



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11875

Hearing Date: January 6, 2023
Decision Issued: February 13, 2023

PROCEDURAL HISTORY

On April 16, 2022, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 16, 2022, the Office of Employment Dispute Resolution issued Ruling 2022-5421 qualifying this grievance for hearing. On August 29, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

1. Whether the Agency misapplied or unfairly applied DHRM Policy 4.57, the Virginia Sickness and Disability Program?

2. Whether Grievant's separation was consistent with the requirements of the Americans with Disabilities Act and related State polies.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief the Grievant seeks should be granted. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Medical Records Clerk at one of its locations. Grievant began working for the Agency on September 25, 2010.

The Facility has electronic medical records except for one book called the "Corduroy Book". It weighs more than 10 lbs. Grievant was expected to lift the book out of a fire-proof file cabinet, make entries in the book, and ensure that the book was returned to the cabinet. Grievant asked other employees to lift the book out of the cabinet so that she could make entries into the book.

On September 20, 2021, Grievant applied for Short-Term Disability (STD) benefits with the Third Party Administrator (TPA). Grievant began short-term disability on October 14, 2021. Her projected STD "max date" was April 6, 2022.

On December 7, 2021, the Agency drafted an Initial Disability Claim Form – Employer's Statement indicating that Grievant had not returned to work but was expected to return to work on January 14, 2022.

On January 14, 2022, the Third Party Administrator received a Release to Return to Work signed by Dr. W. The note showed Grievant had surgery on October 7, 2021, had an appointment on January 14, 2022, and stated:

Return to light duties. Do not lift more than 10 lbs. Return back on 1/17/22.¹

¹ Agency Exhibit D.

On January 18, 2022, Grievant gave the doctor's note to the Supervisor. The Supervisor wrote on Dr. W's note, "Supervisor is willing to accommodate these restrictions 1/18/2022"²

On January 18, 2022, the TPA notified Grievant that her leave had been approved from October 7, 2021 to January 16, 2022 as a continuous block of time. The TPA closed Grievant's STD claim. Grievant resumed working full time without STD benefits.

On January 27, 2022, Grievant met with the Supervisor to review and sign Grievant's Employee Work Profile and Physical Demands Worksheet that indicated Grievant's position required her to move items weighing 11 lbs. to 25 lbs. for one to two hours at one time.

On February 17, 2022, the HR Analyst sent Grievant an email asking, "Please advise if you have been released to RTW full duty. *** I have the note with the accommodation restrictions of no lifting over 10 lbs. Is this still the case?"³

On February 17, 2022, Grievant replied, "Good morning still under restrictions of not lifting over 10 pounds. I have a follow up appointment on 2/28 and I can let you know more then."⁴

Dr. W filled out a Release to Return to Work form showing that Grievant had an appointment on February 28, 2022 and that Grievant was not to lift items over 10 lbs.

On March 3, 2022, Grievant received a performance evaluation with an overall rating of "Contributor."

On March 15, 2022, the HR Analyst sent Grievant an email asking, "Please let me know if you have been released to return to work-full duty." Grievant replied, "I have an appointment on 3/21 and I will let you know."⁵

On March 24, 2022, the Agency received a medical note dated March 21, 2022 written by Dr. H stating Grievant, "needs to limit any lifting to less than 10 pounds until further notice."⁶

On April 7, 2022, the HR Analyst sent an email to the TPA asking, "Please advise as to whether the above claim – [Grievant] – is still approved as working with restrictions

² Agency Exhibit D.

³ Agency Exhibit D.

⁴ Agency Exhibit D.

⁵ Agency Exhibit D.

⁶ Agency Exhibit D.

of no lifting over 10 pounds.” On April 11, 2022, the TPA’s RN Nurse Case Manager responded, “The Short Term Disability claim was approved through 01/16/2022 and per documentation on file this employee was released to return to work full time full duty on 01/17/2022. We do not have anything from the employee or provider with restrictions.”⁷

On April 12, 2022, the HR Analyst emailed the TPA RN Nurse Case Manager stating:

She brought in a medical note in which she returned to work on 1/17/2022 stating return to work light duty. Do not lift more than 10 lbs. The facility has been accommodating this since that day. I have emailed her 2 separate times regarding this and she brings a note each time. Please advise if this is something that [TPA] should be involved in. The accommodation is creating a hardship on her department.

On April 12, 2022, the TPA RN Case Manager emailed the HR Analyst:

If there is a restriction that is true for the position, then yes, [TPA] should be involved as Short Term Disability is managed to full time full duty release or with restrictions/accommodations that do not impact the position. Can you please forward the work notes to [TPA] and we will contact the employee and advise of Short Term Disability rules? Thank you for bringing this to our attention. I apologize for the confusion as [TPA] received Short Term Disability documentation that the employee was being released full time full duty.

On April 12, 2022, the HR Analyst sent the TPA RN Case Manager an email with the medical notes Grievant provided to the Agency on January 18, 2022 indicating lifting of restrictions and the medical note Grievant provided to the Agency on March 24, 2022 indicating continued lifting restrictions until further notice.

On April 12, 2022, the TPA RN Case Manager emailed the HR Analyst and informed her that Grievant’s STD claim was reopened and sent a RTW Restriction Request to obtain the Agency’s response. The TPA RN Case Manager informed the HR Analyst that Grievant’s STD exhausted on April 6, 2022 and that the TPA would be opening a LTD claim for April 7, 2022 going forward.

On April 13, 2022, the HR Analyst emailed the TPA RN Case Manager:

Employer can no longer accommodate the restrictions of no lifting over 10 pounds for [Grievant] as it is a requirement of her job duties. [Grievant] returned to her job with the aforementioned restrictions on January 17, 2022 which we did accommodate as a result of a medical note being submitted by the employee. Please advise how to proceed.

⁷ Grievant Exhibit p. 32.

The TPA RN Case Manager asked the HR Analyst, “What is the last date of the accommodation of this restriction?” The HR Analyst replied, “Today 4/13/22.”⁸

The Agency considered Grievant’s status to have transitioned from short-term disability to long-term disability on April 6, 2022. The TPA notified Grievant that her “Requested Start”⁹ for LTD was April 7, 2022. Because Grievant transitioned to LTD, the Agency no longer considered her to be an Agency employee.

On April 14, 2022, the HR Director sent Grievant a letter regarding Grievant’s separation from employment and LTD transition.

CONCLUSIONS OF POLICY

For the reasons stated below, Grievant has established that the Agency misapplied and unfairly applied DHRM Policy 4.57. Grievant should be restored to her position and circumstances prior to her removal.

DHRM Policy 4.57 governs the Virginia Sickness and Disability Program. The purpose of this policy is:

Provides eligible employees supplemental replacement income during periods of partial or total disability for both nonoccupational and occupational disabilities. Encourages rehabilitation with an ultimate goal to return employees back to gainful employment when medically able. Provides employees with sick and family and personal leave.

DHRM Policy 4.57 sets forth numerous definitions. Disability is defined as:

An illness or injury or other medical condition, including pregnancy, that prevents an employee from performing the duties of his or her job. A disability can be total or partial.

Long Term Disability is defined as:

An income replacement benefit that commences upon the expiration of the maximum period for which the employee is eligible to receive STD benefits, and provides income replacement in an amount equal to 60% of participating employee’s creditable compensation or 80% income replacement if the disability has been designated catastrophic.

⁸ Agency Exhibit D.

⁹ Grievant Exhibit p. 40.

Long Term Working Disability Benefit (LTD-W) is defined as:

An income replacement benefit that commences upon the expiration of the maximum period for which the employee is eligible to receive STD benefits, and allows employees to continue to work for their agencies from STD working status into LTD-W. In LTD-W the employee must work at least 20 hours or more per workweek in his own position. Qualified part-time employees continue to work for their agency when moving from STD into LTD-W for 20 or more hours per week.

Short Term Disability Benefits:

Commences upon the expiration of a 7 calendar day waiting period, and provides replacement income for a maximum of 125 work days

The Third Party Administrator is:

The company designated by the Virginia Retirement System (VRS) to administer the daily operation of the Virginia Sickness and Disability Program.

In this case, the TPA began Grievant's STD and then ended it on January 18, 2022. Grievant no longer received short-term disability benefits. It appears that the TPA's decision to end STD on January 18, 2022 was by mistake because it incorrectly believed Grievant had returned to work without restrictions.

On April 12, 2022, the TPA informed the Agency that Grievant's disability case was reopened. The TPA informed the Agency that Grievant's STD exhausted on April 6, 2022 and that it would be opening a LTD claim for April 7, 2022 going forward. The effect of Grievant transitioning to LTD was that she was no longer employed by the Agency. The Agency did not give Grievant an opportunity to obtain approval from her doctor to work without restriction or seek a permanent accommodation through an interactive process under the provisions of the American's with Disabilities Act.

The TPA's decision to reopen Grievant's STD claim is not supported by policy. DHRM Policy 4.57 does not authorize the TPA to reopen a claim because it made a mistake and incorrectly closed a STD claim. Because the TPA did not have authority to unilaterally reopen a STD claim for the reason that it made a mistake in closing the claim, Grievant could not have resumed STD status and transitioned to LTD.¹⁰

¹⁰ In addition, it is unclear how the TPA could reopen an STD claim after the STD benefits period had "exhausted" on April 6, 2022. DHRM Policy 4.57 provides for a 14 day lookback period - " VSDP will adjust benefits retroactively for only 14 calendar days from the date a claim is initiated by an employee. (Emphasis added.)

DHRM Policy 4.57 addresses continuation of periods of disability and successive claims. This policy provides:

Successive Periods of Short-Term Disability:

Employees released to return to their pre-disability positions on a full-duty basis who again become disabled due to the same condition will be considered to be in a continuation of the prior disability if the employee works fewer than 45 consecutive calendar days (defined as scheduled work days and rest days, e.g., weekends) and the absence is related to the same major chronic or non-major chronic condition. Approved absences due to leaves for other reasons, e.g., SL, annual leave, etc., have no effect in the counting of the 45 or 28 consecutive calendar days. Days worked or on leave do not count towards the transition into LTD.

When a Claim Becomes a New Period of STD:

A new period of STD begins when employees:

- Return to work full-time/full duty for 45 or more consecutive calendar days after a major chronic or non-chronic condition, but cannot continue to work, or
- Experience a new disability or illness during the 45 calendar day period unrelated to the first condition. Employees must satisfy a new 7 calendar day waiting period for non-chronic conditions. Income replacement begins again at 100% of pre-disability income, or at 60% for employees hired or rehired on or after 7/1/09 with less than 60 months of continuous state service.

The key factor in claim succession is the 45 calendar day period. The TPA reopened Grievant's STD claim well in excess of 45 days after closing the claim on January 18, 2022. If the Hearing Officer assumes for the sake of argument that the TPA had the authority to reopen the claim because it was a continuance of a prior disability, the Agency has not established a basis to continue the claim. Since more than 45 days passed after January 18, 2022, Grievant would have had to file a new claim for STD. Grievant did not file a new claim.

DHRM Policy 4.57 permits employees receiving STD benefits to transition to LTD-W instead of LTD. Employees in LTD-W status remain agency employees while they work to resume full duty. DHRM Policy 4.57 provides:

LTD Working status is in effect when:

- Employees working during STD (modified schedule or with restrictions) continue to work for their agency from STD working status into LTD for 20 hours or more per workweek in their own full-time position. ***

If the Hearing Officer assumes for the sake of argument that the TPA had the authority to unilaterally reopen the STD claim, it is unclear why the Agency did not deem Grievant to be in LTD-W status. Since LTD-W “is in effect” when an employee on STD continues to work for at least 20 hours per week, Grievant would have entered LTD-W status on April 7, 2022 after STD benefits expired on April 6, 2022. The Agency did not notify Grievant she transitioned to LTD-W and that it intended to transition her to LTD if she could not perform her full work duties without accommodation.

The Agency argued that Grievant could not perform the essential functions of her job because she could not lift objects weighing more than ten pounds. Grievant argued that lifting a large record book was not an essential function of her job and it could be easily accommodated. It is not necessary for the Hearing Officer to resolve this issue since the Agency’s removal of Grievant was not authorized by policy. Upon Grievant’s reinstatement, the parties should address this issue.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, Grievant’s request for relief must be granted. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management

101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.