

Issue: Termination of Employment; Hearing Date: 06/29/04; Decision Issued:  
06/30/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 744



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 744

Hearing Date: June 29, 2004  
Decision Issued: June 30, 2004

PROCEDURAL ISSUE

The agency asserted that grievant did not have access to the grievance procedure and failed to initiate her grievance within the required 30-day period. When the grievant complained that the agency was not in compliance with the grievance procedure, the agency referred the matter to the Director of the Department of Employment Dispute Resolution (EDR) for a compliance ruling. The EDR Director ruled that grievant has access to the grievance procedure and that her grievance was filed within the 30-day period.<sup>1</sup>

APPEARANCES

Grievant  
Warden  
Advocate for Agency

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<sup>1</sup> Agency Exhibit 2. EDR Access and Compliance Ruling of Director, Number 2004-645, issued April 9, 2004.

One witness for Agency

## ISSUES

Did the agency misapply policy by placing grievant on long term disability?

## FINDINGS OF FACT

The grievant filed a grievance because her employment was terminated subsequent to being placed on long-term disability.<sup>2</sup> The Department of Corrections (Hereinafter referred to as agency) has employed grievant for four years.

The Virginia Sickness and Disability Program (VSDP) provides eligible employees supplemental or replacement income during periods of partial or total disability. The program encourages rehabilitation. Its ultimate goal is to return the employee to gainful employment when she is medically able. Short-term disability (STD) payments continue for up to 180 calendar days from the date the disability begins.<sup>3</sup> Eligible employees receiving short-term disability benefits are considered to be in leave-with-pay status. If an employee is released to return to her pre-disability job full-time and performing the full duties of the job, and she again becomes disabled due to the same condition, it is considered a continuation of the prior disability if she works fewer than 14 consecutive calendar days after a non-major chronic condition.<sup>4</sup> While on STD, an employee's position is held open until she either returns to work or is moved to long-term disability.

Long-term disability (LTD) benefits an employee with income replacement if she is unable to work for a long period of time due to illness or injury. LTD benefits begin at the conclusion of the 180 calendar days of STD. Return to the employee's pre-disability position is not guaranteed after she begins LTD.<sup>5</sup> In most cases, agencies automatically terminate employment when an employee is moved to LTD because the agency needs to fill the position with an active employee.

LTD-Working status is available for employees who have returned to work on a restricted basis while on short-term disability. Thus, if an employee has returned to work with limitations while on STD, she can be moved to LTD-Working status after 180 days of STD. However, if an employee does not return

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<sup>2</sup> Agency Exhibit 1. Grievance Form A, filed January 10, 2004.

<sup>3</sup> Agency Exhibit 7, p. 7. *VSDP Handbook*, 2002.

<sup>4</sup> *Ibid.*

<sup>5</sup> Agency Exhibit 7, p. 10. *Ibid.*

to work while on STD, and is moved to LTD status, the employee cannot thereafter be placed in LTD-Working status.<sup>6</sup>

Grievant asserts that, on June 5, 2003, she missed a step while walking down stairs at work and injured her back. She took an analgesic pill and finished her shift. Grievant worked the following day but on June 7, 2003 was unable to get out of bed due to back pain. She first consulted a physician on June 11, 2003. The physician notes grievant's complaint as having "back pain for some time." Grievant's physician approved grievant to return to work in mid-July with the restriction that she not lift more than 20 pounds.<sup>7</sup> Grievant attempted to return to work on July 21, 2003 but was unable to work for more than three hours due to back pain. Grievant did not report the June 7, 2003 incident to the agency until October 30, 2003. The Workers' Compensation Commission determined that grievant's claim is not compensable.<sup>8</sup>

On December 1, 2003, the agency notified grievant by letter that her STD status would end on December 4, 2003 and she would be moved to LTD status effective December 5, 2003. The letter did not address grievant's job status. On December 5, 2003, the agency received a job modification form from the third-party VSDP administrator. The form recommended allowing grievant to work four hours per day, five days per week, with several restrictions. Grievant never advised the agency's human resources department that her physician had made such a recommendation. By this time, grievant had already been moved to LTD status and therefore could not be placed in LTD-Working status. Grievant learned on December 30, 2003 that her job had not been held open and that her employment had been terminated.<sup>9</sup>

As of this date, grievant remains on long-term disability. The VSDP third-party administrator has approved grievant for LTD through June 7, 2005.<sup>10</sup> Grievant currently wears a back brace, and a transcutaneous electrical nerve stimulator (TENS) device. In addition she continues to take medication for pain. Grievant believes she is currently capable of working in a part-time job but with restrictions (no lifting, bending, squatting, crawling, ladder climbing, prolonged standing, prolonged sitting, or climbing stairs).

Grievant received a VSDP Handbook but did not read it thoroughly prior to filing her grievance. VSDP participants are charged with the responsibility to know and understand their benefits.<sup>11</sup> In October 2000, the facility had granted

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<sup>6</sup> Agency Exhibit 4. Memorandum to Human Resource Directors from Department of Human Resource Management Policy Analyst, March 19, 2001.

<sup>7</sup> Agency Exhibit 3. Job modification release form, July 28, 2003.

<sup>8</sup> Agency Exhibit 3. Letter to grievant from third party administrator, February 23, 2004.

<sup>9</sup> The Department of Human Resource Management (DHRM) has determined that because an employee on LTD is not guaranteed reinstatement to her former position, DHRM considers the employee "separated" from state service upon being placed on LTD.

<sup>10</sup> Agency Exhibit 8. Virginia Retirement System Claim Status Review, June 27, 2004.

<sup>11</sup> Agency Exhibit 7, p. 22. *VSDP Handbook*, 2002.

to grievant an accommodation when she requested an adjusted work assignment for a short-term impairment.<sup>12</sup>

### 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, such as claims of misapplication of policy, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.<sup>13</sup>

The preponderance of evidence establishes that the agency handled this case routinely and in accordance with policy. Grievant was placed on STD for 180 days. In July 2003, her physician approved a return to work with restrictions. Grievant returned to work but was able to work less than half a day before again being placed on full STD. Her physician rescinded the work approval. By the end of the STD period, grievant had not returned to work. She did not notify the agency that she either wanted to return to work or was able to return to work. The agency notified her before the end of the STD period that she was about to be placed on LTD. Hearing nothing further from grievant, the agency routinely

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<sup>12</sup> Agency Exhibit 6. Adjusted Work Assignment, October 26, 2000.

<sup>13</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

moved her to LTD status after her STD benefits were exhausted on December 4, 2003. In addition, as part of the agency's routine practice, it terminated her employment in order to be able to fill her position with a new employee.

After grievant was moved to LTD status, the agency received information indicating that grievant's physician had approved a part-time return to work with substantial restrictions. However, the policy does not permit employees to be moved from LTD to LTD-Working status. Moreover, grievant's employment had already been terminated. Accordingly, grievant has not shown, by a preponderance of evidence, that the agency misapplied the VSDP policy.

The job modification release form received on December 5, 2004 contains a return-to-work start date of October 30, 2003. This suggests that the physician's recommendation *might* have been made on or before that date. However, grievant did not submit any testimony or evidence from the physician as to when he made his recommendation. Nonetheless, assuming, *arguendo*, that the physician had made his recommendation in October, there is no evidence regarding when he submitted it to the VSDP third-party administrator. In any case, grievant was either unaware of the recommendation or failed to advise the agency of it prior to the termination of her employment. Moreover, even if the agency had received the recommendation prior to the end of grievant's STD, it is highly unlikely that it would have had a position available for grievant that would accommodate all of the restrictions. It is difficult to imagine any corrections officer's position that would involve no lifting, bending, squatting, crawling, climbing stairs, prolonged sitting, or prolonged standing.

Grievant knew, or reasonably should have known, that being moved from STD status to LTD status means that her employment is no longer guaranteed. Likewise, she should have known that once she moved to LTD status, she would no longer be able to be placed in LTD-Working status. Although agencies are *encouraged* to inform employees who are moved into LTD status whether their job is being held, they are *not required* to make such a notification.<sup>14</sup> In this case, EDR concluded that the agency's failure to provide such notice to the grievant meant that grievant did not become aware of the event that formed the basis of her grievance until December 30, 2003. While this resulted in the grievance being deemed timely filed, it does not alter the underlying facts in this case. The fact is that grievant did not return to work while on short-term disability. Had she done so, she could have been moved to STD-Working status thereby making her eligible for LTD-Working status when the 180 days of short-term disability ended.

Grievant claimed that two other employees are working with job modifications. While grievant did not offer these employees as witnesses, the agency acknowledged that it has a few employees whose job modifications were able to be accommodated. Those employees returned to work while on STD.

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<sup>14</sup> Neither party submitted evidence on this point. However, EDR Ruling 2004-645 (Agency Exhibit 2) cites a VSDP fact sheet that addresses this question.

One employee has a brace on her arm on a short-term basis and has been temporarily allowed to work in the mail room. However, the agency does not have a position that would accommodate all the restrictions grievant's physician has imposed. Moreover, grievant is unaware of any position that would accommodate her restrictions.

Grievant had a satisfactory performance record while employed. The agency has advised her that she can reapply for employment *when she is able to work*. However, despite grievant's assertion that she feels able to work, her physician continues to restrict her to only 20 hours of work per week with an extensive list of activity restrictions. Moreover, the third-party administrator (which is in direct contact with grievant's physician) has certified grievant for at least one more year of long-term disability. Finally, grievant continues to wear a back brace, take pain medication, and utilize a TENS device for pain management. It is difficult to imagine that grievant could fulfill the duties and responsibilities of a corrections officer under these conditions.

### DECISION

Grievant has not shown that the agency misapplied the VSDP policy. Grievant's request for reinstatement 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 400  
Richmond, VA 23219

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. 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.<sup>15</sup> 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.<sup>16</sup>

[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

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<sup>15</sup> 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).

<sup>16</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.