

Issue: Misapplication of disability policy; Hearing Date: 01/19/05; Decision
Issued: 01/21/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No.
7945



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7945

Hearing Date: January 19, 2005
Decision Issued: January 21, 2005

APPEARANCES

Grievant
Attorney for Grievant
Benefits Administrator
Representative for Agency

ISSUES

Did the agency misapply either the Virginia Sickness and Disability Program policy or any other applicable policy when it terminated grievant's employment?

FINDINGS OF FACT

The grievant filed a timely grievance asserting that the agency misapplied policy when it terminated his employment.¹ The Virginia Department of Transportation (VDOT) (Hereinafter referred to as agency) employed grievant for seven years as a Bridge-Tunnel Patroller.

In 1999, the Commonwealth implemented the Virginia Sickness and Disability Program (VSDP) for state employees. Employee meetings were conducted for all employees to explain the new program. Employees were given the option of accepting the VSDP or remaining in the traditional sick leave program.² The VSDP is administered by a third party administrator (TPA) located in Massachusetts.³ Grievant accepted VSDP, was enrolled in the program, and was given a copy of the VSDP Handbook.⁴ The Handbook is widely available in human resources offices and online. Since the implementation of the program, grievant has utilized the VSDP on multiple occasions and received short-term disability (STD) benefits through the program.

On February 4, 2004, grievant injured his back in an on-the-job accident. He promptly sought medical treatment and applied for both workers' compensation and STD benefits. VSDP provides for a short-term disability period of up to 180 days, which includes a one-week waiting period. Grievant began his STD period on February 6, 2004; after the waiting period, his benefits began on February 13, 2004. In July 2004, grievant submitted a claim for long-term disability (LTD) benefits. The TPA wrote to grievant the same month to request additional information from him.⁵ By early August, the TPA approved grievant's request for LTD.⁶ The 180-day STD period ended on August 3, 2004 and grievant transitioned into LTD on August 4, 2004.⁷

If an employee is able to return to his job in the same position during the short-term disability period, his position is held open up to the 180th day. However, after an employee transitions into LTD, return to the employee's pre-disability position is not guaranteed and the agency may fill or eliminate the position.⁸ Grievant was aware that his position was not guaranteed after he transitioned to LTD. In this case, by the summer of 2004, the agency had made a decision to reduce employment levels by not filling vacant positions in order to begin privatization of some job functions. Accordingly, when grievant transitioned into LTD, the agency determined that his vacant position would not

¹ Agency Exhibit 1. Grievance Form A, filed August 20, 2004.

² Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 4.57, *Virginia Sickness and Disability Program Leave*, effective January 1, 1999.

³ The current TPA is Unum Provident.

⁴ Agency Exhibit 2. VSDP Handbook.

⁵ Agency Exhibit 5. Letter from TPA to grievant, July 23, 2004.

⁶ Agency Exhibit 7. Letter from TPA to grievant, August 10, 2004.

⁷ The 180-day period began on February 6, 2004 and went through August 3, 2004 – a period of 180 days (including the seven-day waiting period). [NOTE: 2004 was a leap year which meant that February had 29 days].

⁸ Agency Exhibit 2, p.10. VSDP Handbook.

be filled and notified him of this decision on August 10, 2004.⁹ Grievant continued to receive workers' compensation and LTD benefits until his physician released him for work on October 11, 2004. Grievant did not advise either his physician or the agency that he was able to return to work, either full-time or on a light-duty basis, at any time prior to October 11, 2004.

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 a claim of misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁰

Only the VSDP can determine when an employee is able to return to work. The evidence established that only the TPA handles all communication with grievant's physician. Only the TPA's medical staff is authorized to contact the physician to resolve questions. When the TPA is satisfied that the physician's documentation supports disability, the TPA 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 the TPA continues to

⁹ Grievant Exhibit 1. Letter from Benefits and Payroll Administrator to grievant, August 10, 2004.

¹⁰ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

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 the TPA 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 undisputed evidence establishes that grievant was on short-term disability and totally unable to work until he was released by his physician on October 11, 2004. Grievant never notified his physician or the agency that he was able to return to work prior to October 11th. As noted above, the agency must rely upon the TPA for information regarding the grievant's status. Here, the TPA continued to certify grievant as totally disabled based on the information that grievant's physician provided to the TPA. In fact, grievant's physician did not release grievant as able to work until more than two months after grievant had transitioned to LTD. As of August 4, 2004, when grievant went into long-term disability, the agency could not know whether grievant would be disabled for one month, two months, a year, or permanently. The agency cannot hold a position open indefinitely. Once the grievant had transitioned into LTD, the agency could decide to hold the position open longer or it could decide to eliminate the position. In this case, for legitimate business reasons, the agency determined that it had to eliminate the position.

If grievant had indicated to his physician that he was able to return to work, even on a light-duty or part-time basis, before his STD period had expired, the physician would have notified the TPA. In turn, the TPA would have contacted the agency to determine whether the agency could accommodate grievant with a return-to-work program. However, grievant never notified his physician that he was ready to return to work, presumably because grievant was still totally disabled. Even after grievant began long-term disability, he never advised his physician that he was ready to attempt a return-to-work program.

Grievant suggests that the agency should have contacted him and attempted to place him in a return-to-work program. As noted above, when an employee is out due to a disability, the agency is *prohibited* from contacting the employee. The decision as to when a disabled person can return to work must be made by the employee and his physician. Once an employee indicates a willingness to return to work, and the physician certifies the employee's ability to return, the TPA and the agency will work together to accommodate the employee's return to work pursuant to the programs discussed in the VSDP Handbook.

The fact that grievant received workers' compensation benefits after his employment ended is not relevant. By law, employees are entitled to specific workers' compensation benefits regardless of whether their employment status changes subsequent to the date of injury. Similarly, the VSDP continues to pay its benefits pursuant to the policy even though an employee's employment has ended.

Now that grievant's disability has ended, he is free to apply to the agency for any available position.¹¹

DECISION

Grievant has not shown that the agency misapplied any policy when it terminated his employment following his transition into long-term disability. Grievant's request for relief is hereby 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th 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 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party.

¹¹ Agency Exhibit 1. Second-step response from District Maintenance/Operation Manager, September 14, 2004.

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.¹² 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.¹³

[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]

David J. Latham, Esq.
Hearing Officer

¹² 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).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.