

Issue: Misapplication of VSDP policy; Hearing Date: 01/27/05; Decision Issued: 03/10/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 7923;
**Judicial Review: Appealed to the Circuit Court in Wise County (04/08/05);
Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7923

Hearing Date: January 27, 2005
Decision Issued: March 10, 2005

PROCEDURAL HISTORY

On June 3, 2003, Grievant appeared at the Agency's Facility and sought to be reinstated to his position prior to his being placed on long term disability. His request was denied. On June 3, 2003, 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 he requested a hearing. The Agency denied qualification of the grievance for a hearing. Grievant appealed that decision to the Department of Employment Dispute Resolution who upheld the denial. Grievant appealed that decision to the local Circuit Court who ordered on October 19, 2004, "the Court finds that [Grievant] may present facts to support an allegation of misapplication of policy or unfair application of state policy, that policy being the Virginia Sickness and Disability Program, and this matter qualifies for a hearing before a Hearing Officer as to that issue raised." On December 20, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 27, 2005, 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 has misapplied or unfairly applied the Virginia Sickness and Disability Policy (VSDP).

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he 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 Department of Corrections employed Grievant as a Corrections Officer at one of Facilities. The purpose of his position was to "Provide security and supervision of adult offenders."¹ Grievant received an overall work performance rating of "Contributor" on his October 2002 evaluation.²

The Third Party Administrator handles disability claims under the Virginia Sickness and Disability Program. The TPA obtains information from employees and their medical professionals and determines employee eligibility for Short Term Disability (STC), Short Term Disability – Working (STD-W), Long Term Disability (LTD), and Long Term Disability – Working (LTD-W).³ The TPA drafts and disseminates VSDP Action Reports.

The Workers' Compensation Administrator handled workers' compensation claims filed by employees. The WCA coordinates medical care for employees and determines whether employees should receive workers' compensation benefits. Benefits under VSDP supplement benefits under workers' compensation.

¹ Agency Exhibit 22.

² Grievant Exhibit 13.

³ The Agency does not inform the TPA regarding whether it is holding a position open for an employee on disability.

On September 2, 2002, Grievant was injured at work in the scope and course of his employment thereby entitling him to seek worker's compensation benefits.⁴ Grievant notified the WCA and begin receiving workers' compensation benefits. After notifying the Third Party Administrator, Grievant was placed on STD.⁵

On March 12, 2003, the Facility HRO sent Grievant a letter stating, "Effective March 2, 2003 you have been placed on long-term disability through the Virginia Sickness and Disability Program."⁶

On March 21, 2003, Grievant had surgery. Grievant presented to the Agency a doctor's note dated April 21, 2003 indicating Grievant had the ability to return to work with restrictions such as no lifting or climbing.⁷ The Facility HRO told Grievant that he would need to be full time, full-duty status in order to be considered for a Corrections Officer position. The HRO did not tell Grievant that he was no longer an employee and would have to re-apply.

Grievant's medical provider drafted a note dated June 2, 2003 stating that Grievant was "fully released to his regular duty."⁸ On June 3, 2003, Grievant took his doctor's release to the Facility HRO and indicated he wished to return to work. The HRO told Grievant he was no longer an employee because he had been placed on LTD. Grievant was not permitted to resume his position as a Corrections Officer.

On June 25, 2003, four Corrections Officers began their employment at the Facility.⁹ Four more Corrections Officers began their employment in the month of August 2003.¹⁰ The Agency is continuously recruiting Corrections Officers.

On July 29, 2003, the Agency sent Grievant a letter stating, "Effective June 10, 2003, you have been separated from Long-Term Disability status as [TPA] has closed your claim for noncompliance."¹¹ Grievant had not applied for social security disability as required and his claim was closed.

⁴ Grievant fell onto his back while walking on a slick floor. His back, hip, and kidney were injured.

⁵ Agency Exhibit 20.

⁶ Agency Exhibit 23.

⁷ Agency Exhibit 24.

⁸ Grievant Exhibit 19.

⁹ Grievant Exhibit 17.

¹⁰ Grievant Exhibit 16.

¹¹ Agency Exhibit 26.

In November 2004, Grievant applied for the position of Corrections Officer at the Facility. He has not been interviewed or re-hired.

Officer E began receiving STD on July 18, 2001. He returned to work with job modifications of no inmate contact effective September 4, 2001 but continued working more than 20 hours per week. His status was STD-working.¹² On January 7, 2002, Officer E entered LTD-working status.¹³ On January 10, 2002, his status changed to LTD status. He complained to the Warden at that time.¹⁴ The Warden agreed that Officer E should not have been placed on LTD and instructed the HRO to reinstate Officer E to his position. Officer E returned to work February 4, 2002.¹⁵ He did not have to fill out an application for employment prior to returning to work.

Officer C began receiving STD on June 3, 2002. He asked that his duties be modified so that he could work full time without inmate contact. His request for modification was denied.¹⁶ He sought placement in a position other than one as a Correctional Officer. Officer C was placed on LTD effective November 30, 2002. He returned to work full time on December 23, 2002 without having to submit a new application for employment.

CONCLUSIONS OF POLICY

The *Virginia Sickness and Disability Program* arises from *Va. Code § 51.1-1100 et seq.* “Disability” means a partial disability¹⁷ or total disability.¹⁸ Disabled State employees may be entitled to a Short Term or Long Term Disability benefit. “Disability

¹² VSDP Action Reports do not always distinguish between STD and STD-working or LTD and LTD-working status. If an employee was working more than 20 hours when he or she was placed on STD, that employee’s status was STD-working regardless of how it was reported on VSDP Action Reports.

¹³ Grievant Exhibit 18.

¹⁴ Officer E did not miss 180 days of work prior to speaking with the Warden.

¹⁵ Offer E was placed on LTD in September 2003. He was no longer working at the Facility.

¹⁶ Agency Exhibit 7.

¹⁷ “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.*

¹⁸ “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.*

benefit” means income replacement payments payable to a participating employee under a short-term or long-term disability benefit program¹⁹

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.

Although not expressly set forth in statute, the DHRM has created employee benefits entitled Short Term Disability – Working and Long Term Disability – Working. DHRM does not define²⁰ these terms in DHRM Policy 4.57 but discusses them within the

¹⁹ Va. Code § 51.1-1100.

²⁰ 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.
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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.
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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.

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 his own position on a continuing basis.²¹

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).²² Once an employee is 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.

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).

Grievant was placed on STD effective September 2, 2002. He was unable to work in any capacity at the Facility for at least six months thereafter. After 180 days passed Grievant was placed on LTD. This action was in accordance with Va. Code § 51.1-1112 and VSDP policy. Grievant could not have been placed on LTD-W because he had not worked over 20 hours during the prior 180 days. He was not eligible for STD-W. The Agency did not act contrary to policy when it informed him by letter dated March 12, 2003 that he was being placed on LTD effective March 2, 2003. Once Grievant was moved to LTD status, the Agency could consider him an inactive employee and remove him from his position.

Grievant contends he is being treated unfairly because Officer E and Officer C were permitted to return to their positions as Correctional Officers after having been placed on LTD and without having to re-apply.

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.
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²¹ Page 4, *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*.

²² Pages 4 and 5, *VSDP FAQ's for VSDP Coordinators and Human Resource Departments*.

The key distinction between Grievant and Officer E and Officer C is that Grievant was not working at all for 180 days before he was placed on LTD. Officer E was working during his short term disability and was placed on LTD-W after the expiration of 180 days. Three days later the HR staff decided to move Officer E to LTD. Officer E complained to the Warden who overruled the HR staff decision. Officer C had been working while on disability and was trying to obtain placement in another position when the 180 days transition to LTD passed. The Agency had not filled Officer E and Officer C's positions with other employees at the time the warden instructed that they would be returned to full time work status.

There is nothing in DHRM policy or Virginia law which provides that if an Agency makes an exception to policy in two instances, that it must make exceptions in every other instance. Although the Agency has treated two employees differently from the way in which Grievant was treated, the Agency's inconsistency was motivated by its business needs and not because of any desire to single out Grievant or to intentionally exclude Grievant. Grievant has not established that the Agency misapplied the VSDP policy with respect to his claim. To the extent the Agency has inconsistently treated Grievant when compared to Officer E and Officer C, the inconsistency is not so egregious as to amount to an unfair application of the VSDP.

Grievant has established that the Agency failed to inform him whether or not his job would be held for him as he entered LTD. Policy, however, does not specify whether there are any consequences to an Agency if it fails to inform an employee regarding whether the employee's job would be held open. If the Agency had informed Grievant that his job would not have been held open for him, there is no reason to believe any of the significant facts of this case would have changed or that Grievant has suffered any prejudice by the Agency's omission. The Agency's omission was harmless error.

Grievant contends the Agency should have placed him in a restricted duty position once his medical provider authorized his return to work with restrictions in April 21, 2003. Grievant has not presented any policy requiring the Agency to find restricted work for him to perform rather than remain on disability. Whether the Agency chooses to have an employee work with restrictions is at the Agency's discretion.

Although it seems unusual that the Agency has not at least granted Grievant a job interview following his November 2004 re-application for employment, no evidence was presented showing the Agency has refused to re-hire Grievant in retaliation for his having filed a grievance. The Facility's HRO testified that Grievant's application was being considered along with other applications.

DECISION

For the reasons stated herein, the Grievant's request for relief for misapplication or unfair application of the Virginia Sickness and Disability policy is **denied**.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.²³

²³ 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