date: July 25, 2011; Ruling No. 2011-2957; Agency: Virginia Department of Transportation; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2011-2957
July 25, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9489. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts as set forth in Case Number 9489 are as follows:[1]

> The Virginia Department of Transportation employed Grievant as a Residency Maintenance Manager (formerly known as a Residency Administrator) until he retired in January 2011. He had been employed by the Agency for approximately 42 years. He was the longest-serving Resident Maintenance Manager in Virginia prior to his retirement.
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> In 2008, the Agency decided to make permanent long-term business changes to ensure that the agency remained viable in the future. Agency managers developed a "Blueprint for Our Future" to address the demands of the following two years and position the agency to deal with "economic realities" projected for the following six years. The Blueprint had three major components: (1) restructuring the Agency's construction program, (2) restructuring the Agency's services and customer programs, and (3) reshaping the Agency's organization and streamlining staffing.
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> The Agency has offices located throughout the State referred to as Residencies. As part of the restructuring, the Agency decided to eliminate more than 30% of its Residencies. The Agency recognized that eliminating so many Residencies would result in a significant number of employee layoffs. Agency managers met with staff of the Department of Human Resource Management to discuss the Agency's implementation of the DHRM Policy 1.30 governing layoffs. DHRM granted the Agency flexibility to implement DHRM Policy 1.30. The Agency decided to use substitution rules within DHRM Policy 1.30 to create

[1] Decision of Hearing Officer, Case No. 9489, issued March 30, 2011 ("Hearing Decision") at 2-6 (Footnotes from the Hearing Decision have been omitted here).

placement options for employees given notice of layoff. The Agency's objective was to create more placement options for affected employees who wished to remain employed with the Agency. For example, the Agency intended to solicit substitutes beyond just the affected workgroups.

In an email to VDOT employees dated July 16, 2009, the Agency Head wrote:

> Substitution – With large numbers of VDOT employees approaching retirement, a number of employees who are eligible for retirement may choose to exit under Workforce Transition Act enhanced retirement benefits if given the opportunity. With expanded flexibility for substitution, we will generate employment opportunities for many affected employees who wish to remain at VDOT while creating options for those wishing to retire or to otherwise leave the agency for personal reasons.
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> Here's how substitution works: After affected employees had been given notification, non-affected employees who are eligible for retirement or wish to leave the agency can submit a request within a limited time frame. A review team will evaluate vacancies first and then substitution request to determine a potential placement match for each affected employee who requested placement. The affected employee who originally received a layoff notification must meet the minimum qualifications for the potential placement opportunity. If a substitute match is appropriate, the substitute receives notification of layoff and the affected employee assumes the substitute's position.

In an email dated August 3, 2009, the Agency Head informed employees that:

> Affected employees have until August 11 to submit their request for placement or not. Unaffected employees have until August 14 to submit a substitution interest form if they find that the severance benefits offered to substitutes may be beneficial. A substitute must be willing to give up their employment for an employee who received the initial notice of layoff, has similar job skills, and wants placement at VDOT. Matched substitutes will receive the same severance benefits as those who receive notice of layoff with the exception of recall rights and preferential treatment in a hire for a state position.

Prior to the layoff, the Agency defined the work unit to the Residency.

A Residency Maintenance Manager is the individual in charge of operations at a Residency. Grievant was in charge of Residency H. Mr. G. was in

charge of Residency SH. Mr. S was in charge of Residency A. They were all Residency Maintenance Managers performing the same job but in different locations. Their positions were in the same Pay Band. Mr. S was minimally qualified to perform the job duties of Mr. G and Grievant. Grievant had more seniority than did Mr. G.

The Agency decided to close Residency A and layoff all of the employees working there including Mr. S. Mr. S was an "affected" employee. Mr. S decided that he did not wish to leave the Agency and asked the Agency placed him in another position.

Mr. S's residence was located in Town V. He drove approximately 35 miles from his residence in Town V to County A to work in his office at the Agency's Residency A.

Residency H is within a 50 mile radius of Town V. If Mr. S drove from his residence in Town V to Residency H he would travel approximately 48 miles. Residency SH is within a 50 mile radius of Town V. If Mr. S drove from his residence in Town V to Residency SH, he would travel approximately 30 miles. If Mr. S began working at Residency SH instead of Residency A, his daily morning commute from his home to his office would be reduced by approximately 5 miles. If Mr. S began working at Residency H, his daily morning commute from his home to his office would increase by approximately 12 miles.

On January 11, 2010, Grievant submitted a Substitute Request to the Agency. He intended to be considered as a substitute for another Agency employee who had been identified for layoff. He made the following certification:

My invitation below is my understanding of the following:

- Submission of this form is not a guarantee that I will be able to substitute for another employee who will be laid off.
- If I am selected to substitute for someone else being laid off, my last work day will be determined by the agency. I will receive notification of that day, if I have been approved to substitute.
- The Department of Human Resources Management (DHRM) policy 1.57, Severance Benefits, explains eligibility for and the value of severance benefits.
- To revoke this expression of interest I must keep my withdrawal into the Blueprint Transition system by the deadline published.
- I will have a very limited opportunity to withdrawal my submission in the current Blueprint stage. The specific withdrawal period for this stage is documented in communication published about the substitution option. After that limited withdrawal period I may only withdraw my submission after the end of the current

Blueprint stage and before the beginning of the next day; or during a subsequent stage's open submission period, to be published at a later date.

- This expression of interest will become void if my position is identified for elimination.
- Any work visa I have through VDOT could be impacted and I could lose my eligibility to remain in the United States, if my application is approved.
- Any learning partnership agreements I entered into become null and void upon my scheduled separation, if I am approved as a substitute. I may retain any funds paid to me prior to my date of separation.
- If I am laid-off, my responsibilities for repayment under a tenure agreement will be waived upon my layoff date.
- I will remain responsible for the paying a debt I owe to the Commonwealth (e.g., salary overpayment, leave overpayment) even if I am laid off.
- If I leave the agency voluntarily before an affected employee is scheduled to assume my current position, any written agreements will be enforced.
- Any approval to substitute I receive will be withdrawn if the affected employee scheduled to assume my position becomes unavailable to do so, due to voluntary or involuntary separation before the reassignment is to become effective.

Grievant was not an "affected" employee because he was not an employee who was being laid off by the Agency.

Members of the Agency's Placement Team looked for vacant positions available to Mr. S within a 50 mile radius of Town V. They found no vacant position in Mr. S's Pay Band for which he was minimally qualified. Once the Placement Team determined that there were no vacant positions available to Mr. S, they considered whether substitution would be appropriate.

The Agency chose Mr. G as the substitute for Mr. S instead of choosing Grievant. The Placement Team found 71 possible substitutes across the state. One substitute was in County W. The Placement Team excluded the possible substitute in County W because County W was more than 50 miles from Town V.

The Placement Team considered seniority as being relevant only if one or more substitutes worked in the same Residency. For example, if two potential substitutes worked in the same Residency, the Agency would select as the substitute the employee in that Residency with the most seniority. The Placement Team did not compare Grievant's seniority with Mr. G's seniority because they worked in different Residencies. Only if Grievant and Mr. G had worked at Residency SH would the Agency have selected Grievant as the substitute because of his seniority.

The Agency chose Mr. G as a substitute because Mr. G worked at Residency SH and Residency SH was closer to the Town where Mr. S lived. The Agency believed that it would be best for the Agency and for Mr. S to have a shorter commute to Residency SH than a longer commute to Residency H. The Agency did not consult with Mr. S regarding his preference of working at Residency SH or Residency H. If Mr. S. had preferred to work at Residency H and the Agency had learned of that preference, the Agency would likely have disregarded Mr. S's preference and placed him in Residency SH because the commute from Mr. S's home to Residency SH was shorter than his commute to Residency H. The Agency disregarded the fact that Grievant had more seniority than did Mr. G and that Residency H where Grievant work was within a 50 mile radius of Town V.

If the Agency had chosen Grievant instead of Mr. G to serve as a substitute for Mr. S, Grievant would have been eligible to receive an enhanced retirement benefit that would have increased his monthly retirement benefit by over $600 for the remainder of his life.

As part of the reorganization, the Agency created a Planning and Investment Management (PIM) position in District L. Mr. H worked as a Residency Maintenance Manager at Residency C located in County P. The Agency decided to close Residency C. Mr. H wished to remain with the Agency and sought placement. He informed the Agency that he was willing to relocate to another area of the State. Mr. H was minimally qualified for the vacant PIM position but taking the position would have increased Mr. H's commute to 56 miles. Because the commute exceeded 50 miles, the Agency did not insist that Mr. H accept the vacant position. Only because Mr. H was willing to relocate to District L did the Agency decide to place them in the vacant PIM position. If Mr. H had rejected the option of being placed in a position outside of a 50 mile radius of his home, the Agency would have attempted to find a substitute for Mr. H. Because Residency H was within a 50 mile radius of Mr. H's home, Grievant would have been considered as a possible substitute for Mr. H.

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On March 25, 2010, Grievant filed a grievance challenging the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The appeal was qualified for hearing by the Circuit Court on November 29, 2010. On January 18, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On February 24, 2011, a hearing was held at the Agency's office.[2]

[2] *Id* at 1.

In a March 30, 2011 hearing decision, the hearing officer denied the grievant's request for relief.[3] The hearing officer denied the grievant's request for reconsideration on July 5, 2011.[4] The grievant now seeks administrative review from this Department.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Inconsistency with Agency Policy

The grievant's request for administrative review primarily challenges whether the hearing decision is consistent with DHRM Policy 1.30 (Layoffs), DHRM Policy 1.57 (Severance Benefits), and the substitution rules as outlined in the "VDOT Blueprint Implementation DHRM Policy Exceptions and Flexibilities", "Quick Tips", and the "VDOT Blueprint Organizational Restructuring Frequently Asked Questions." Furthermore, the grievant challenges the degree of discretion the agency was afforded in interpreting these policies when making its substitute decisions. DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Challenge to Hearing Officer's Findings of Fact and Conclusions

To the extent that the grievant's request for administrative review challenges the hearing officer's findings of fact, we find no error. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

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[3] *Id* at 23.
[4] *See* Decision of Hearing Officer, Case No. 9489-R ("Reconsideration Decision") issued July 5, 2011 at 2.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.

Here, the grievant contends that the policies and guidelines did not state commute distance would be used as a primary factor in determining which employee would be selected as a substitute for an affected layoff employee. Hence, the grievant states that the hearing officer should not have found that consideration of a potential substitute's commute distance was a critical business need of the agency. However, determinations of disputed facts are within the hearing officer's authority.

This Department cannot find that the hearing officer exceeded or abused his fact-finding authority where, as here, the findings are supported by the record evidence and the material issues in the case. Specifically, the agency's division administrator testified in detail about the process the agency used in selecting substitutes for affected layoff employees.[10] He stated that once an employee was selected as an affected layoff employee, the agency placement team would calculate that employee's current commute. (Here, the affected layoff employee had a 35 mile commute.) Then, the agency placement team would draw a 50 mile circle radius around the affected layoff employee's residence to determine what positions within that radius were available. In this particular case, the agency placement team considered any job vacancies within the same job classification and 50 mile radius of the affected layoff employee's residence. Here, there were two positions within the same job classification and within the 50 mile radius of the affected layoff employee's residence.[11] Then, pursuant to policy, the agency placement team determined which position had the shortest commute distance for the affected layoff employee so that the transition would be "least disruptive" to that employee.[12] In this case, the agency division administrator testified that the commute distance for the affected layoff employee would be 30 miles to the SH residency and 48 miles to the H residency where the grievant was stationed.[13] Hence, the agency placement team chose the "least disruptive" option for the affected layoff employee and selected the SH residency substitute instead of the grievant.[14] The agency division administrator also testified that seniority only became a factor when more than one substitute was located in the same facility; the agency placement team did not use the seniority test in this case since the grievant was located at a different facility.[15] He testified that the seniority test was only used in "very narrow circumstances" which were not present in the grievant's case.[16] Moreover, the agency division administrator testified that had the SH residency substitute and the grievant been located in the same facility, then the grievant would have been selected as the substitute based upon the seniority test.[17] We must conclude that the hearing officer's findings are based upon evidence in the record and the material issues of the case, and thus have no reason to remand the decision.[18]

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[10] *See* Hearing Recording at 1:42:34 through 1:50:00 (testimony of agency division administrator).
[11] *Id*.
[12] *See* Hearing Recording at 2:16:37 through 2:16:59 (testimony of agency division administrator).
[13] *See* Hearing Recording at 2:35:59 through 2:37:50 (testimony of agency division administrator).
[14] *See* Hearing Recording at 2:18:27 through 2:24:03 (testimony of agency division administrator).
[15] *See* Hearing Recording at 1:50:25 through 1:52:24 (testimony of agency division administrator).
[16] *See* Hearing Recording at 2:08:46 through 2:09:38 (testimony of agency division administrator).
[17] *See* Hearing Recording at 2:14:31 through 2:15:23 (testimony of agency division administrator).
[18] Again, if the grievant has not already done so, he may raise with the Director of the Department of Human Resource Management, within 15 calendar days of the date of this ruling, the issue of whether the hearing decision is consistent with policy, including, but not limited to, the question of whether, under policy, commute distance is a factor that could be considered by management under the facts presented here.

Timeliness of Reconsideration Decision

The grievant asserts that the hearing officer was noncompliant with the grievance procedure because the reconsideration decision was not issued within fifteen calendar days from receipt of the grievant's request for reconsideration. According to the grievance procedure and rules established by this Department, hearing officers are instructed to attempt to issue a written reconsideration decision within 15 calendar days of receiving a request for reconsideration.[19] Preferably, reconsideration decisions are written within this 15-day timeframe. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing. This Department views the 15-day language timeframe as directive rather than mandatory. Standing alone, failure to issue a reconsideration decision within the 15-day timeframe does not serve as grounds for a rehearing or a favorable decision. Accordingly, this Department concludes that there is no indication of inappropriate or improper delay in this case.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[20] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

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Claudia T. Farr
Director

[19] *Rules for Conducting Grievance Hearings* § VI(A). ("The hearing officer *should* issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request.") (Emphasis added).
[20] *Grievance Procedure Manual* § 7.2(d).
[21] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[22] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).