

Issue: Misapplication of disability policy; Hearing Date: 09/17/04; Decision Issued:
10/14/04; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 855



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 855

Hearing Date: September 17, 2004
Decision Issued: October 14, 2004

PROCEDURAL HISTORY

The Agency placed Grievant on Long Term Disability status and removed her from employment. On June 25, 2003, Grievant filed a grievance to challenge the Agency's action. The Agency denied qualification of the grievance for a hearing. Grievant sought a ruling from Employment Dispute Resolution. On March 26, 2004, the EDR Director issued Qualification Ruling of Director No. 2003-487 denying Grievant's request to have her grievance sent to a Hearing Officer. Grievant challenged the EDR Director's decision in Circuit Court. On August 2, 2004, the Circuit Court Ordered that the grievance qualified for hearing solely on the issue of whether the Agency "may have misapplied or unfairly applied state policy when the [Grievant] was placed on long-term disability on June 28, 2003. On August 19, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 17, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel

Witnesses

ISSUE

Whether the Agency misapplied or unfairly applied State policy when it placed Grievant on Long Term Disability on June 28, 2003.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. 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 Virginia Department of Health employed Grievant as an Office Service Specialist at one of its county facilities. She had been employed by the Agency for approximately 28 years and was covered by the Commonwealth’s Virginia Sickness and Disability Program (VSDP).¹ She is 59 years old.

The Commonwealth of Virginia utilizes a Third Party Administrator (TPA) to evaluate and process employee claims of disability under the VSDP. Responsibilities of the TPA include receiving medical information from doctors and determining whether an employee should be placed on disability status. The TPA is a private contractor selected by the Virginia Retirement System (VRS). Agencies do not have access to the medical information provided by employees to the TPA.²

The TPA advises agencies on the status of their employees’ disability claims through Action Reports (AR). There are three types of ARs. An Initialization AR is generated once the claim has been reported to the TPA and eligibility under VSDP has been verified and entered into the TPA’s database. A Determination AR is generated once an employee’s claim has been approved. A Closure AR is generated once the claim has been closed.³

¹ Grievant is an “existing employee” who has elected to participate under the *Virginia Sickness and Disability Program*. Va. Code § 51.1-1100.

² Grievant provided some of her doctor’s notes to both the TPA and the VDH.

³ Agency Exhibit 5. Only page 1 of *VSDP Action Reports* was submitted as an exhibit.

In September 2002, Grievant began suffering back pain. Grievant sought treatment from a Medical Provider. In December 2002, she was placed on Short Term Disability (STD). She stopped working.

On April 3, 2003, Grievant's Medical Provider wrote two notes. One stated she could return to work on April 9, 2003 and excused her from work from April 3, 2003 through April 8, 2003. A second note stated Grievant could return to work on April 9, 2003 for one-half days for two weeks. Grievant returned to work and began working four hours per day in a five day week.

Grievant's Medical Provider wrote a note dated April 23, 2003 stating Grievant should be placed on light duty only and that her one-half day work schedule was extended through May 14, 2003.

On May 9, 2003, Grievant's Medical Provider wrote a note stating Grievant should continue working half days through June 1, 2003 with full time duty beginning on June 2, 2003. On June 2, 2003, Grievant's Medical Provider wrote a note stating Grievant may return to work on June 3, 2003 for light duty only with one-half workdays for two weeks. On June 3, 2003, Grievant's Medical Provider wrote a note stating Grievant should have light duty only with one-half days for two weeks and five minute breaks each hour to stretch.

On June 16, 2003, Grievant's Medical Provider wrote a note stating Grievant could return to work on June 17, 2003 for light duty only with restrictions of five minute breaks on the hour. The Medical Provider issued a second note dated June 16, 2003 eliminating the light duty only provision and indicating Grievant has a return medical appointment on July 1, 2003.

On June 16, 2003, Grievant submitted⁴ a memorandum to the Business Manager stating:

I have discussed this with my supervisor ... regarding the reception. Due to my back problem I am unable to be confined to the front for several hours, I am able to relieve for short periods of time.

I am trained to do all other duties in the health dept. example: Ordering supplies and equipment, making bank deposits, expense accounts, opening mail, petty cash; I have also typed grants for [another employee].⁵

⁴ The Health Director testified that the memorandum was left on the Business Manager's desk and that although the memorandum showed him being copied, he did not receive a copy.

⁵ Agency Exhibit 10.

The Agency sent Grievant home on June 25, 2003, because Agency managers believed Grievant's restrictions should not be accommodated and because Grievant had entered LTD status. The Agency relied on Grievant's original STD begin date of December 19, 2002 in order to conclude that she had entered LTD status.

Grievant called the TPA on June 26, 2003 and told them she was on annual leave in December 2002 and, thus, they had incorrectly listed the start of her STD. The TPA later changed her the start date of her STD to December 30, 2002.

On June 27, 2003, Grievant's Medical Provider wrote a note stating Grievant could return to work on June 30, 2003⁶ without restrictions.⁷ The Agency considered Grievant to have been separated from employment as of Saturday, June 28, 2003 and, thus, did not reinstate Grievant. Once Grievant was placed on LTD, the Agency considered her to be an inactive employee and thus she was not guaranteed to be returned to her predisability position.⁸

On June 30, 2003, Grievant wrote a note to the County Health Director stating:

In light of the fact that I have been released to return to work by my treating physician, I am ready, willing and able to return to my full time employment.⁹

Grievant received a letter from the TPA dated July 2, 2003, advising her that:

Based on medical information supplied to us by your licensed treating professional (LTP), your short-term disability period has been authorized from 12/30/2002 to 06/27/2003.¹⁰

On July 11, 2003, the TPA issued an Action Report showing her LTD case had been closed¹¹ because Grievant had been released to return to work. Her authorized start date for LTD was June 28, 2003 and her authorized end date was June 30, 2003.

On July 28, 2003, Grievant's Medical Provider wrote a note stating Grievant could return to work on June 28, 2003 without restrictions.¹²

⁶ June 28, 2003 was a Saturday and June 29, 2003 was a Sunday. The Agency's offices were usually closed on weekends.

⁷ Agency Exhibit 4. Grievant Exhibit 2.

⁸ Agency Exhibit 2. *VSDP Long Term Disability*. Only page 3 of this employer manual was submitted for review.

⁹ Grievant Exhibit 3.

¹⁰ Agency Exhibit 3. Grievant Exhibit 4.

¹¹ Neither party presented evidence of the TPA's Initialization and Determination Action Reports.

Grievant contacted the TPA to provide the TPA with information that would enable the TPA to delay the start of LTD. The TPA did not change Grievant's LTD start date. No facts were presented explaining why the TPA refused to change the start of Grievant's LTD whereas it had previously changed the start of Grievant's STD.¹³

On September 30, 2003, Grievant's Medical Provider wrote a memorandum stating:

According to the records on [Grievant], she has been a patient of ours since April 3, 2002 and regarding her work status, she was returned to work full duty on June 27 and was able to return to work at that time. Hopefully this clarifies her work situation. If you have any further questions, please feel free to contact me.¹⁴

The Agency eventually abolished Grievant's position even though it had another employee in a similar position assume a number of Grievant's duties.

CONCLUSIONS OF POLICY

The *Virginia Sickness and Disability Program* arises from *Va. Code § 51.1-1100 et seq.* "Disability" means a partial disability¹⁵ or total disability.¹⁶ Disabled State employees may be entitled to a Short Term or Long Term Disability benefit. "Disability benefit" means income replacement payments payable to a participating employee under a short-term or long-term disability benefit program¹⁷

¹² Agency Exhibit 9.

¹³ The Agency asserts the TPA did not consider Grievant's subsequent doctor's notes because doctor's notes made retroactively should not be relied upon. No credible evidence was presented regarding the TPA's methods of decision-making. Based on the evidence presented, the Agency's assertion remains speculation.

¹⁴ Grievant Exhibit 5.

¹⁵ "Partial disability" exists during the first twenty-four months following the occurrence or commencement of an illness or injury when an employee is earning less than eighty percent of his predisability earnings and, as a result of an injury or illness, is (i) able to perform one or more, but not all, of the essential job functions of his own job on an active employment or a part-time basis or (ii) able to perform all of the essential job functions of his own job only on a part-time basis. *Va. Code § 51.1-1100.*

¹⁶ "Total disability" exists during the first twenty-four months following the occurrence or commencement of an illness or injury if an employee is unable to perform all of his essential job functions or (ii) after twenty-four months following the occurrence or commencement of an illness or injury if an employee is unable to perform any job for which he is reasonably qualified based on his training or experience and earning less than eighty percent of his predisability earnings. *Va. Code § 51.1-1100.*

¹⁷ *Va. Code § 51.1-1100.*

Va. Code § 51.1-1110(A) provides:

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.

Va. Code § 51.1-1112 provides:

Long-term disability benefits for participating employees shall commence upon the expiration of a 180-calendar-day waiting period. The waiting period shall commence the first day of the disability.

The Department of Human Resource Management (DHRM) is responsible for creating policy governing the VSDP. DHRM Policy 4.57, *Virginia Sickness and Disability Program* defines disability as:

A medical condition that renders an eligible employee partially or totally incapable of performing the duties of his/her job. After the period of short-term disability, the condition must render the eligible employee unable to perform the main duties of any job for which he/she is reasonably qualified based on training or experience.

When Grievant's STD ended, she was not disabled.¹⁸ She was not partially or totally incapable of performing the duties of her job. Grievant was able to perform the main duties of her job and was doing so (without taking five minute breaks) at the time she was moved to LTD. She did not have a medical condition that rendered her unable to perform the main duties of any job for which she was reasonably qualified based on her training and experience. Based on Grievant's physical condition at the time STD ended, the Agency improperly placed Grievant on LTD. Accordingly, the Agency misapplied DHRM policy 4.57 by treating as disabled an employee who was no longer disabled.

If the Hearing Officer assumes for the sake of argument that Grievant's underlying physical condition is not relevant and that only the paperwork generated by the TPA defines Grievant's disability status, the conclusion remains that the Agency has misapplied DHRM and VRS policy.

Although not expressly set forth in statute, the DHRM has created employee benefits entitled Short Term Disability – Working and Long Term Disability – Working.

¹⁸ What may have been lost in prior analysis of this case is that disability benefits are intended for those who actually are physically disabled. When documents do not accurately reflect an employee's underlying physical condition, decisions based on those documents should give way to decisions based on the employee's actual medical condition.

DHRM does not define¹⁹ these terms in DHRM Policy 4.57 but discusses them within the Frequently Asked Questions portion of that policy. DHRM policy presents STD, STD-W, LTD-W, and LTD as benefits available to an employee. Likewise, the Virginia Retirement System *Handbook* on the VSDP refers to STD, LTD-W, and LTD as employee benefits. Once benefits are created and given to employees, those benefits cannot be taken away except in accordance with State policy.

When an employee on STD is released to return to work with restrictions, the VSDP Coordinator²⁰ should contact the employee's department to determine if the restrictions can be accommodated. If the restrictions cannot be accommodated, the VSDP Coordinator must notify the TPA and the employee will continue on STD. If the Agency can accommodate the requested restrictions, the VSDP Coordinator must notify the TPA and bring the employee back to work according to modifications received from the TPA.²¹ When the employee comes back to work with modifications from the TPA, the employee is in STD-Working status.²²

VDH accommodated Grievant's restrictions in April 2003 because it permitted her to work four hours per day in a five day work week. Thus, Grievant should have begun

¹⁹ These terms are defined in another policy, DHRM Policy 1.65 *Temporary Work Force Reduction*, as follows:

Long Term Disability (LTD)	A benefit received by employees in a disability status who are covered by Policy 4.57, Virginia Sickness and Disability Program (VSDP). The benefit commences upon the expiration of a 180-calendar-day waiting period and provides partial income replacement.
Long Term Disability-Working (LTD-Working)	A benefit received by employees in a disability status who are covered by Policy 4.57, Virginia Sickness and Disability Program (VSDP). The benefit commences upon the expiration of a 180-calendar-day waiting period, and allows employees to continue to work for their agency from short-term disability working status into LTD-working. An employee in LTD-working must work at least 20 hours or more per workweek in their own position.
Short Term Disability (STD)	A benefit received by employees in a disability status who are covered by Policy 4.57, Virginia Sickness and Disability Program (VSDP). The benefit commences upon the expiration of a 7-calendar-day waiting period, and provides replacement income for defined periods of time based on an employee's total months of state service.

²⁰ *VSDP FAQ's for VSDP Coordinators and Human Resource Departments* does not define a VSDP Coordinator.

²¹ Page 2, *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*.

²² Immediately following discussion of returning an employee to work with modifications from the TPA, page 2, *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*, states that "NOTE: Employee still remains in STD. STD working status affords employees the benefits of accruing leave." The Hearing Officer construes this language to mean that when an employee on STD is returned to work with restrictions, the employee should be considered as being on STD-Working.

receiving benefits under STD-Working status instead of STD (non-working). Because the Agency (acting through the TPA) failed to do so, it misapplied policy.

An employee who is on STD-W status on the 180th day of the waiting period may change to LTD-W status on the 181st day. To be in LTD-W status, the employee must work at least 20 hours per week in her own position on a continuing basis.²³ Grievant was eligible to be considered for LTD-W status. She was ready, willing, and able to continue working more than 20 hours per week. By removing from consideration the possibility of placing Grievant on LTD-W the Agency, in effect, rendered her ineligible for LTD-W. The Agency misapplied policy because it did not consider whether Grievant should be placed on LTD-W status prior to sending her home.

An agency should review an employee's LTD-W status every 30 days to ensure that the agency can continue the restrictions. If the agency cannot continue the restrictions, the employee is placed into LTD status (non-working).²⁴ Once an employee moved to LTD status, the employee is considered an inactive employee and may be removed from his or her position. An employee cannot change from LTD to LTD-W status.

When an employee presents a doctor's note to his or her agency stating the employee can return to work full-time prior to the authorized end date, the agency may allow the employee to return to work immediately. "If the doctor's note indicates restrictions, the agency must review the request and determine if the restrictions can be accommodated." If the restrictions are clear and the TPA confirms²⁵ the doctor's note is from the licensed treating professional who certified the disability under VSDP, the employee may be returned to work immediately, if the agency can accommodate the restrictions.²⁶

VDH did not attempt to determine whether Grievant's medical restrictions could be accommodated. VDH concluded that it did not wish to accommodate Grievant's medical restrictions because doing so may result in an inefficient operation of its business. Based on the nature of Grievant's job duties, the Agency had other support staff who could have relieved Grievant for five minutes every hour. DHRM Policy 1.25 authorizes Agency Heads to grant full time employees a 15 minute break in the morning and one in the afternoon. If DHRM Policy recognizes the flexibility of a total of 30 minutes for an employee break, an Agency should be able to accommodate a total of 40

²³ Page 4, *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*.

²⁴ Pages 4 and 5, *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*.

²⁵ Although no evidence was presented regarding whether the TPA confirmed that the doctor's notes were from the licensed treating professional who certified the disability under VSDP, the Hearing Officer finds that if presented with that issue, the TPA would have so determined. All of Grievant's doctor's notes were from the same medical provider.

²⁶ Page 8, *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*.

minutes for an employee break. The test is not whether VDH preferred to accommodate Grievant's restrictions, the question is whether VDH could accommodate her restrictions. Under the facts of this case, the Agency could have accommodated Grievant's restrictions without materially disrupting the Agency's operations. By failing to accommodate Grievant's restrictions, the Agency misapplied policy.

The Agency argues it must rely on the conclusions of the TPA as expressed in the TPA's Action Reports. It cannot control whether the TPA extends the start date of LTD. The Hearing Officer construes the actions of the TPA to be those of the Agency. The TPA is a private entity acting on behalf of the Commonwealth and, in this case, acting on behalf of the Agency to administer the VDSP for the Agency's employees. To relieve the Agency of responsibility for the actions of the TPA would be to permit the TPA to act as an autonomous and unaccountable body. State policy is drafted with the assumption that the TPA will act properly and on behalf of the Commonwealth. Thus, mistakes made by the TPA are also mistakes of the Agency.

The Agency argues it has discretion to determine whether Grievant should be placed on LTD-W. This argument is untenable. First, no evidence was presented suggesting the Agency was aware that it could place Grievant on LTD-W and then decided not to do so. Second, STD, STC-W, LTD-W, and LTD are described by DHRM and the VRS as being benefits to employees.²⁷ Nothing in policy suggests the Agency has sole discretion to determine whether an employee may receive STD or LTD. Nothing in policy renders STD-W and LTD-W lesser employee benefits than are STD and LTD. If an employee has the right to receive STD and LTD benefits, the employee also has the right to receive STD-W and LTD-W when appropriate. Moreover, the VRS Handbook for VSDP suggests LTD-W may be automatic:

LTD-Working status is in effect when you continue to work for your agency from short-term disability into long-term disability for 20 hours or more per week in your own or another VRS covered position with restrictions. (Emphasis added).²⁸

DECISION

For the reasons stated herein, the Agency misapplied State policy when it removed Grievant from employment. The Agency is ordered to comply with policy by reinstating Grievant to an objectively similar position.²⁹

²⁷ In addition, DHRM Policy 1.65 *Temporary Work Force Reduction*, defines LTD, LTD-W, and STD as a "benefit received by employees in a disability status"

²⁸ Agency Exhibit 1.

²⁹ Grievant's request for back pay and benefits is denied. Under the *Rules for Conducting Grievance Hearings*, back pay is not awarded in matters not involving discipline unless "under established policy an entitlement to compensation is found." The underlying policy does not establish an entitlement to back pay for Grievant.

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. Please address your request to:

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

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.³⁰

³⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer