Issue: Misapplication of VSDP policy and termination; Hearing Date: 03/17/03; Decision Issued: 03/31/03; Agency: DRS; AHO: David J. Latham, Esq.; Case No. 5659

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5659

Hearing Date: March 17, 2003
Decision Issued: March 31, 2003

PROCEDURAL ISSUE

Due to the availability of participants, the hearing could not be docketed until the 32nd day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Two advocates for Grievant
Three witnesses for Grievant
Human Resource Manager
Representative for Agency

[1] § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001 requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

Three witnesses for Agency

ISSUE

Was the Virginia Sickness & Disability Plan misapplied?

FINDINGS OF FACT

The grievant filed a timely grievance following the termination of his employment effective August 5, 2002. Following failure to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing.[2] Subsequently, the grievant requested the EDR Director to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that the case raised a sufficient question as to whether the agency correctly applied the applicable policies, and therefore qualified this issue for a hearing.[3]

The Department of Rehabilitative Services (hereinafter referred to as "agency") employed grievant for 10 years as a full-time classified training instructor. He worked at a facility that provides comprehensive medical, assistive technology and vocational rehabilitation services to persons with disabilities.

On February 6, 2002, grievant went under the care of a physician for depression and anxiety.[4] After the seven-calendar day waiting period the claimant came under the aegis of the Commonwealth's Virginia Sickness and Disability Program (VSDP). Effective with the eighth-calendar day of his absence he became eligible for, and began to receive, short-term disability benefits (STD). The VSDP plan provides that, "Short-term disability payments continue for up to 180 calendar days…"[5] During the entire period of his short-term disability, grievant did not work and therefore was not placed in what is termed "STD-Working" status.

During his period of STD, grievant maintained reasonable contact with the agency by calling his supervisor approximately every other week to update her on his status. Grievant also maintained appropriate contact with the human resources department to assure that it was aware of his status. The Virginia Retirement System (VRS) administers VSDP benefits in conjunction with CORE, Inc., a third party administrator. Grievant's physician periodically provided reports to CORE, which reviewed the reports and advised the agency whether

[2] Grievant Exhibit 1. Grievance Form A, filed August 27, 2002.
[3] Grievant Exhibit 2. Ruling Number 2002-184, *Qualification Ruling of Director*, February 6, 2003.
[4] Grievant Exhibit 16. Affidavit of grievant's psychologist, March 14, 2003.
[5] Grievant Exhibit 3. *Virginia Sickness and Disability Program (VSDP) Handbook 2002*, p. 7.

benefits should be continued. Grievant received continuous benefits during the entire period of his STD.

As is customary, CORE mailed a packet of information to grievant on June 21, 2002 notifying him that his STD benefits would be ending on August 4, 2002. The packet contains detailed information and all forms needed to apply for long-term disability (LTD), which begins with the 181st calendar day of disability.[6] Grievant completed the necessary forms and returned them to CORE on July 19, 2002. On or about June 26, 2002, grievant advised his supervisor that he planned to return to work on July 31, 2002. Sometime during July 2002, he spoke with his supervisor again and told her that his return-to-work date would be August 2, 2002. On or about July 30, 2002, grievant called a human resource analyst and advised that his physician had released him to return to work on a part-time basis the following week. On August 1, 2002, CORE notified human resources that grievant was approved to return to work four hours per day beginning August 5, 2002.

On August 1, 2002, the human resource analyst asked grievant's supervisor whether he could accommodate the physician's recommended job modifications. The supervisor responded the following day that he could accommodate the requested modifications.[7] On August 1 & 2, 2002, the human resource analyst also exchanged several email messages relating to grievant's case with the human resources department in the agency's central office.[8] On the morning of August 2, 2002, the analyst noticed that the VSDP policy precludes having an employee return to work on LTD-working status if the employee had not already been working in STD-working status.

A human resources consultant in central office discussed this issue with a CORE representative and concluded that the policy did, indeed, preclude grievant from returning to work in an LTD-working status. By 2:40 p.m. on August 2, 2002, human resources central office concluded that the policy prevented returning grievant to work in an LTD-working status and notified the local human resource analyst. The analyst then advised CORE that the agency could not accept the job modifications because of internal agency hiring restrictions.[9] The agency's human resources director spoke with grievant by telephone that same afternoon and explained the situation to him. She advised him that because of the hiring restrictions, that he could only return to work as a wage employee. Grievant rejected that option stating that he did not want to be a wage employee. The following week, the agency advised grievant that he had

[6] Agency Exhibit 25. VSDP's Long-Term Disability Application Packet.
[7] Grievant Exhibit 9. E-mails between human resource analyst and grievant's supervisor, August 1 & 2, 2002.
[8] Grievant Exhibit 10. Email string, August 1-2, 2002.
[9] Grievant Exhibit 11. Email string, August 2, 2002

been placed in LTD status, effective August 5, 2002, that he was now in inactive status and that the agency was not required to hold his job.[10]

Grievant's position was abolished in October or November 2002 in order to help the agency achieve required budget reductions. However, the Executive Director knew in early August 2002 that she was going to have to eliminate several positions in the near future. When the grievant became an inactive employee, the position was therefore held unfilled until the budget cuts became necessary in the fall.

When an employee is in LTD, he is considered an inactive employee of the state.[11] Accordingly, grievant could only be reemployed in a wage position when he was able to return on an unrestricted full-time basis. Grievant was aware that he would be placed on inactive status once STD ended. Further, such reemployment in a wage position would require that the agency submit a hiring request to its Cabinet Secretary for approval.[12]

VRS has published a list of frequently asked questions and answers relating to the VSDP. One of the questions asks, "Does an employee need to be in an STD-working status when transitioning to LTD in order to be considered LTD-working?" The answer states:

> Yes. In order for an employee to go into LTD-working status he/she must be in an STD-working status on the 180th day of the waiting period. If the employee is not in an STD-working status on the 180th day, he/she cannot be placed in LTD-working on the 181st day. … If the employee was not in STD working on the 180th calendar day, or if the agency cannot continue to accommodate restrictions, the employee will be placed in LTD status.[13]

Another question asks, "What should an agency do when an employee on full LTD is released to return to work with restrictions?" The answer states:

> **Note: An employee cannot go into LTD-working from LTD status.**

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[10] Grievant Exhibit 12. Letter from human resource analyst to grievant, August 8, 2002.

[11] Grievant Exhibit 4, p.5. *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*, March 19, 2002. *See also* Agency Exhibit 22, p. 3. *VSDP's Long Term Disability (LTD) Status*, which provides that an employee on LTD is not guaranteed a return to his predisability position.

[12] Agency Exhibit 24. Executive Order 9, *Commonwealth Hiring Guidelines*, February 22, 2002.

[13] Grievant Exhibit 4, pp. 3-4. *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*.

> The only way an agency can hire an employee that is in LTD status, who has been released to return with restrictions, is in an hourly position.[14]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[15]

The Virginia Sickness and Disability Program is codified in Code of Virginia §§ 51.1-1100 through 51.1-1140, and provides, in pertinent part:

> Short-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar day waiting period. The waiting period shall commence the first day of a disability or of maternity leave.[16]

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[14] Grievant Exhibit 4, pp. 5-6., *Ibid.* NOTE: The Commonwealth's term for an hourly position is wage employee.

[15] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.

[16] Va. Code § 51.1-1110, Short-term disability benefit.

> Long-term disability benefits for participating employees shall commence upon the expiration of a 180-calenday-day waiting period. The waiting period shall commence the first day of the disability.[17]

Application of Policy

Grievant began his disability leave on February 6, 2002. His disability benefits began following the seven-calendar day waiting period. The 180-calendar day waiting period for long-term disability benefits expired on August 4, 2002. The definitions above are reaffirmed by the definition of long-term disability benefit found in the Commonwealth's policy on VSDP Leave.[18] Thus, the agency and CORE correctly calculated that grievant's long-term benefits would begin on August 5, 2002.

The VSDP statute defines "disability *benefit*" as "income replacement *payments* payable to a participating employee under a short-term or long-term disability program pursuant to this chapter."[19] The VSDP provides that such *payments* begin after the seven-day waiting period. Since the statute provides that long-term disability benefits begin on the 181st day of disability, it follows that payment of short-term disability benefits is a maximum of 173 days (180 days of short-term disability minus the seven-day waiting period). The VSDP Handbook contains language that states otherwise. There are at least three statements in the Handbook that refer to "180 calendar days of short-term disability *benefits*."[20] Thus, while the statute is clear in limiting short-term disability payments to 173 days following the seven-day waiting period, the VSDP Handbook contains language that could mislead an employee into believing that the long-term disability period begins seven days later than it actually does. However, grievant did not argue that he had been mislead by this language and the language does not appear to have been a factor in this case.

Grievant avers that he was able to return to work prior to August 5, 2002. He further testified that his physician would have agreed to certify him for return to work prior to August 5, 2002 if grievant had told the physician he felt able to return. Thus, by his own testimony, grievant's short-term disability had actually ended at some point prior to six months. However, grievant had no explanation

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[17] Va. Code § 51.1-1112, Long-term disability benefit.

[18] Agency Exhibit 2. DHRM Policy 3.57, *Virginia Sickness and Disability Program Leave*, effective January 1, 1999.

[19] Va. Code § 51.1-1100, Definitions.

[20] *VSDP Handbook 2002*, p.7 – "…short-term disability *payments* continue for up to 180 calendar days." p. 10 – "Long-term disability benefits begin at the conclusion of the 180 calendar days of short-term disability *benefits*." p. 31 – In defining long-term disability, "A period of approved disability absence that begins after 180 calendar days of short-term disability *benefits*." (Italics added in all examples).

for his failure to return to work earlier in view of his assertion that he could have done so. In cases involving subjective ailments such as depression and anxiety, the physician must rely primarily on what the patient says. Apparently, grievant led his physician to believe that he was not able to return to work before August 5, 2002 notwithstanding that grievant now argues that he could have returned earlier. By misleading his physician, grievant was effectively misleading the agency and receiving benefits to which he was not entitled.

This pattern may have begun at least as early as April 2002 when grievant advised his supervisor that he would return to work on April 29, 2002 but then failed to do so.[21] In late June 2002, grievant advised his supervisor he would return to work on July 31, 2002. Grievant later extended the date to August 2, 2002. Subsequently, he again extended the date until August 5, 2002. It would therefore appear that grievant made a conscious decision not to return to work until he had drawn the maximum amount of short-term disability benefits. Moreover, grievant continued to draw LTD benefits from August 5, 2002 through August 31, 2002. If, as grievant argues, he was able to return to work even before the end of the STD period, he was clearly not entitled to any further benefits from the VSDP. Further, if grievant was able to return to work before August 5, 2002, it is curious that he continued to draw and accept LTD payments during the month of August. Only after his payments were ending did grievant file this grievance.

The VSDP FAQs contain multiple references that advise the agency that it may need to assess accommodations under the Americans with Disabilities Act if the employee has a "disability" as defined by ADA. Grievant's arguments suggest that he should be considered to have such a "disability." However, from the evidence presented in this case, it does not appear that grievant meets the ADA definition of an "individual with a disability." The ADA definition is, "An individual who has a physical or mental impairment, and the impairment substantially limits one or more of the individual's major life activities."[22] Grievant has not provided any evidence of a physical impairment. From the record of this hearing, it was established only that he was on STD for depression and anxiety. Moreover, the ADA requires that any impairment be of sufficient extent, duration and impact, that it "substantially limits" a major life activity. Generally, short-term restrictions have been held not to be substantially limiting. In this case, grievant maintains that his disability was not long-term and that he was prepared to return to work before the end of his STD period. Therefore, it is concluded that the evidence is insufficient to establish a "disability" for ADA purposes.

A careful review of the evidence reflects that the VSDP policy was correctly applied. The VSDP is not administered by grievant's employing agency. Rather, the Virginia Retirement System (VRS) and a third party administrator (CORE) administer the Program. The VRS is an independent

[21] Grievant Exhibit 8. E-mail string, April 18, 2002.
[22] Grievant Exhibit 15. § 12102(2)(A) United States Code Title 42.

agency of the Commonwealth (not part of the executive branch). All available evidence indicates that VRS and CORE make the policy decisions. Grievant's agency had no input into the decision-making process in grievant's case. Despite thorough examination of the agency's witnesses, there was no evidence to suggest that the agency attempted to influence the decisions made by VRS and CORE in this case. Moreover, there is no evidence to suggest that the agency had any hidden agenda or ulterior motive that might have caused it to attempt to influence the decisions of VRS and CORE.

The agency maintains that only the VSDP can determine when an employee is able to return to work. The evidence bears out that only CORE handles all communication with grievant's physician. Only CORE's medical staff is authorized to contact the physician to resolve questions. When CORE is satisfied that the physician's documentation supports disability, CORE then certifies another period of disability to the agency. During the period of disability, the agency's primary function is to make payments to the employee, as long as CORE continues to certify the disability. The agency is not permitted to contact the physician. The agency is also not permitted to suggest that an employee return to work as long as CORE continues to certify disability. In fact, it appears that the intent in having an independent agency and a third-party administrator operate VSDP is to assure that the program is administered in a fair and objective manner by a party other than the employee's own agency.

The evidence further reflects that grievant had stated on more than one occasion that he would return to work before the expiration of his STD, but each time he and his physician extended the period of disability. Even during the last week of the six-month STD period, grievant extended his return-to-work date from July 31 to August 2 to August 5. Grievant's physician provided information to CORE that indicated grievant was unable to work until August 5, 2002. Grievant's agency had no input into this process. Grievant's physician and grievant provided the information, and CORE approved it. CORE's decision mirrored the physician's return-to-work recommendation. Accordingly, it is concluded that VRS, CORE, and the agency correctly and fairly applied the applicable policies.

Suggested options

The EDR qualification ruling suggested that the agency might have had four possible options in this case. It must be noted that EDR's suggestions were based solely on information provided by the parties during EDR's inquiry into the situation. In conducting such an inquiry, EDR elicits only the amount of information necessary to determine whether the issue qualifies for a hearing. However, the evidentiary hearing conducted by a hearing officer elicits far more information, subjecting the information to examination and cross-examination by the parties, and results in a far more detailed and accurate picture than is

afforded by the initial EDR inquiry. Therefore, it is appropriate to address the four potential options in light of all the evidence educed at the hearing.

First, it was suggested that the agency *could* have notified grievant earlier of its conclusion regarding the LTD-working rule so that he and his physician could determine whether he would be able to work for at least one hour while still in his PTD status, and thereby qualify grievant for LTD-working status. It must first be said that grievant had led the agency to believe that he was returning to work *prior* to the expiration of his STD. It was not until August 1, 2002 that CORE notified the agency that grievant would not return to work until August 5, 2002. The agency's human resource analyst worked diligently to accommodate grievant's return to work on that date by obtaining approval from grievant's supervisor's for the physician's recommended restriction. Late the following morning, she discovered that there might be a problem that precluded grievant from returning to a classified position with restricted hours. This question was not resolved until early afternoon after consultation between the agency's Human Resource Director and CORE.

In theory, if grievant had worked for one hour on August 2, 2002, he would have been in an STD-working status and, therefore, eligible for return on August 5, 2002 in an LTD-working status. However, in order for grievant to work for even one hour on August 2, 2002, it would have been necessary for grievant's physician to provide a written recommendation to CORE, the medical staff at CORE would have had to review the recommendation, and CORE would have had to notify the agency of its approval. Normally, this process would require several days. One may argue that, with facsimile transmission, the process *might* have been accomplished in hours. However, to do this, grievant would have had to contact his physician, convince the physician to allow him to return to work earlier, the physician's office would have to prepare a letter to CORE, the CORE medical staff would have had to review it immediately upon receipt, and CORE would then have to send notification to the agency. It is highly speculative to assume that all of this could have happened within one or two hours, and still allow grievant to return to work for one hour during that same afternoon of August 2, 2002.

It further assumes that the physician, his staff, and the CORE staff would agree to drop what they were doing in order to handle this matter on a rush basis. Moreover, there is no evidence that the agency had work available for the grievant to perform on August 2, 2002. Grievant's supervisors had previously planned the work schedule for grievant to begin working afternoons on August 5, 2002; someone else was already assigned to work on August 2, 2002. Therefore, it has not been demonstrated that this suggestion would have been possible in actual practice.

Second, it has been suggested that the agency could have allowed grievant to return as a wage employee in order to accommodate the 20-hour per

week restriction. This suggestion fails for two reasons. First, pursuant to Executive Order 9, the agency could not fill a wage position unless approval was obtained from the Cabinet Secretary. This process requires a written request from the agency head to the Cabinet Secretary. There is no evidence to suggest that either the agency head or the Cabinet Secretary were available on August 2, 2002. Assuming for argument's sake that they were available, there is no assurance that either or both would have approved such a request. In fact, given the hiring freeze and budget crisis, it is more likely than not that they would have denied the request. Second, and more significantly, grievant told the Human Resource Director that he did not want to return to work in a wage position. Thus, grievant himself eliminated this possibility before it could even be explored.

A third scenario suggests that the agency could have sought Secretarial approval to allow grievant to return to work on August 19, 2002 on a full-time basis. Under this scenario, grievant would have first been placed on LTD effective August 5, 2002. Pursuant to VSDP rules, grievant would be in an inactive status and the agency would not be under any obligation to bring him back. There is no reason to believe that the agency head or the Cabinet Secretary would be inclined to fill a vacant wage position for the reason stated in the preceding paragraph, i.e., the hiring freeze and budget crisis.

Finally, a fourth suggestion was that the agency could have allowed grievant to return to work as a full-time salaried employee on August 5, 2002, and use accumulated leave, or leave without pay for the first two weeks of part-time work. This is at once the most attractive but least realistic suggestion. It is attractive because it simply sweeps away the statutory requirements of the VSDP and allows the agency to resolve the problem on its own. However, there has been no evidence offered, and the Hearing Officer can find no evidence, that would allow an agency to opt out of or ignore the VSDP. When an employee elects VSDP coverage, both the employee and the agency are bound by the terms of the statute. Here, the agency was bound by the VSDP decision that, effective August 5, 2002, grievant's status was LTD. The agency has no authority to ignore the VSDP decision by making a unilateral decision to allow grievant to return to work in a de facto LTD-working status when the VSDP rules specifically prohibit that possibility. If an agency were permitted to set its own return-to-work rules, the VSDP would become meaningless. Accordingly, it does not appear that any of the four suggested options were possible because each was unrealistic, impractical or prohibited.

The evidence reflects that grievant had 10 years of service, performed satisfactorily, and had the support of his supervisors. To a casual observer it might therefore appear that the agency was callous because it did not find some way to retain the grievant in state service. The evidence does not bear out such a conclusion. In fact, the agency was willing to allow grievant to return to work before it learned of the rule precluding such a return. Even after learning of the preclusion rule, the agency offered grievant the possibility of a wage position but

he rejected the offer. Under the VSDP rules the agency did what it could but the available options were very limited.

However, once grievant was placed in an inactive status, the agency then had to make a difficult decision. It could have pleaded a case to the Cabinet Secretary to rehire grievant upon the expiration of his LTD. Alternatively, it could elect to leave the position vacant in order to facilitate compliance with the cost-cutting regime mandated by the Governor. The agency chose the latter alternative. The decision of whether to fill vacancies is an internal management decision made by each agency. Section 2.2-3004.B of the Code of Virginia states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." A hearing officer may not overrule such management decisions.[23]

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DECISION

The grievant has not demonstrated by a preponderance of evidence that the Virginia Sickness and Disability Program was misapplied or unfairly applied. Grievant's request for relief is hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party.

[23] § 5.9(b)6 & 7, EDR *Grievance Procedure Manual*, Ibid.

The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[24] 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.[25]

[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]

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David J. Latham, Esq.
Hearing Officer

[24] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[25] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.