

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 11945

DECISION OF HEARING OFFICER

This case has straightforward facts. The governing policy to be applied to those facts is not as straightforward. The grievant challenges being placed on Long Term Disability status (hereafter LTD) and removed from his employment with the Commonwealth of Virginia Department of Corrections on Aug 1, 2022. I find these actions to have been improper.

I. PROCEDURAL BACKGROUND

The grievant commenced this matter by filing his Form A on September 23, 2022. The head of the agency ruled on December 12, 2022 that the issues raised by the grievant were not grievable. The Department of Human Resource Management (“DHRM”) issued its formal ruling, DHRM Ruling 2023-5493, on March 3, 2023. The DHRM found several bases for the issues to be subject to a grievance hearing.

I was appointed as the hearing officer on March 21, 2023. On March 24, the grievant filed a motion to limit the representation of the agency attorney. The agency submitted a response that same day. I denied the motion on March 25. The grievant requested a reconsideration, which was denied on March 31.

On April 2, the grievant filed a motion to grant relief without a hearing. The agency submitted a response on April 4. The grievant supplemented the motion on April 4. On May 14, I denied this motion, finding that nothing in the DHRM Rules for Conducting Grievance Hearings or the Grievance Procedure Manual authorized the granting of the motion prior to the hearing, particularly in light of there being disputed facts to be determined.

At the initial prehearing conference the hearing had been scheduled for May 22. On the request of the grievant, I continued the matter on May 9. A second prehearing conference call was held in June and the matter was set for hearing on July 31 by agreement of all parties. The hearing was conducted on that date.

II. APPEARANCES

The grievant was represented by a lay advocate. He called as adverse witnesses three agency employees. The grievant did not testify. The proposed exhibits tendered in accordance with the prehearing orders were accepted into evidence without objection.

The agency was represented by an attorney, who is also an employee of the agency. It presented one additional witness beyond those called by the grievant. The exhibits submitted in accordance with the prehearing order were accepted into evidence without objection.

III. ISSUES

- a. Whether the agency correctly applied DHRM Policy 4.57 in denying his claim for Short Term Disability (STD) benefits filed on July 5, 2023, transitioning the grievant into Long Term Disability status and terminating him from employment?
- b. If so, was the agency correct in making the termination effective as of August 1, 2023?

IV. FACTUAL FINDINGS

The grievant began his employment with the agency in 2007. In 2022, he was employed as a corrections officer. In early October 2021 the grievant was diagnosed with colon cancer. He ceased working on October 13 and filed a claim for STD benefits on October 14, 2021. He remained off work until April 14, 2022.

In December 2021 the grievant received a second diagnosis - this for liver cancer. When he returned to work in April 2022, he was informed of the provisions in DHRM Policy 4.57 requiring him to be able to work for a minimum of 45 consecutive calendar days. The policy allows an employee to have approved leave during those 45 days without resetting the clock.

The grievant took approved leave for a partial day on April 27, 2022, for follow-up regarding the liver cancer. On May 25, 2022, he missed a full day of work for further consultation with physicians regarding the liver cancer. This leave had also been approved in advance. He also took a personal leave day on June 8, 2022.

Prior to his leaving work in October 2021 the work schedule of the grievant was such that he had scheduled days off during a "normal" work week of Monday through Friday. When he returned to work in April 2022, the warden adjusted the schedule of the grievant and had him work eight-hour workdays on a Monday through Friday schedule. The grievant denies that he made this request for a modification of the twelve hour shifts he had prior to his disability claim.

On July 5, 2022, the grievant submitted a new claim for STD benefits to allow him time to seek and recover from treatment for his liver cancer. The third-party administrator (TPA) of the Virginia Sickness and Disability Program denied this claim on August 28. It found the grievant to be ineligible due to his not having worked, or available for work, during the 45 consecutive days commencing April 14, 2022. It ruled that his new claim was a continuation of the claim filed in October 2021. Because the length of the original claim then exceeded the 125 days provided for in Policy 4.57, the TPA transitioned the claim to one for Long Term Disability. With that transition, the agency terminated the grievant from employment, effective August 1, 2023. That date was used to coordinate with the cessation of entitlement to certain benefits, including health insurance, based on his last having worked in July.

V. ANALYSIS

The Department of Human Resource Management has promulgated a Grievance Procedure Manual (GPM) to govern these proceedings. Under Section 5.8 of the GPM, the grievant here had the burden of proving his claim by a preponderance of the evidence. The burden is on the grievant due to this not being a disciplinary action.

DHRM Policy 4.57 is the “Virginia Sickness and Disability Program.” The purpose of the program is to provide supplemental replacement income and to encourage “rehabilitation with an ultimate goal to return employees back to gainful employment when medically able.”

Under the policy, a disability is any illness, injury, or other medical condition preventing “an employee from performing the duties of his or her job.” Short-term disability benefits commence after a seven-calendar day waiting period and provide replacement income for a maximum of 125 workdays. Long term disability benefits commence when the maximum period for short term benefits expires.

The crux of this case is whether the grievant became entitled to a new period of STD upon his filing in July of 2022, or as, the agency argues, the grievant falls under the portion of Policy 4.57 for “successive periods of short-term disability.” (Pg 17). The argument of the agency is that the grievant worked fewer than 45 consecutive calendar days after April 14, 2022, due to the same condition as was the cause of his initial time of STD. Under the policy, a claim becomes a new period of STD when an employee “returns to work full-time/full duty for 45 or more consecutive calendar days...but cannot continue to work or experiences a new disability or illness during 45 calendar day unrelated to the first condition.” If the agency is correct in its interpretation of the facts and policy, then the grievant exceeded his time of 125 working days for STD benefits and was properly transitioned into LTD status. The agency is incorrect, however.

The agency has conflated the second STD claim with the initial diagnosis and treatment for colon cancer suffered by the grievant serving as the reason for his initial STD claim. The exhibits submitted by the grievant, without objection, reflect that he was seeking the second period of STD benefits because of his cancer of the liver, not the colon as was originally the issue. The record would be much stronger had the grievant supplied any corroborating medical records. The strongest corroboration for his exhibits was the testimony of the human resource manager of the facility where the grievant was employed referencing a “second diagnosis.” This is significant because the policy, in the relevant portions, requires that successive periods of STD be “the result of “the same condition.” There is no exception for a similar condition being the cause of the second, successive claim.

Reviewing the scant evidence in the record, it appears the grievant had surgery for his colon cancer in December 2021. His path to recovery was such that he was able to return to work on April 14, 2022. To rule in favor of the agency I would need to conclude that the treatment for the liver cancer was merely related to the disability arising from colon cancer. To find that the second diagnosis, one of cancer to a different organ of the body, was sufficient to bar a second, successive STD claim would be inconsistent with the wording of the policy as to the requirement

“same” condition. It would also be inconsistent with the purpose of the policy to have employees return to work when and if physically able. The prima facie case made by the grievant as to a second disabling condition could possibly have been rebutted by medical evidence showing a link between the two cancers. None was presented.

The agency has argued that the leave days taken by the grievant to seek treatment for the liver cancer should be viewed as stopping the clock for the 45 consecutive calendar day timeline under the Policy. The portion of the Policy addressing leave speaks in terms of the absence being “related to the same major chronic or non-major chronic condition.” If leave is approved for “other reasons”, those days do not affect the counting of the 45 consecutive calendar days. Again, the express language of the policy bars the agency from holding against the grievant the approved leave taken by him for the medical appointments for liver cancer. All the other absences of the grievant were also approved by the agency and not to be considered by it in calculating the 45 days.

The agency argued and presented evidence that the grievant was told, in advance, that his taking time off for medical appointments after April 14 could possibly affect his ability to claim a new disability. The grievant denies being made expressly aware of that. The grievant did not testify at the hearing. Because of that fact, I cannot determine whether his version of events was more credible than that of the testimony of the agency witnesses. If the agency employees had directed the grievant, that would have been a flawed statement and a misapplication of policy.

The agency further presented evidence that the grievant had not made a sufficient request for a disability accommodation to trigger the protections of the Americans with Disabilities Act. I find the argument to be curious, given that the warden had already adjusted the work schedule of the grievant upon his return to work, whether at his request or otherwise. Also, the Equal Employment Opportunity Commission has ruled that there need not be a specific, express request for an accommodation for the statute to apply. EEOC “Enforcement Guidance on Reasonable Accommodations and Undue Hardship under the ADA”, Section 915.002. Assuming the applicability of the statute, I cannot find that the grievant was the subject of discrimination.

VI. DECISION

For the reasons stated above, I find that the grievant should have been allowed the second, successive period of Short Term Disability benefits as claimed by him on July 5, 2023. Because of this finding, I do not address whether the agency acted properly in making his termination from employment retroactive to August 1, 2022. Nothing in this decision shall affect the rights of the agency, through its Third Party Administrator or otherwise, to determine when the grievant could properly be returned to work, placed on a status of Long Term Disability or Long Term Disability-Working after his claim of July 5, 2022. All appropriate benefits shall be restored to the grievant consistent with this decision. This includes all lost income for any period if it is determined the grievant was eligible to work, either full time, or part time in Long Term Disability – Working status. Benefits received previously by the grievant shall be allowed as an offset.

APPEAL RIGHTS

The parties may file an administrative review request within 15 calendar days from the date this decision is issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

Director, Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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

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

ORDERED this August 11 ,2023

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer